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THE LAWYERS REPORTS ANNOTATED

BOOK LI.

**ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.**

**BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.**

ROCHESTER, N. Y.

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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 51,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

Alabama & V. R. Co. v. Williams (78 Miss. 209)	836	Hatfield v. De Long (156 Ind. 207)	751
Baldwin v. Great Northern R. Co. (81 Minn. 247)	640	Hibbette v. Bains (78 Miss. 695)	839
Barker v. Valentine (125 Mich. 336) ...	787	J. M. James Co. v. Continental Nat. Bank (105 Tenn. 1)	255
Barrett v. Fish (72 Vt. 18)	754	Johnson v. State (42 Tex. Crim. Rep. 87)	272
Bonte v. Postell (109 Ky. 64)	187	Kansas & Tex. Coal R. Co. v. Northwestern Coal & Min. Co. (161 Mo. 288)	936
Boston Woven Hose & Rubber Co. v. Kendall (178 Mass. 232) ...	781	Kennedy, Ex parte (42 Tex. Crim. Rep. 148)	270
Brown v. Johnson Bros. (127 Ala. 292) 403		La Crosse City R. Co. v. Higbee (107 Wis. 389)	923
v. Sun Life Ins. Co. (Tenn. Ch. No. Off. Rep.)	252	Lindsay v. United States Sav. & L. Co. (127 Ala. 366)	393
Bullard v. Chaffee (61 Neb. 83)	715	Little v. State (60 Neb. 749)	717
Chicago, R. I. & Pac. R. Co. v. Ottumwa (112 Iowa, 300)	763	Lyle v. McCormick Harvesting Mach. Co. (108 Wis. 81)	906
Clark v. Needham (125 Mich. 84)	785	Marye v. Diggs (98 Va. 749)	902
Connecticut Fire Ins. Co. v. Jeary (60 Neb. 338)	698	Mereness v. First Nat. Bank (112 Iowa, 11)	410
Cunningham, Re (80 Minn. 180)	642	Meyer v. State (112 Ga. 20)	496
Davis v. Hambrick (109 Ky. 276)	671	Miller v. Detroit, Y. & A. A. R. Co. (125 Mich. 171)	955
Denny, Re (156 Ind. 104)	722	Montgomery Beer Bottling Works v. Gaston, (126 Ala. 425)	396
Denver & Rio Grande R. Co. v. Spencer (27 Colo. 313)	121	Murray v. Ramsey County Comrs. (81 Minn. 359)	828
Dowell v. Goodwin (22 R. I. 287)	873	Newcomb v. Newcomb (108 Ky. 582) ..	419
Eikhoff v. Gilbert (124 Mich. 353)	451	Ocean City Asso. v. Shriver (64 N. J. L. 550)	425
Ellsworth v. Metheney (44 C. C. A. 484, 104 Fed. 119)	389	O'Neil v. Great Northern R. Co. (80 Minn. 27)	532
Elmore v. Elmore (58 S. C. 289)	261	Ott v. Hentall (70 N. H. 231)	226
Erickson v. Great Northern R. Co. (82 Minn. 60)	645	Overshiner v. State (156 Ind. 187)	748
Ertz v. Produce Exchange (82 Minn. 173)	825	Patterson, Ex parte (42 Tex. Crim. Rep. 256)	654
Fisher v. Cushman (43 C. C. A. 381, 103 Fed. 860)	292	Pendleton v. Lutz (78 Miss. 322)	649
Flukes, Re (157 Mo. 125)	176	People v. Marsh (125 Mich. 410)	461
Fox v. Mohawk & H. R. Humane Soc. (165 N. Y. 517)	681	People, Green v. Court of Appeals (27 Colo. 405)	105
French Lumbering Co. v. Theriault (107 Wis. 627)	910	Ranaud v. State Court of Meditation & A. (124 Mich. 648)	458
Fuller v. Huff (43 C. C. A. 453, 104 Fed. 141)	332	Rhobidas v. Concord (70 N. H. 90)	381
German Sav. Bank v. Drake Roofing Co. (112 Iowa 184)	758	Richmond Nat. Gas Co. v. Clawson (155 Ind. 659)	744
Godshaw v. Struck (109 Ky. 285)	668	Rockport v. Rockport Granite Co. (177 Mass. 246)	779
Hall v. Union Central Life Ins. Co. (23 Wash. 610)	288		
Harrodsburg v. Renfro (Ky.) Not to be Rep.	897		

SUPPLEMENTAL TABLE OF CASES.

Rose v. Hirsh (36 C. C. A. 132, 94 Fed. 177)	801	State, Remley v. Meek (112 Iowa, 338)	414
St. Louis v. Consolidated Coal Co. (158 Mo. 342)	850	Monett Milling Co. v. Neville (157 Mo. 386)	95
Sanborn v. People's Ice Co. (82 Minn. 43)	829	Davis & Starr Lumber Co. v. Pors (107 Wis. 420)	917
Schmidt v. Northern Life Asso. (112 Iowa, 41)	141	Winnie v. Stoddard (25 Nev. 452)	229
Smith v. State (155 Ind. 611)	404	Steichen v. Fehleisen (112 Iowa, 612)	412
v. State, Walsh (92 Md. 518)	772	Stretch v. Cassopolis (125 Mich. 167)	345
Sovereign Camp, Woodmen of the World v. Fraley (94 Tex. 200)	898	Stull v. De Mattos (23 Wash. 71)	892
State v. Bair (112 Iowa, 466)	776	Sweetland v. Lynn & Boston R. Co. (177 Mass. 574)	783
v. Chauvet (111 Iowa, 687)	630	Tabb v. Commonwealth (98 Va. 47)	283
v. Kodat (158 Mo. 125)	509	Trammell v. Vaughan (158 Mo. 214)	854
v. Schlenker (112 Iowa, 642)	347	Walker v. St. Paul City R. Co. (81 Minn. 404)	632
State, Star Pub. Co. v. Associated Press (159 Mo. 410)	151	West v. Bechtel (125 Mich. 144)	791
Scharnikow v. Hogan (24 Mont. 379)	958	Willow Creek Irrig. Co. v. Michaelson (21 Utah, 248)	280

TABLE

OF

CASES REPORTED

IN

LAWYERS REPORTS ANNOTATED, BOOK LI.

A.		B.	
Abbey, Travers v. (Tenn.)	260	Bains, Hibbette v. (Miss.)	839
Alabama & V. R. Co. v. Williams		Bair, State v. (Iowa)	776
(Miss.)	836	Baldwin v. Great Northern R. Co.	
Appeal of Engelskirger (Pa.)	876	(Minn.)	640
Associated Press, State ex rel. Star Pub.		Bank, Continental Nat., J. M. James	
Co. v. (Mo.)	151	Co. v. (Tenn.)	255
Atlanta v. Stein (Ga.)	335	First Nat., Mereness v. (Iowa)	410
Atlanta Ry. & P. Co., Southern R. Co.		Fourth Nat., State ex rel., v.	
v. (Ga.)	125	Johnson (Wis.)	33
Atlanta Rapid Transit Co., Southern R.		German Sav., v. Drake (Iowa)	758
Co. v. (Ga.)	125	German Sav., v. Drake Roofing	
		Co. (Iowa)	758
		National Granite, v. Tyndale	
		(Mass.)	447
		Second Nat., v. Becker (Ohio)	860
		Banking Co., Citizens', Page v. (Ga.)	463
		Barclay v. Barclay (Ill.)	351
		Barker v. Valentine (Mich.)	787
		Barrett v. Fish (Vt.)	754
		Bechtel, West v. (Mich.)	791
		Becker, Second Nat. Bank v. (Ohio)	860
		Bellevue Land & I. Co., Buffalo & L.	
		Land Co. v. (N. Y.)	951
		Boardman v. Scott (Ga.)	178
		Board of Election Comrs., Britton v.	
		(Cal.)	115
		Boddy, Chattanooga Elec. R. Co. v.	
		(Tenn.)	885
		Bonte v. Postell (Ky.)	187
		Boston Woven Hose & R. Co. v. Kendall	
		(Mass.)	781
		Britton v. Board of Election Comrs.	
		(Cal.)	115
		Brown v. Johnson (Ala.)	403
		v. Sun L. Ins. Co. (Tenn.)	252
		51 L. R. A.	
		Buffalo & L. Land Co. v. Bellevue Land	
		& I. Co. (N. Y.)	951
		Bullard v. Chaffee (Neb.)	715
		Butterfield Min. Co., Herriman Irrig.	
		Co. v. (Utah)	930
		C.	
		Cassopolis, Stretch v. (Mich.)	345
		Chaffee, Bullard v. (Neb.)	715
		Chamberlin, Stevens v. (C. C. App. 1st	
		C.)	613
		Chaplin, Handel v. (Ga.)	720
		Chattanooga Elec. R. Co. v. Boddy	
		(Tenn.)	885
		Chattanooga Rapid Transit Co. v. Ven-	
		able (Tenn.)	886
		Chauvet, State v. (Iowa)	630
		Chicago, Frazer v. (Ill.)	306
		Chicago, R. I. & P. R. Co. v. Keokuk &	
		D. M. R. Co. (Iowa)	763
		v. Ottumwa (Iowa)	765
		Citizens' Bkg. Co., Page v. (Ga.)	463
		Clark v. Needham (Mich.)	785
		Clarke v. Havard (Ga.)	499
		Clawson, Richmond Natural Gas Co. v.	
		(Ind.)	744
		Coast Co. v. Spring Lake (N. J. Err. &	
		App.)	657
		Coffey, People ex rel., v. Democratic	
		General Committee (N. Y.)	674
		Colorado Court of Appeals, People ex	
		rel. Green v. (Colo.)	105
		Com., Tabb v. (Va.)	283
		Concord, Rhobidas v. (N. H.)	381
		Connecticut F. Ins. Co. v. Jeary (Neb.)	698
		Consolidated Coal Co., St. Louis v.	
		(Mo.)	850
		Continental Nat. Bank, J. M. James Co.	
		v. (Tenn.)	255
		Court of Appeals, People ex rel. Green	
		v. (Colo.)	105
		Croy v. Epperson (Tenn.)	254
		Cunningham v. Cunningham (Minn.)	642
		Turpin v. (N. C.)	800
		Cunningham's Will, Re (Minn.)	642
		Cushman, Fisher v. (C. C. App. 1st C.)	292
		D.	
		Davis v. Hambrick (Ky.)	671

Davis & S. Lumber Co., State ex rel., v. Pors (Wis.)	917	Great Northern R. Co., Baldwin v. (Minn.)	640
De Long, Hatfield v. (Ind.)	751	Erickson v. (Minn.)	645
Democratic General Committee, People ex rel. Coffey v. (N. Y.)	674	Green, People ex rel., v. Court of Appeals (Colo.)	105
Denny, Re (Ind.)	722	Griffin, Gray v. (Ga.)	131
Denver & R. G. R. Co. v. Spencer (Colo.)	121	Gunn, Lehman v. (Ala.)	112
Detroit, Y. & A. A. R. Co. Miller v. (Mich.)	955	H.	
Diggs, Marye v. (Va.)	902	Hall v. Union C. L. Ins. Co. (Wash.)	288
Dowell v. Goodwin (R. I.)	873	Ham, Spence v. (N. Y.)	238
Downend v. Kansas City (Mo.)	170	Hambrick, Davis v. (Ky.)	671
Downey, Wolf v. (N. Y.)	241	Hamilton v. Pittsburg, B. & L. E. R. Co. (Pa.)	319
Drake, German Sav. Bank v. (Iowa)	758	Handel v. Chaplin (Ga.)	720
Drake Roofing Co., German Sav. Bank v. (Iowa)	758	Harris v. Hentall (N. H.)	226
E.		Harrodsburg v. Renfro (Ky.)	897
Ebner v. Mackey (Ill.)	298	Hatfield v. De Long (Ind.)	751
Edgerly v. Lawson (Mass.)	432	Havard, Clarke v. (Ga.)	499
Eikhoff v. Gilbert (Mich.)	451	Hentall, Harris v. (N. H.)	226
Ellsworth v. Metheny (C. C. App. 6th C.)	389	Hutson v. (N. H.)	226
Elmore v. Elmore (S. C.)	261	Ott v. (N. H.)	226
Engelskirger's Appeal (Pa.)	876	Walker v. (N. H.)	226
Epperson, Croy v. (Tenn.)	254	Herriman Irrig. Co. v. Butterfield Min. Co. (Utah)	930
Erickson v. Great Northern R. Co. (Minn.)	645	Hibbette v. Bains (Miss.)	839
Ertz v. Produce Exchange (Minn.)	825	Higbee, La Cross City R. Co. v. (Wis.)	923
Ewertsen v. Gerstenberg (Ill.)	310	Hirsh, Rose v. (C. C. App. 3d C.)	801
Ex parte Kennedy (Tex. Crim. App.)	270	Hogan, State ex rel. Scharnikow v. (Mont.)	958
Patterson (Tex. Crim. App.)	654	Huff, Fuller v. (C. C. App. 2d C.)	332
F.		Hutson v. Hentall (N. H.)	226
Fehleisen, Steichen v. (Iowa)	412	I.	
First Nat. Bank, Mereness v. (Iowa)	410	Illinois C. R. Co. v. Johnson (Miss.)	837
Fish, Barrett v. (Vt.)	754	Insurance Co., Connecticut F., v. Jeary (Neb.)	698
Fisher, Re (C. C. App. 1st C.)	292	Sun L., Brown v. (Tenn.)	252
v. Cushman (C. C. App. 1st C.)	292	Union C. L., Hall v. (Wash.)	288
Flukes, Re (Mo.)	176	J.	
Forbell v. New York (N. Y.)	695	Jeary, Connecticut F. Ins. Co. v. (Neb.)	698
Fourth Nat. Bank, State ex rel., v. Johnson (Wis.)	33	J. M. James Co. v. Continental Nat. Bank (Tenn.)	255
Fox v. Mohawk & H. River Humane Soc. (N. Y.)	681	J. N. Struck & Bro., Godshaw v. (Ky.)	668
Fraley, Sovereign Camp, W. of W. v. (Tex.)	898	Johnson, Brown v. (Ala.)	403
Frazer v. Chicago (Ill.)	306	Illinois C. R. Co. v. (Miss.)	837
Freeman, Miller v. (Ga.)	504	v. State (Tex. Crim. App.)	272
French Lumbering Co. v. Theriault (Wis.)	910	State ex rel. Fourth Nat. Bank v. (Wis.)	33
Fuller v. Huff (C. C. App. 2d C.)	332	Judge of Civil Dist. Ct., State ex rel. New Orleans v. (La.)	71
G.		Judges of Ct. of Registration, Tyler v. (Mass.)	433
Gaston, Montgomery Beer Bottling Works v. (Ala.)	396	K.	
Georgia & A. R. Co., Mitchell v. (Ga.)	622	Kansas & T. Coal R. Co. v. Northwest-ern Coal & M. Co. (Mo.)	936
German Sav. Bank v. Drake (Iowa)	758	Kansas City, Downend v. (Mo.)	170
v. Drake Roofing Co. (Iowa)	758	Kendall, Boston Woven Hose & R. Co. v. (Mass.)	781
Gerstenberg, Ewertsen v. (Ill.)	310	Digitized by Google	
Gilbert, Eikhoff v. (Mich.)	451		
Godshaw v. J. N. Struck & Bro. (Ky.)	668		
Goodwin, Dowell v. (R. I.)	873		
Gray v. Griffin (Ga.)	131		
51 L. R. A.			

Kennedy, Ex parte (Tex. Crim. App.)	270
State ex rel., v. Martin (Mont.)	958
Keokuk & D. M. R. Co., Chicago, R. I.	
& P. R. Co. v. (Iowa)	763
Kerr Salt Co., Strobel v. (N. Y.)	687
Kodat, State v. (Mo.)	509

L

La Crosse City R. Co. v. Higbee (Wis.)	923
Lawson, Ederly v. (Mass.)	432
Leger v. Warren (Ohio)	193
Lehman v. Gunn (Ala.)	112
Lenoir v. Linville Improv. Co. (N. C.)	146
Lindsay v. United States Sav. & L. Co.	
(Ala.)	393
Linville Improv. Co., Lenoir v. (N. C.)	146
Little v. State (Neb.)	717
Lowery v. Pekin (Ill.)	301
Lutz, Pendleton v. (Miss.)	649
Lyle v. McCormick Harvesting Mach.	
Co. (Wis.)	903
Lynn & B. R. Co., Sweetland v. (Mass.)	783

M.

McCommons, Racine Iron Co. v. (Ga.)	134
McCormick Harvesting Mach. Co., Lyle	
v. (Wis.)	906
Mackey, Ebner v. (Ill.)	298
Marsh, People v. (Mich.)	461
Martin, State ex rel. Kennedy v.	
(Mont.)	958
Marye v. Diggs (Va.)	902
Meek, State ex rel. Ramley v. (Iowa)	414
Meekin, Re (N. Y.)	235
Mereness v. First Nat. Bank (Iowa)	410
Metheney, Ellsworth v. (C. C. App. 6th	
C.)	389
Meyer v. State (Ga.)	496
Michaelsen, Willow Creek Irrig. Co. v.	
(Utah)	280
Miller v. Detroit, Y. & A. A. R. Co.	
(Mich.)	955
v. Freeman (Ga.)	504
Mitchell v. Georgia & A. R. Co. (Ga.)	622
Mohawk & H. River Humane Soc., Fox	
v. (N. Y.)	681
Monett Milling Co., State ex rel., v.	
Neville (Mo.)	95
Monroe, Press Pub. Co. v. (C. C. App.	
2d C.)	353
Montgomery Beer Bottling Works v.	
Gaston (Ala.)	396
Morgan v. Randolph-Clowes Co. (Conn.)	653
Murray v. Ramsey County Comrs.	
(Minn.)	828

N.

National Granite Bank v. Tyndale	
(Mass.)	447
Needham, Clark v. (Mich.)	785
Neville, State ex rel. Monett Milling Co.	
v. (Mo.)	95
Newcomb v. Newcomb (Ky.)	419
New Orleans, State ex rel., v. Judge of	
Civil Dist. Ct. (La.)	71
New York, Forbell v. (N. Y.)	695
51 L. R. A.	

Northern Life Asso., Schmidt v. (Iowa)	141
Northwestern Coal & M. Co., Kansas	
& T. Coal R. Co. v. (Mo.)	930

O.

Ocean City Asso. v. Shriver (N. J. Err.	
& App.)	425
O'Neil v. Great Northern R. Co.	
(Minn.)	532
Ott v. Hentall (N. H.)	226
Ottumwa, Chicago, R. I. & P. R. Co.	
v. (Iowa)	763
Overshiner v. State (Ind.)	748

P.

Page v. Citizens' Bkg. Co. (Ga.)	463
Patterson, Ex parte (Tex. Crim. App.)	654
Pekin, Lowery v. (Ill.)	301
Pendleton v. Lutz (Miss.)	649
People v. Marsh (Mich.)	461
People ex rel. Green v. Court of Ap-	
peals (Colo.)	105
Coffey v. Democratic General	
Committee (N. Y.)	674
People's Ice Co., Sanborn v. (Minn.)	820
Pittsburg, B. & L. E. R. Co., Hamilton	
v. (Pa.)	319
Plant v. Woods (Mass.)	339
Pors, State ex rel. Davis & S. Lumber	
Co. v. (Wis.)	917
Postell, Bonte v. (Ky.)	187
Press Pub. Co. v. Monroe (C. C. App. 2d	
C.)	353
Produce Exchange, Ertz v. (Minn.)	825
Purdy v. Westinghouse Electric & Mfg.	
Co. (Pa.)	881

R.

Racine Iron Co. v. McCommons (Ga.)	134
Railroad Co., Denver & R. G., v. Spencer	
(Colo.)	121
Illinois C., v. Johnson (Miss.)	837
Lynn & B., Sweetland v. (Mass.)	783
Pittsburg, B. & L. E., Hamilton v.	
(Pa.)	319
Railway & P. Co., Atlanta, Southern R.	
Co. v. (Ga.)	125
Railway Co., Alabama & V., v. Williams	
(Miss.)	836
Chattanooga Elec., v. Boddy	
(Tenn.)	885
Chicago, R. I. & P., v. Keokuk &	
D. M. R. Co. (Iowa)	763
Chicago, R. I. & P., v. Ottumwa	
(Iowa)	763
Detroit, Y. & A. A., Miller v.	
(Mich.)	955
Georgia & A., Mitchell v. (Ga.)	622
Great Northern, Baldwin v.	
(Minn.)	640
Great Northern, Erickson v.	
(Minn.)	645
Great Northern, O'Neil v.	
(Minn.)	532
Kansas & T. Coal, v. Northwest-	
ern Coal & M. Co. (Mo.)	936

Railway Co., Keokuk & D. M., Chicago, R. I. & P. R. Co. v. (Iowa) ..	763
La Crosse City, v. Higbee (Wis.) ..	923
St. Paul City, Walker v. (Minn.) ..	632
Southern, v. Atlanta Ry. & P. Co. (Ga.) ..	125
Southern, v. Atlanta Rapid Transit Co. (Ga.) ..	125
Ramsey County Comrs., Murray v. (Minn.) ..	828
Randolph-Clowes Co., Morgan v. (Conn.) ..	653
Re Cunningham's Will (Minn.) ..	642
Denny (Ind.) ..	722
Fisher (C. C. App. 1st C.) ..	202
Flukes (Mo.) ..	176
Meekin (N. Y.) ..	235
Willbor (R. I.) ..	863
Remley, State ex rel., v. Meek (Iowa) ..	414
Renaud v. State Ct. of Mediation & Arbitration (Mich.) ..	458
Renfro, Harrodsburg v. (Ky.) ..	897
Rhobidas v. Concord (N. H.) ..	381
Richmond Natural Gas Co., v. Clawson (Ind.) ..	744
Roche v. Smith (Mass.) ..	510
Rockport v. Rockport Granite Co. (Mass.) ..	779
Rockport Granite Co., Rockport v. (Mass.) ..	779
Rose v. Hirsh (C. C. App. 3d C.) ..	801

S.

St. Louis v. Consolidated Coal Co. (Mo.) ..	850
St. Paul City R. Co., Walker v. (Minn.) ..	632
Sanborn v. People's Ice Co. (Minn.) ..	829
San Francisco Bd. of Election Comrs., Britton v. (Cal.) ..	115
Scharnikow, State ex rel., v. Hogan (Mont.) ..	958
Schlenker, State v. (Iowa) ..	347
Schmidt v. Northern Life Asso. (Iowa) ..	141
Scott, Boardman v. (Ga.) ..	178
Second Nat. Bank v. Becker (Ohio) ..	860
Shriver, Ocean City Asso. v. (N. J. Err. & App.) ..	425
Smith, Roche v. (Mass.) ..	510
v. State (Ind.) ..	404
v. State, use of Walsh (Md.) ..	772
Southern R. Co. v. Atlanta Ry. & P. Co. (Ga.) ..	125
v. Atlanta Rapid Transit Co. (Ga.) ..	125
Sovereign Camp, W. of W. v. Fraley (Tex.) ..	898
Spence v. Ham (N. Y.) ..	238
Spencer, Denver & R. G. R. Co. v. (Colo.) ..	121
Spring Lakes, Coast Co. v. (N. J. Err. & App.) ..	657
Standard Furniture Co. v. Van Alstine (Wash.) ..	889
Star Pub. Co., State ex rel., v. Associated Press (Mo.) ..	151
State v. Bair (Iowa) ..	776
v. Chauvet (Iowa) ..	630
Johnson v. (Tex. Crim. App.) ..	272
v. Kodat (Mo.) ..	509

51 L. R. A.

State Little v. (Neb.) ..	717
Meyer v. (Ga.) ..	496
Overshiner v. (Ind.) ..	748
v. Schlenker (Iowa) ..	347
Smith v. (Ind.) ..	404
Thompson v. (Tenn.) ..	883
v. Tucker (Or.) ..	240
State ex rel. Star Pub. Co. v. Associated Press (Mo.) ..	151
Scharnikow v. Hogan (Mont.) ..	958
Fourth Nat. Bank v. Johnson (Wis.) ..	33
New Orleans v. Judge of Civil Dist. Ct. (La.) ..	71
Kennedy v. Martin (Mont.) ..	958
Ramley v. Meek (Iowa) ..	414
Monett Milling Co. v. Neville (Mo.) ..	95
Davis & S. Lumber Co. v. Pors (Wis.) ..	917
Winnie v. Stoddard (Nev.) ..	229
State, use of Walsh, Smith v. (Md.) ..	772
State Ct. of Mediation & Arbitration, Renaud v. (Mich.) ..	458
Steichen v. Fehleisen (Iowa) ..	412
Stein, Atlanta v. (Ga.) ..	335
Stevens v. Chamberlin (C. C. App. 1st C.) ..	513
Stoddard, State ex rel. Winnie v. (Nev.) ..	229
Stretch v. Cassopolis (Mich.) ..	345
Strobel v. Kerr Salt Co. (N. Y.) ..	687
Stull v. De Mattos (Wash.) ..	802
Sun L. Ins. Co., Brown v. (Tenn.) ..	252
Sweetland v. Lynn & B. R. Co. (Mass.) ..	783

T.

Tabb v. Com. (Va.) ..	283
Therriault, French Lumbering Co. v. (Wis.) ..	910
Thompson v. State (Tenn.) ..	833
Trammell v. Vaughan (Mo.) ..	854
Travers v. Abbey (Tenn.) ..	260
Treadwell v. Treadwell (Mass.) ..	190
Tucker, State v. (Or.) ..	246
Turpin v. Cunningham (N. C.) ..	800
Tyler v. Judges of Ct. of Registration (Mass.) ..	433
Tyndale, National Granite Bank v. (Mass.) ..	447

U.

Union C. L. Ins. Co., Hall v. (Wash.) ..	288
United States Sav. & L. Co., Lindsay v. (Ala.) ..	393

V.

Valentine, Barker v. (Mich.) ..	787
Van Alstine, Standard Furniture Co. v. (Wash.) ..	889
Vaughan, Trammell v. (Mo.) ..	854
Venable, Chattanooga Rapid Transit Co. v. (Tenn.) ..	886

W.

Walker v. Hentall (N. H.) ..	226
v. St. Paul City R. Co. (Minn.) ..	632

Walsh, State, Use of, Smith v. (Md.)	772	Wingert v. Zeigler (Md.)	316
Ward v. Ward (Ohio)	858	Winnie, State ex rel., v. Stoddard	
Warren, Leger v. (Ohio)	193	(Nev.)	229
West v. Bechtel (Mich.)	791	Wolf v. Downey (N. Y.)	241
Westinghouse Elec. & Mfg. Co., Purdy		Woods, Plant v. (Mass.)	339
v. (Pa.)	881		
Willbor, Re (R. I.)	863	Z.	
Williams, Alabama & V. R. Co. v.			
(Miss.)	836	Zeigler, Wingert v. (Md.)	316
Will of Cunningham, Re (Minn.)	642		
Willow Creek Irrig. Co. v. Michaelson			
(Utah)	280		
51 L. R. A.			

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Accident Ins. Co. of N. A. v. Bennett, 90 Tenn. 256, 16 S. W. 725.....	253
Acton v. Blundell, 12 Mees. & W. 324.....	283, 697
Adams v. Brennan, 177 Ill. 194, 42 L. R. A. 718, 52 N. E. 314.....	338
v. Couillard, 102 Mass. 167.....	891
v. Jones, 12 Pet. 207, 9 L. ed. 1058.....	761, 762
Agee v. Dement, 1 Humph. 332.....	261
Ab Doon v. Smith, 25 Or. 89, 34 Pac. 1093.....	892
Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.....	914
Aiken v. Blaisdell, 41 Vt. 665.....	891
Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 300, 18 Sup. Ct. Rep. 40.....	526
Albert v. State use of Ryan, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697.....	774, 776
Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264.....	915
Aldridge v. Tusculum, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 807.....	944
Allen v. Aldrich, 29 N. H. 63.....	227
v. Allen, 100 Mass. 373.....	352
v. Baker, 86 N. C. 91, 40 Am. Rep. 443.....	856
v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309.....	916
v. Donnelly, 5 Ir. Ch. Rep. 229.....	184
v. Drew, 44 Vt. 174.....	767
v. Flood [1898] A. C. 1.....	343-345
v. Monmouth County Freeholders, 13 N. J. Eq. 68.....	665
v. Pike, 3 Cush. 238.....	761
v. Young, 76 Me. 80.....	408
Alley v. Denson, 8 Tex. 297.....	736
v. Winn, 134 Mass. 77, 45 Am. Rep. 297.....	227
Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.....	166
Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744.....	916
Allison Mfg. Co. v. McCormick, 118 Pa. 519, 12 Atl. 273.....	882
Allnutt v. Ingalls, 12 East. 527.....	157, 166, 167
Almand v. Atlanta Consol. Street R. Co. 108 Ga. 423, 34 S. E. 6.....	127
American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 56 N. W. 711.....	716
American Emigrant Co. v. Fuller, 83 Iowa, 599, 50 N. W. 48.....	418
American Exp. Co. v. People, 183 Ill. 649, 9 L. R. A. 138, 24 N. E. 758.....	406
American Live-Stock Commission Co. v. Chicago Live-Stock Exchange, 143 Ill. 210, 18 L. R. A. 190, 32 N. E. 274.....	168-170
American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 699.....	189
American Waltham Watch Co. v. United States Watch Co. 178 Mass. 85, 43 L. R. A. 826, 53 N. E. 141.....	334, 335
Americus v. Eldridge, 64 Ga. 524.....	387
Amery v. Keokuk, 72 Iowa, 704, 30 N. W. 780.....	770
Ames v. Port Huron Log Driving & Boom Co. 11 Mich. 189, 83 Am. Dec. 731.....	685
Amicable Soc. v. Bolland, 4 Bligh, N. R. 194.....	144
Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993.....	335
Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757.....	696
Amy v. Watertown, 130 U. S. 320, 32 L. ed. 865, 8 Sup. Ct. Rep. 537.....	411
Anderson v. Anderson, 64 Ala. 403.....	114
v. Bellenger, 87 Ala. 834, 4 L. R. A. 680, 6 So. 82.....	404
v. Pollard, 62 Ga. 51.....	472

Andover & M. Turnp. Corp. v. Gould, 6 Mass. 44, 4 Am. Dec. 80.....	904
Angell v. Bowler, 3 R. I. 77.....	874
Angier v. Smith, 101 Ga. 844, 28 S. E. 167.....	501
Angus v. Dalton, L. R. 4 Q. B. Div. 184, L. R. 6 App. Cas. 828.....	780
Arbuckle v. Taylor, 3 Dow. 160.....	473
Arine v. Minneapolis & St. L. R. Co. 76 Minn. 202, 78 N. W. 1108.....	632
Arkansas & O. R. Co. v. St. Louis & S. F. R. Co. 103 Fed. Rep. 747.....	943
Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.....	525
Armour Bros. Bkg. Co. v. Kinney County Comrs. 41 Fed. Rep. 321.....	780
Armory v. Delamirie, 1 Strange, 504.....	624
Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557.....	446
Arnegard v. Arnegard, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797.....	859
Arnold v. Brandt, 16 Ind. App. 169, 44 N. E. 936.....	228
v. Foot, 12 Wend. 330.....	694
Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1.....	136
Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 607, 28 L. ed. 291, 4 Sup. Ct. Rep. 185.....	155
v. Peterson, 58 Kan. 818, 51 Pac. 290.....	770
Atkins v. State, 95 Tenn. 474, 32 S. W. 391.....	885
Atlanta v. Gate City Gaslight Co. 71 Ga. 119.....	626
v. Holliday, 96 Ga. 546, 23 S. E. 509.....	337
Atlanta Brewing & Ice Co. v. Bluthenthal, 101 Ga. 542, 28 S. E. 1003.....	627
Atlanta Nat. Bank v. Davis, 96 Ga. 334, 23 S. E. 190.....	258, 259
Attaway v. Cartersville, 68 Ga. 740.....	134
Atty. Gen. v. Blossom, 1 Wis. 317.....	52, 53
v. Boston Municipal Ct. Justices, 103 Mass. 456.....	445
v. Chicago & N. W. R. Co. 85 Wis. 425.....	58
v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146.....	694
v. New Jersey R. & Transp. Co. 3 N. J. Eq. 140.....	666
v. Stone, 12 Times L. R. 76.....	780
Atty. Gen. ex rel. Holtz v. Helshon, 18 N. J. Eq. 410.....	665
Augerstein v. Jones, 139 Pa. 183, 21 Atl. 24.....	882
Augusta v. Murphey, 79 Ga. 101, 3 S. E. 326.....	766
Austin v. Hyndman, 119 Mich. 615, 78 N. W. 663.....	455
v. Rutland R. Co. 45 Vt. 215.....	186
v. State, 101 Tenn. 563, 50 L. R. A. 478, 48 S. W. 305.....	255
Avery v. Everett, 110 N. Y. 817, 1 L. R. A. 264, 18 N. E. 148.....	143
v. Job, 25 Or. 512, 36 Pac. 293.....	337

B.

Bachelder v. Epping, 28 N. H. 534.....	385
Baez, Ex parte, 177 U. S. 378, 44 L. ed. 813, 20 Sup. Ct. Rep. 678.....	298
Bailey v. Homestead Ins. Co. 16 Hun. 508.....	702, 708
v. Kalamazoo Pub. Co. 40 Mich. 254.....	455
v. State (Tex. Crim. App.) 45 S. W. 708.....	274
Baird, Re, 142 N. Y. 527, 37 N. E. 619.....	234
Baker v. Campbell, 82 Mo. App. 529.....	625
v. Stone, 136 Mass. 405.....	450
Baldwin v. Dow, 130 Mass. 416.....	433
v. Springfield, 141 Mo. 205, 42 S. W. 717.....	178, 175
Ball v. Mannin, 1 Dowl. & C. 380.....	914
v. Winchester, 32 N. H. 485, 885, 887.....	387

Baltimore v. Chester, 58 Vt. 815, 38 Am. Rep. 677.....	148	Bird v. Thompson, 96 Mo. 428, 9 S. W. 788	857
v. Fairfield Improvement Co. 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081.....	309	Birmingham Traction Co. v. Birmingham R. & Elec. Co. 119 Ala. 137, 43 L. R. A. 233, 24 So. 502.....	929
v. Warren Mfg. Co. 59 Md. 96.....	695	Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665.....	762
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.....	529	v. State ex rel. Griner, 149 Ind. 228, 39 L. R. A. 278, 48 N. E. 1038.....	740
v. Rose, 65 Md. 485, 4 Atl. 899.....	774	Black v. Christ Church Finance Co. (1894) A. C. 48.....	780
Bancroft v. Russell, 157 Mass. 47, 31 N. E. 710.....	145	v. Miller, 75 Mich. 323, 42 N. W. 837	418
Bangs v. Potter, 135 Mass. 245.....	812	v. Ross, 110 Iowa, 112, 81 N. W. 229	411
Bank of Commerce v. Goos, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84.....	259	v. Woodrow, 39 Md. 194.....	317
Banks v. Ogden, 2 Wall. 57, 17 L. ed. 818	428, 420	Blackburn v. Reilly, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27.....	798
Barbler v. Connolly, 113 U. S. 27, 28 L. ed. 923, 3 Sup. Ct. Rep. 357.....	350	Blair v. Adams, 59 Fed. Rep. 248.....	837
Bard v. Yohn, 26 Pa. 482.....	189	v. Forehand, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82.....	684
Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519.....	282, 697	Blake v. Pontiac, 49 Ill. App. 453.....	133
Barnard v. Shirley, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117.....	692	Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245.....	790
Barned's Bkg. Co., Re, L. R. 3 Ch. 105.....	796	Blaney v. Electric Traction Co. 194 Pa. 524, 39 Atl. 294.....	639
Barrows v. National Rubber Co. 13 R. I. 48	874	Blank v. Nohl, 112 Mo. loc. cit. 167, 18 L. R. A. 350, 20 S. W. 477.....	856
Barth v. Graf, 101 Wis. 27, 76 N. W. 1104.....	908	Block v. Standard Distilling & Distributing Co. 95 Fed. Rep. 978.....	334
Bartlett v. Columbus, 101 Ga. 300, 44 L. R. A. 795, 28 S. E. 599.....	132, 134	Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433.....	282, 697
Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,802, 5 McLean, 32, Fed. Cas. No. 1,076.....	357, 360	Bloomfield & R. Natural Gaslight Co. v. Richardson, 63 Barb. loc. cit. 448	944
Bascom v. Smith, 164 Mass. 61, 41 N. E. 130.....	762	Bloomington Electric Light Co. v. Radbourn, 56 Ill. App. 165.....	799
Bateman v. Willoe, 1 Sch. & Lef. 201.....	876	Blunt v. Hay, 4 Sandf. Ch. 362.....	695
Battis, Ex parte, 40 Tex. Crim. Rep. 112, 43 L. R. A. 863, 48 S. W. 518.....	656	Boggs v. Reid, 3 Rich. L. 450, Appendix.....	268
Baxter v. Camp, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803.....	654	Bohannon v. Wrought Iron Range Co. 111 Ga. 860, 36 S. E. 907.....	141
v. Chicago & N. W. R. Co. 104 Wis. 307, 80 N. W. 644.....	909	Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119.....	343
v. McDonnell, 155 N. Y. 83, 40 L. R. A. 675, 49 N. E. 607.....	261	v. Northwestern Lumbermen's Assn. 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119.....	343
Bayard v. Klinge, 16 Minn. 249, Gil. 221	728, 729, 731	Boland, Ex parte, 11 Tex. App. 159.....	656
Beach v. Sterling Iron & Zinc Co. 54 N. J. Eq. 65, 33 Atl. 286.....	604	Bolin v. State, 51 Neb. 581, 71 N. W. 444.....	249
Beal v. Chase, 31 Mich. 490.....	787	Bolt v. Stennett, 5 T. R. 606.....	157
v. Lowell & D. Street R. Co. 157 Mass. 444, 32 N. E. 653.....	784	Bomelsler v. Forster, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534.....	240
Bean v. Briggs, 1 Iowa, 488, 63 Am. Dec. 461.....	411	Bonaker v. Evans, 16 Q. B. 162.....	441, 443
Beckwith, Re, 43 Kan. 159, 23 Pac. 164.....	844	Bonnemort v. Gill, 167 Mass. 338, 45 N. E. 768.....	435, 443
v. Phillee, 15 Wis. 224.....	623, 629	Bonnett ex rel. Newmeyer v. Bonnett, 61 Iowa, 190, 47 Am. Rep. 810, 18 N. W. 91.....	846
Bedford v. British Museum, 2 Myl. & K. 552	312	Boomer Dist. Twp. v. French, 40 Iowa, 601	411
Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341.....	761	Boone v. Eyre, B. R. East, 17 Geo. III. 1	793, 794
v. Guinault, 29 La. Ann. 795.....	85	H. Bl. 273.....	181
Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428.....	827	Boorman v. Sunnuchs, 42 Wis. 233.....	181
Beckman v. Hale, 17 Johns. 140.....	761	Born v. Home Ins. Co. 110 Iowa, 379, 81 N. W. 676.....	707
Behre v. National Cash Register Co. 100 Ga. 213, 27 S. E. 980.....	471, 477	Bosse v. Thomas, 3 Mo. App. 472.....	835
Belcher v. Mhoon, 47 Miss. 613.....	446	Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1.....	947
v. Smith, 7 Cush. 482.....	433	Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.....	296
Belknap v. Ball, 83 Mich. 587, 11 L. R. A. 72, 47 N. W. 674.....	455	Bott v. Secretary of State, 62 N. J. L. 107, 40 Atl. 740.....	736
v. Louisville, 99 Ky. 474, 34 L. R. A. 256, 36 S. W. 1118.....	728	v. Secretary of State, 63 N. J. L. 289, 45 L. R. A. 251, 43 Atl. 744.....	736, 741
Bell v. State, 5 Sneed, 507.....	498	Boughner v. Boughner (Ky.) 41 S. W. 26.....	857
Bellona Co.'s Case, 3 Bland, Ch. 442.....	947	Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69.....	753
Bellows Falls Bank v. Rutland County, 40 Vt. 377.....	411	v. Lockhart, 3 Baxt. 262.....	730
Belmont Nail Co. v. Columbia Iron & Steel Co. 46 Fed. Rep. 336.....	905	Boulter, Re, 5 Wyo. 329, 40 Pac. 520, 249, 250 Bound v. Wisconsin C. R. Co. 45 Wis. 579.....	730
Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326.....	954	Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471.....	775
Bennett v. Detroit Citizens' Street R. Co. (Mich.) 7 Det. L. N. 83, 82 N. W. 518.....	639	Bowen v. Matheson, 14 Allen, 499.....	843
v. Louisville & N. R. Co. 102 U. S. 577, 26 L. ed. 235.....	392	Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689.....	139
v. Woolfolk, 15 Ga. 213.....	472	Boyd v. Negley, 40 Pa. 377.....	943
Bently v. Terry, 50 Ga. 555, 27 Am. Rep. 399.....	844	Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249.....	916
Berger v. St. Paul, M. & M. R. Co. 39 Minn. 78, 38 N. W. 814.....	540	Braden v. Stumph, 16 Lea, 581.....	730
Bergh v. Warner, 47 Minn. 250, 50 N. W. 77.....	227	Bradford v. McCormick, 71 Iowa, 129, 82 N. W. 93.....	411
Beries v. Comstock, 104 Mich. 129, 62 N. W. 148.....	64	Bradley v. Rice, 13 Me. 200, 29 Am. Dec. 501.....	181
Berry v. State, 37 Tex. Crim. Rep. 44, 38 S. W. 812.....	275	v. State, 69 Ala. 322.....	394
Bickel v. Sheets, 24 Ind. 1.....	891	Brainard v. Clapp, 10 Cush. 6, 57 Am. Dec. 74.....	958
51 L. R. A.			

Brass v. North Dakota ex rel. Stoesser , 153 U. S. 391, 38 L. ed. 767, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 837.....	156, 184
Brastow v. Rockport Ice Co. , 77 Me. 100.....	835
Brennan v. Titusville , 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 829.....	156, 138
Brewster v. De Fremery , 33 Cal. 341.....	775
Bridgeport v. New York & N. H. R. Co. , 36 Conn. 255, 4 Am. Rep. 63.....	768
Bridgeport Sav. Bank v. Eldredge , 28 Conn. 563, 73 Am. Dec. 688.....	875
Briggs v. Garrett , 111 Pa. St. 404, 56 Am. Rep. 274, 2 Atl. 513.....	457
v. Lewiston & A. Horse R. Co. , 79 Me. 363, 10 Atl. 47.....	929, 512
Brigham v. Evans , 113 Mass. 538.....	915
v. Fayerweather , 144 Mass. 48, 10 N. E. 735.....	175, 183
Brinck v. Collier , 56 Mo. 166.....	173, 175
Bristow v. Cormican , L. R. 3 App. Cas. 641.....	183
Britton v. Supreme Council of R. A. , 46 N. J. Eq. 102, 18 Atl. 676.....	144
Broadbent v. Ramsbotham , 34 Eng. L. & Eq. 553.....	282
Brock v. Old Colony R. Co. , 146 Mass. 194, 15 N. E. 555.....	435
v. Stimson , 108 Mass. 520, 11 Am. Rep. 390.....	203
Broderick Will Case , 21 Wall. 503, 22 L. ed. 599.....	424
Bronson v. Bruce , 59 Mich. 469, 60 Am. Rep. 307, 26 N. W. 671.....	455
Brooklyn v. Meserole , 26 Wend. 132.....	664
Brown v. Buck , 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226.....	277
v. Concord , 56 N. H. 375.....	389
v. Cunningham , 82 Iowa, 512, 12 L. R. A. 583, 48 N. W. 1042.....	935
v. Cure , L. R. 6 P. C. 157.....	753
v. De Groff , 50 N. J. L. 411, 14 Atl. 219.....	662, 664
v. Grand Lodge A. O. U. W. , 80 Iowa, 287, 45 N. W. 884.....	144
v. Guyardotte , 34 W. Va. 299, 11 L. R. A. 121, 12 S. E. 707.....	132
v. Houston , 114 U. S. 623, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.....	138
v. Levee Camrs. , 50 Miss. 468.....	435, 446, 447
v. McElroy , 52 Ind. 404.....	411
v. Miles , 16 N. Y. Supp. 251.....	915
v. Minneapolis & St. L. R. Co. , 31 Minn. 553, 18 N. W. 834.....	538
v. Morris Canal Bkg. Co. , 27 N. J. L. 648.....	431
v. Pendergast , 7 Allen, 427.....	919
v. Winona & St. P. R. Co. , 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.....	539
v. Young , 69 Iowa, 625, 29 N. W. 941.....	770
Brownell v. Manchester , 1 Pick. 232.....	625
Brule County v. King , 11 S. D. 294, 77 N. W. 107.....	904
Brummagin v. Tallant , 29 Cal. 504, 89 Am. Dec. 61.....	411
Bruner v. Stanton , 19 Ky. L. Rep. 1514, 43 S. W. 411.....	898
Brusso v. Buffalo , 90 N. Y. 679.....	244
Bryan v. East St. Louis , 12 Ill. App. 390.....	305
v. Lincoln , 50 Neb. 620, 35 L. R. A. 752, 70 N. W. 252.....	729
v. Lyon , 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880.....	846
Buch v. Amory Mfg. Co. , 69 N. H. 257, 44 Atl. 809.....	886
Bucroft v. Council Bluffs , 63 Iowa, 646, 19 N. W. 807.....	766
Budd v. New York , 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.....	156, 184
Buell v. Ball , 20 Iowa, 282.....	896
Buffalo v. Collins Baking Co. , 39 App. Div. 432, 57 N. Y. Supp. 347, 24 Misc. 745, 53 N. Y. Supp. 968.....	157
Bullard v. Saratoga Victory Mfg. Co. , 77 N. Y. 525.....	694
Burdick v. Cheadle , 26 Ohio St. 393, 20 Am. Rep. 767.....	775
Burge v. Cedar Rapids & M. River R. Co. , 52 Iowa, 101.....	799
Burgess v. Salt Lake City R. Co. , 17 Utah, 406, 58 Pac. 1014.....	639
Burke v. Allen , 29 N. H. 106, 61 Am. Dec. 242.....	916
Burlington & M. River R. Co. v. Spearman , 12 Iowa, 112.....	770
Burmester v. New York Elev. R. Co. , 15 Jones & S. 264.....	245
Burnham v. Kidwell , 113 Ill. 425.....	916
v. Upton , 174 Mass. 408, 54 N. E. 873.....	512
Burns v. Grand Lodge, A. O. U. W. , 153 Mass. 173, 26 N. E. 443.....	144
Buschmann v. St. Louis , 231 Mo. 536, 26 S. W. 687.....	173
Butler, Ex parte , 1 Atk. 210.....	295
v. Baker , 17 R. I. 582, 23 Atl. 1019.....	512
v. Chambers , 36 Minn. 69, 30 N. W. 308.....	350
v. Hunter , 7 Hurist. & N. 826.....	245
Butte, A. & P. R. Co. v. Montana Union R. Co. , 16 Mont. 504, 31 L. R. A. 293, 41 Pac. 232.....	943, 948
Butte Canal & Ditch Co. v. Vaughn , 11 Cal. 143, 70 Am. Dec. 769.....	934
Byrd v. State , 57 Miss. 243, 34 Am. Rep. 440.....	349
Buzby v. Philadelphia Traction Co. , 126 Pa. 559, 17 Atl. 895.....	886

C.

Cabin Creek Dist. Bd. of Edu. v. Old Dominion Iron, Min. & Mfg. Co. , 18 W. Va. 445.....	905
Cahen v. Platt , 69 N. Y. 348, 25 Am. Rep. 203.....	799
Cain v. Page , 19 Ky. L. Rep. 977, 42 S. W. 336.....	673
Calder v. Bull , 3 Dall. 386, 1 L. ed. 648.....	119
Caldwell v. King , 76 Ala. 149.....	114
California v. Howard , 78 Mo. 88.....	173
Camden v. Allen , 26 N. J. L. 399.....	904
Camden & A. Land Co. v. Lippincott , 45 N. J. L. 405.....	427
Campbell v. Metropolitan Street R. Co. , 82 Ga. 320, 9 S. E. 1078.....	130
v. Whoriskey , 170 Mass. 63, 48 N. E. 1070.....	192
Camron v. Kenfield , 57 Cal. 550.....	959
Cannon v. New Orleans , 20 Wall. 577, 22 L. ed. 417.....	852
v. Windsor , 1 Houst. (Del.) 143.....	143
Capel v. Child , 2 Cromp. & J. 558.....	441, 448
Carew v. Rutherford , 106 Mass. 1, 8 Am. Rep. 287.....	242, 244
Carlsbad v. Kutnow , 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. Rep. 167.....	334
Carlton v. Carlton , 44 Ga. 216.....	352
Carman v. Elledge , 40 Iowa, 409.....	762
Carney v. Chicago , St. P. M. & O. R. Co. 46 Minn. 220, 48 N. W. 912, 636.....	638
Carpenter v. Capital Electric Co. , 178 Ill. 29, 43 L. R. A. 645, 52 N. E. 973.....	305
v. Nashua , 58 N. H. 37.....	385
v. Nashua , 104 Briefs & Cases, 649.....	385
v. Northern P. R. Co. , 75 Fed. Rep. 850.....	650
Carpenter's Estate , 170 Pa. 203, 29 L. R. A. 145, 82 Atl. 637.....	144
Carrier v. Chicago , R. I. & P. R. Co. 79 Iowa, 80, 6 L. R. A. 799, 44 N. W. 203.....	411
v. Sears , 4 Allen, 336, 81 Am. Dec. 707.....	915
Carroll County Supers. v. Smith , 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539.....	730, 736
Carson v. Phelps , 40 Md. 73.....	319
Carter v. Berlin Mills Co. , 58 N. H. 52, 42 Am. Rep. 572.....	386
v. Chicago , 57 Ill. 283.....	305
Carthage v. Frederick , 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480.....	308
Case v. Howard , 41 Iowa, 479.....	762
v. Luse , 28 Iowa, 527.....	762
Cassady v. Hammer , 62 Iowa, 359, 17 N. W. 588.....	771
Cass County v. Johnston , 95 U. S. 360, 24 L. ed. 416.....	730, 736, 738
Castro v. Gell , 110 Cal. 292, 42 Pac. 804.....	916
Central R. Co. v. Keegan , 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.....	525, 528
v. Peacock , 69 Md. 257, 14 Atl. 709.....	886

Central Trust Co. v. Eastern Tennessee, V. & G. R. Co. 59 Fed. Rep. 523.	651
Central U. Teleph. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721.	747
v. State ex rel. Falley, 118 Ind. 194, 19 N. E. 604.	747
Centre Street, Re, 115 Pa. 247, 8 Atl. 56.	767
Chaddock v. Day, 75 Mich. 527, 4 L. R. A. 809, 42 N. W. 977.	895
Chaffin v. Lynch, 84 Va. 884, 6 S. E. 474.	457
Chambers v. Sloan, 19 Ga. 84.	472
Champer v. Greencastle, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.	895
Champlain & St. L. R. Co. v. Valentine, 19 Barb. 434.	186
Chandler v. Hollingsworth, 3 Del. Ch. 99.	859
v. Nash, 5 Mich. 409.	459
Chaplin v. Barrett, 12 Rich. L. 284, 75 Am. Dec. 731.	265, 269
v. Freeland, 7 Ind. App. 678, 34 N. E. 1007.	670
Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321.	844
Charge to Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18,255.	249
Chase v. Cheney, 58 Ill. 541.	753
v. Oshkosh, 81 Wis. 313, 15 L. R. A. 553, 51 N. W. 560.	958
v. Silverstone, 62 Me. 176, 16 Am. Rep. 419.	283
Chatard v. New Orleans, 10 La. Ann. 752.	88
Chateau v. Singla, 114 Cal. 91, 33 L. R. A. 750, 45 Pac. 1015.	892
Chatfield v. Wilson, 28 Vt. 49.	283
Chavannah v. State, 49 Ala. 396.	498
Cheney v. Powell, 88 Ga. 629, 15 S. E. 750.	478
Chestnutwood v. Hood, 68 Ill. 132.	728
Chibnall v. Paul, 29 Week Rep. 536.	780
Chicago v. Rumpf, 45 Ill. 90.	338
Chicago & A. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077.	770
Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. 139 Ind. 297, 26 L. R. A. 837, 38 N. E. 604.	128
Chicago & N. W. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437.	770
v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 561, 37 L. R. A. 856, 70 N. W. 678.	926
Chicago, B. & N. R. Co. v. Porter, 48 Minn. 527, 46 N. W. 75.	944
Chicago, B. & Q. R. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239.	301
v. Nebraska ex rel. Omaha, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 518.	296
v. Steel, 47 Neb. 741, 66 N. W. 830.	129
v. West Chicago Street R. Co. 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008.	128, 929
Chicago General R. Co. v. Chicago, B. & Q. R. Co. 181 Ill. 605, 54 N. E. 1028.	306
Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750.	809
v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779.	955
v. Lowell, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281.	784
v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.	164
v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.	530
Chicago, P. & St. L. R. Co. v. Wolf, 137 Ill. loc. cit. 365, 27 N. E. 78.	947
Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1053, 20 Sup. Ct. Rep. 854.	652
Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931, 943, 946.	948
Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.	166
Christie v. Life Indemnity & Invest. Co. 82 Iowa, 360, 48 N. W. 94.	351
Christopher v. State (Tex. Crim. App.) 53 S. W. 852.	408
Chrystal v. Macon, 108 Ga. 27, 33 S. E. 810.	140
51 L. R. A.	
Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191.	783
Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assc. 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890.	929
Cincinnati Street R. Co. v. Smith, 29 Ohio St. 292.	338
Citizens' Bank v. Webb, 44 La. Ann. 1083, 11 So. 706.	88
Citizens' Ins. Co. v. Sprague, 8 Ind. App. 275, 35 N. E. 720.	705
Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799.	411
Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 455.	119, 338, 686
Citizens' Street R. Co. v. Cooper, 22 Ind. App. 462, 53 N. E. 1092.	837
Claes & F. Mfg. Co. v. McCord, 65 Mo. App. 507.	858
Cladlin v. Briant, 58 Ga. 414.	761
v. Reese, 54 Iowa, 544, 6 N. W. 729.	762
Clapp v. Lawton, 31 Conn. 95.	654
Clare v. National City Bank, 8 Jones & S. 104, 1 Sweeny, 539.	246
Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.	846
v. Dasso, 34 Mich. 86.	846
v. Manchester, 62 N. H. 577.	384, 385
v. Molyneux, L. R. 3 Q. B. Div. 237.	457
v. Patterson, 158 Mass. 388, 33 N. E. 589.	450
v. Skinner, 20 Johns. 465, 11 Am. Dec. 302.	625
Clay v. Centra. R. & Bkg. Co. 84 Ga. 345, 10 S. E. 967.	349
Cleaver v. Mutual Reserve Fund Life Asso. [1892] 1 Q. B. 147.	145
Cleveland v. Augusta, 102 Ga. 233, 43 L. R. A. 658, 29 S. E. 584.	130
Cleveland, C. C. & I. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37.	636
Clifford v. Watts, L. R. 5 C. P. 577.	955
Clifton v. Lange, 108 Iowa, 472, 79 N. W. 276.	455
Clifton Iron Co. v. Dye, 87 Ala. 470, 6 So. 192.	694
Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 375.	694
Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767.	775
Cocke v. Gooch, 5 Helsk. 294.	730
Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.	138
v. Lawrence, 1 El. & Bl. 516.	922
Coffey v. United States, 116 U. S. 437, 29 L. ed. 685, 6 Sup. Ct. Rep. 437.	418
Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257.	166
Cole v. Cunningham, 133 U. S. loc. cit. 134, 33 L. ed. 549, 10 Sup. Ct. Rep. 269.	177
v. Gilford, 146 Briefs & Cases, 281.	385
v. Gilford, 63 N. H. 60.	385
v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279.	775
v. Shallet, 3 Lev. 41.	793
Coleman v. Meade, 13 Bush, 358.	512
Colorado C. R. Co. v. Martin, 7 Colo. 592, 4 Pac. 1118.	123
Colorado E. R. Co. v. Union P. R. Co. 41 Fed. 293.	943, 944, 948
Columbia College v. Thatcher, 87 N. Y. 311, 41 Am. Rep. 365.	812
Columbus & H. Coal Co. v. Tucker, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630.	694
Columbus & P. R. Co. v. Christian, 97 Ga. 50, 25 S. E. 411.	471
Com. v. Adickes, 5 Binn. 520.	847
v. Alger, 7 Cush. 84.	159, 309
v. Ashlin, 95 Va. 145, 28 S. E. 177.	905, 906
v. Cambridge, 4 Mass. 627.	441, 443
v. Certain Intoxicating Liquors, 163 Mass. 42, 39 N. E. 348.	445
v. Clap, 4 Mass. 163, 3 Am. Dec. 212.	454
v. Farren, 9 Allen, 489.	350
v. Gaming Implements, 119 Mass. 332.	445
v. Gordon, 159 Mass. 8, 33 N. E. 709.	350
v. Hall, 128 Mass. 410, 35 Am. Rep. 387.	409
v. Hammond, 10 Pick. 274.	844

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346.....	344	Crossley v. Lightowler, L. R. 3 Eq. 279, L. R. 2 Ch. 478.....	694, 695
v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699.....	462	Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271.....	241
v. Mink, 123 Mass. 422, 25 Am. Rep. 109.....	445	Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.....	456
v. Nichols, 10 Allen, 199.....	350	Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104.....	929
v. Pennsylvania Canal Co. 66 Pa. 41, 5 Am. Rep. 329.....	417	Cummings v. Worcester, L. & S. Street R. Co. 166 Mass. 220, 44 N. E. 126.....	784
v. Schaffner, 146 Mass. 512, 16 N. E. 280.....	350	Cummins v. Des Moines & St. L. R. Co. 63 Iowa, 397, 19 N. W. 268.....	767, 770
v. Smith, 108 Mass. 444.....	350	Cunningham v. Barnes, 37 W. Va. 756, 17 S. E. 308.....	847
v. Stratton, 114 Mass. 803, 19 Am. Rep. 350.....	857	v. Elliott, 92 Ga. 159, 18 S. E. 365.....	627
v. Vrooman, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217.....	751	v. Reardon, 98 Mass. 538, 96 Am. Dec. 670.....	227
v. Waite, 11 Allen, 264, 87 Am. Dec. 711.....	350	Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705.....	411
v. Waldman, 140 Pa. 97, 11 L. R. A. 563, 21 Atl. 248.....	271	Curtis v. Curtis, 5 Gray, 535.....	844
v. Wetherbee, 153 Mass. 159, 26 N. E. 414.....	350	v. Mussey, 6 Gray, 261.....	454
v. Wilkinson, 139 Pa. 304, 21 Atl. 14 194.....	409	Cutler v. Close, 5 Car. & P. 337.....	241
Com. ex rel. Gillespie v. Gillespie, 1 Phila. 194.....	846		
Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. Rep. 263.....	650, 651, 652		
Condon v. Sprigg, 78 Md. 330, 28 Atl. 395 774	774		
Conkling v. Krakauer, 70 Tex. 735, 11 S. W. 117.....	512		
Conn v. Cass County Comrs. 151 Ind. 517, 51 N. E. 1062.....	408		
Connors v. Hennessey, 112 Mass. 96.....	245		
Conrad, Re. 39 Iowa, 399, 56 N. W. 535.....	145		
Consolidated Hand-Method Lasting Mach. Co. v. Bradley, 171 Mass. 127, 50 N. E. 464.....	788		
Continental Nat. Bank v. Bowdre, 92 Tenn. 724, 23 S. W. 131.....	259		
Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. loc. cit. 328.....	943, 944		
Cook v. Allen, 2 Mass. 402.....	435, 446		
v. Cook, 24 S. C. 204.....	268		
v. Darling, 18 Pick. 393.....	440		
v. Fliske, 12 Gray, 491.....	512		
v. Macon, 54 Ga. 468.....	134		
v. Winchester, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106.....	645		
Cooke v. England, 27 Md. 14, 92 Am. Dec. 618.....	319		
v. Orne, 37 Ill. 186.....	761		
Cooper, Ex parte, 3 Tex. App. 489, 30 Am. Rep. 152.....	684		
Corby v. Hill, 4 C. B. N. S. 562.....	392		
Cornell v. Radway, 22 Wis. 260.....	913		
Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213 845	845		
Corson v. Maryland, 120 U. S. 502, 30 L. ed. 399, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655.....	136		
Coster v. Tide Water Co. 18 N. J. Eq. 54.....	944		
Coughlin v. Barker, 46 Mo. App. 54.....	312		
County-seat of Linn County, 15 Kan. 500 729, 730	729, 730		
Covert v. Sargent, 38 Fed. Rep. 237.....	804		
Coy v. Indianapolis Gas Co. 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17.....	747		
Coye v. Leach, 8 Met. 371, 41 Am. Dec. 518 865	865		
Craft v. Dolte, 1 Wms. Saund. 248e.....	457		
v. Isham, 13 Conn. 28.....	761		
Cranson v. Cranson, 4 Mich. 230, 66 Am. Dec. 534.....	859		
Crapo v. Stetson, 8 Met. 393.....	904		
Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766.....	916		
Creamer v. Bowers, 35 Fed. Rep. 209.....	804		
v. West End Street R. Co. 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391.....	886		
Cregin v. Brooklyn Crosstown R. Co. 75 N. Y. 192, 31 Am. Rep. 459.....	237		
Cremer v. Higginson, 1 Mason, 828, Fed. Cas. No. 3,883.....	761		
Crenshaw, Ex parte, 15 Pet. 119, 10 L. ed. 632.....	440		
Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 54 Pac. 244.....	282		
Crittenden v. Steele, 3 G. Greene, 538.....	762		
Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 43 N. W. 731.....	253		
Crooker v. Bragg, 10 Wend. 260, 25 Am. Dec. 555.....	694		
Cross v. Grant, 62 N. H. 675.....	228		
v. Milwaukee, 19 Wis. 509.....	919, 920		
51 L. R. A.			
Dade Coal Co. v. Haslett, 83 Ga. 549, 10 S. E. 485.....	143		
Daniel v. Townsend, 21 Ga. 155.....	472		
Danielly v. Cabanias, 52 Ga. 212.....	387		
Darter v. State, 39 Tex. Crim. Rep. 45, 44 S. W. 850.....	273		
Dascomb v. Davis, 5 Met. 335.....	485, 446		
Davenport v. Ottawa, 54 Kan. 711, 39 Pac. 708.....	499		
Davidson v. Old People's Mut. Ben. Soc. 39 Minn. 303, 1 L. R. A. 482, 39 N. W. 803.....	902		
Davis v. Barrington, 30 N. W. 517.....	385		
v. Brown, 46 W. Va. 716, 34 S. E. 839.....	730		
v. Clinton Waterworks Co. 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126.....	769, 771		
v. Davis, 5 Mo. 183.....	859		
v. Laning, 35 Tex. 39, 18 L. R. A. 82, 19 S. W. 846.....	143		
v. Wells, 104 U. S. 159, 26 L. ed. 836 761	761		
Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173.....	761, 762		
Dawson v. Barcus, 73 Ala. 111.....	395		
Day v. Woodworth, 13 How. 370, 14 L. ed. 184.....	363, 364		
Dayton v. St. Paul, 22 Minn. 400.....	734		
Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394.....	943		
Dean v. Ann Arbor Street R. Co. 93 Mich. 330, 53 N. W. 896.....	929		
v. Snelling, 2 Helsk. 484.....	261		
Decatur v. Wilson, 96 Ga. 251, 23 S. E. 240 729	729		
De Cremer v. Anderson, 113 Mich. 573, 71 N. W. 1090.....	761		
De la Chaumette v. Bank of England, 9 Barn. & C. 208.....	625		
De La Croix v. Villere, 11 La. Ann. 39.....	84		
Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386.....	181		
Delaware, L. & W. R. Co. v. Bowns, 58 N. Y. 578.....	955		
v. Central Stock-Yard & Transit Co. 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146.....	168		
De Leon v. Heller, 77 Ga. 740.....	472		
Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100.....	282, 283, 697		
Dent v. West Virginia, 129 U. S. 122, 32 L. ed. 626, 9 Sup. Ct. Rep. 231.....	777		
Denver City R. Co. v. Denver, 21 Colo. 350, 29 L. R. A. 608, 41 Pac. 826.....	895		
Denver Tramway Co. v. Reid, 22 Colo. 349, 45 Pac. 378.....	123		
Derry Council No. 40, J. O. U. A. M. v. State Council J. O. U. A. M. 197 Pa. 413, 47 Atl. 208.....	902		
De Soto Parish Citizens & Taxpayers v. Williams, 49 La. Ann. 422, 37 L. R. A. 761, 21 So. 647.....	729, 736		
Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007.....	927, 928		
Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73.....	916		
v. Norton, 47 N. Y. 62, 7 Am. Rep. 415.....	955		

Dickens v. New York C. R. Co. 23 N. Y. 184	702	Eastman v. Meredith, 36 N. H. 284. 72 Am. Dec. 302. 384-386, 389
Dickinson v. Northeastern R. Co. 2 Hurlst. & C. 735. 839		v. People use of State Bd. of Health, 71 Ill. App. 238. 719
Diebold v. Sharpe, 19 Ind. App. 474, 49 N. E. 837. 124		v. Schettler, 13 Wis. 324. 912, 913
Diedrich v. Northwestern Union R. Co. 42 Wis. 248. 181		Easton & A. R. Co. v. Greenwich Twp. 25 N. J. Eq. 565. 665
Dietrich v. McDock, 42 Mo. 279. 943, 944		Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147 162, 163, 386
Dillenback v. Jerome, 7 Cow. 294. 625		v. Brown, 96 Cal. 371. 17 L. R. A. 897, 31 Pac. 250. 118, 121
Ditoe v. Davenport, 74 Iowa, 66, 36 N. W. 895. 770		v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716. 916
Dixon v. Caruthers, 9 Yerg. 30. 261		Ebling v. Bauer, 17 N. Y. Week. Dig. 497. 799
v. Hurrell, 8 Car. & P. 717. 227, 228		Eccles v. Darragh, 16 Jones & S. 528. 246
Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152. 875		Eddy v. Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800. 133
Dodd v. Consolidated Traction Co. 57 N. J. L. 482, 31 Atl. 980. 957, 958		Edgerly v. Concord, 62 N. H. 8. 384-386
Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373	784	Edmonston v. Drake, 5 Pet. 624, 8 L. ed. 251. 761
Doe ex dem. Wright v. Manifold, 1 Maule & S. 294. 644		Edson v. Bartow, 154 N. Y. 199, 48 N. E. 541. 240
Dohn v. Dawson, 84 Hun. 110, 32 N. Y. Supp. 59. 245		Edwards v. Chandler, 14 Mich. 475, 90 Am. Dec. 249. 457
v. Dawson, 90 Hun. 271, 35 N. Y. Supp. 984, Aff'd in 157 N. Y. 680, 51 N. E. 1090. 246		v. Gauling, 38 Miss. 165. 836, 839
Dolph, Re, 17 Colo. 35, 28 Pac. 470. 240, 250		v. Pochontas, 47 Fed. Rep. 268. 133
Donahoe v. McDonald, 92 Ky. 123, 17 S. W. 195. 625		Ehle's Will, 73 Wis. 445, 41 N. W. 627. 865
Donnell v. State, 2 Ind. 658. 408		Eller v. Crul, 99 Ind. 375. 228
Donohue v. Flanagan, 28 N. Y. S. R. 757, 9 N. Y. Supp. 273. 512		Ellis v. Duncan, 21 Barb. 230. 282, 697
Donovan v. State Capitol Commission, 21 Mont. 344, 53 Pac. 1133. 960		v. Howard, 17 Vt. 330. 189
Dooley v. Christian, 96 Va. 534, 32 S. E. 54	287	v. Jesup, 11 Bush, 405. 844
Doollittle v. Walpole, 67 N. H. 554, 38 Atl. 19. 384, 385		v. Whitehead, 95 Mich. 115, 54 N. W. 757. 454
Dooner v. Delaware & H. Canal Co. 171 Pa. 581, 33 Atl. 415. 882		Elizabethtown, L. & B. S. R. Co. v. Ashland & C. Street R. Co. 96 Ky. 347, 26 S. W. 181. 128
Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823. 892		Elston v. Jasper, 45 Tex. 409. 916
Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. 296		Eltringham v. Clarke, 49 La. Ann. 340, 21 So. 547. 84
Douglass v. Howland, 24 Wend. 35. 761		Ely v. Parsons, 55 Conn. 83, 10 Atl. 499. 958
v. Pike County, 101 U. S. 677, 25 L. ed. 968. 730, 736		Emerson v. Peteler, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337. 648
v. Reynolds, 7 Pet. 113, 8 L. ed. 626	761	v. Udall, 13 Vt. 477, 37 Am. Dec. 604. 876
Doyle v. Pittsburgh R. Co. 166 Mass. 492, 33 L. R. A. 844, 44 N. E. 611. 889		Emert v. Missouri, 156 U. S. 296, 39 L. ed. 480, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 387. 136, 137
v. Union P. R. Co. 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333	775	Emery v. Erskine, 66 Barb. 9. 695
Drake v. Chicago, R. I. & P. R. Co. 70 Iowa, 59, 29 N. W. 804. 770		Empson Packing Co. v. Vaughn (Colo.) 59 Pac. 749. 123
Drucker v. Wellhouse, 82 Ga. 129, 2 L. R. A. 328, 8 S. E. 40. 471, 476		Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 40, 42 Am. Dec. 716. 947
Drumb v. Keen, 47 Iowa, 435. 846		Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1053. 245
Drury v. Connell, 177 Ill. 43, 52 N. E. 868. 644		English v. State (Tex. Crim. App.) 45 S. W. 713. 274
Dublin, W. & W. R. Co. v. Slattery, L. R. 3 App. Cas. 1155. 784		Enjart v. Hanover Twp. 25 Ohio St. 618. 729, 731
Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co. 149 Pa. 1, 24 Atl. 179. 129		Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761. 636
Dubose v. Dubose, 38 Ala. 241, 42 Am. Dec. 588. 396		Estabrook v. Hughes, 8 Neb. 496. 702
Dudley v. Steele, 71 Ala. 423. 394		Estes v. Cooke, 12 R. I. 6. 874
Duke v. Brown, 96 N. C. 127, 1 S. E. 873. 729		Etherington v. Parrott, 1 Salk. 118. 228
Dumanolse v. Townsend, 60 Mich. 302, 45 N. W. 179. 413		Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52. 418
Dummer v. Den ex dem. Jersey City, 20 N. J. L. 86. 665		v. Loughton, 69 Wis. 138, 83 N. W. 573. 914
Duncan v. Gerdine, 59 Miss. 550. 875		Everitt v. Council Bluffs, 46 Iowa, 66. 957
v. State, 105 Ga. 457, 30 S. E. 755. 140		v. Smith, 22 Minn. 53. 728
Duncombe v. Daniell, 8 Car. & P. 222. 454		Express Cases, 117 U. S. 1, sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co. 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. 155, 166, 168
Dunlap's Cable News Co. v. Stone, 15 N. Y. Supp. 2. 168		Eyster's Estate, 5 Watts, 133. 880
Dunneback v. Tribune Printing Co. 108 Mich. 75, 65 N. W. 583. 455		Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217. 686
Dunnevan v. Green, 57 Ill. 67. 736		
Duperier v. Viator, 35 La. Ann. 957. 729		
Durant v. Rogers, 87 Ill. 508. 474		
E.		
Eakright v. Torrent, 105 Mich. 294, 63 N. W. 293. 800		Fairfield v. Ratcliff, 20 Iowa, 396. 766, 768
Earle v. McVeigh, 91 U. S. 507, 23 L. ed. 400. 875		Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 417, 24 L. R. A. 174, 13 So. 25. 895
East Alabama R. Co. v. Doe ex dem. Viascher, 114 U. S. 350, 29 L. ed. 130, 5 Sup. Ct. Rep. 869. 769		Fanning v. Gilliland (Or.) 61 Pac. 636. 944
East Hampton v. Kirk, 84 N. Y. 215. 429		Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504. 915, 916
Eastland v. Burchell, L. R. 3 Q. B. Div. 432	227	Farnum v. Concord, 2 N. H. 392. 384
Eastman v. Hampstead, 66 N. H. 195, 20 Atl. 975. 585		Farrell v. Friedlander, 63 Hun. 254, 18 N. Y. Supp. 213. 474
61 L. R. A.		Farwell v. Sully, 38 Iowa, 387. 762
		Faulkner v. Brown, 13 Wend. 64. 625, 628
		Fawcett v. Charles, 13 Wend. 477. 681
		Fearn v. Ward, 80 Ala. 560, 2 So. 114. 114

Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603.....	411	G.	
Felton v. Aubrey, 20 C. C. A. 436, 48 U. S. App. 278, 74 Fed. Rep. 350.....	392	Gabriel v. Akinsville Pressed Brick Co. 57 Mo. App. 520.....	858
Fenton v. Reed, 4 Johns. 52, 4 Am. Dec. 244.....	700	Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449.....	753
Ferguson v. Terry, 1 E. Mon. 96.....	189	Gage, Re, 141 N. Y. 112, 25 L. R. A. 781, 35 N. E. 1094.....	679
Ferner v. State, 151 Ind. 247, 51 N. E. 360.....	749	Gainor v. Gainor, 26 Iowa, 337.....	908
Ferren v. Moore, 59 N. H. 106.....	227	Gale v. Nickerson, 144 Mass. 415, 11 N. E. 714.....	859
Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.....	140	Gallagher v. Button, 73 Conn. 172, 46 Atl. 819.....	775
Field v. Magee, 122 Mich. 556, 81 N. W. 354.....	455	v. Kemmerer, 144 Pa. 509, 22 Atl. 970.....	189
v. Milton, 3 Cranch, 514, 2 L. ed. 516.....	68	Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.....	913
Fillieul v. Armstrong, 7 Ad. & El. 557.....	794	Galyon v. Gilmore, 93 Tenn. 677, 28 S. W. 301.....	261
Findley v. Stewart, 40 Iowa, 655.....	411	Gannon v. McGulre, 160 N. Y. 476, 55 N. E. 7.....	240
Finneran v. Leonard, 7 Allen, 54, 83 Am. Dec. 665.....	410	Gardenhire v. Hinds, 1 Head, 410.....	846
Finney v. Ackerman, 21 Wis. 271.....	920	Gardner v. Bennett, 6 Jones & S. 197.....	245
First National Bank v. Carpenter, 41 Iowa, 518.....	762	v. Moore, 51 Ga. 269.....	626
v. Security Nat. Bank (Neb.) 15 L. R. A. 386.....	411	Garland, Ex parte, 4 Wall. 333, 18 L. ed. 368.....	462
Fisher v. McNulty, 30 W. Va. 186, 3 S. E. 593.....	68	Garnett v. Slater, 56 Mo. App. loc. cit. 212.....	175
Fitzgerald v. Equitable Reserve Fund Life Asso. 18 N. Y. S. R. 914, 3 N. Y. Supp. 214.....	902	Garrity v. Detroit Citizens' Street R. Co. 112 Mich. 369, 37 L. R. A. 529, 70 N. W. 1018.....	636
v. Faunce, 46 N. J. L. 536.....	429	Garwood v. New York C. & H. R. R. Co. 116 N. Y. 649, 22 N. E. 396.....	695
v. Robinson, 112 Mass. 371.....	753	Garza v. State, 88 Tex. Crim. Rep. 317, 42 S. W. 563.....	273
Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. 1000.....	512	Gates v. Boomer, 17 Wis. 455.....	913
v. New Albany & S. R. Co. 7 Ind. 486.....	889	Gatlin v. Wilcox, 26 Ark. 309.....	789
Flanagan v. Flanagan, 116 Mich. 185, 74 N. W. 460.....	791	Gavin v. Atlanta, 86 Ga. 132, 12 S. E. 262.....	729
Flanders v. Merrimack, 48 Wis. 567, 4 N. W. 741.....	919-921	Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154.....	891
Flavell's Case, 8 Watts & S. 197.....	463	Gee v. Pritchard, 2 Swanst. 419.....	758
Fleetwood v. Reed, 21 Wash. 547, 47 L. R. A. 205, 58 Pac. 665.....	895	Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 900.....	406
Flower v. Nichols Bros. 55 Neb. 314, 75 N. W. 864.....	275	Gelger v. Clark, 13 Cal. 579.....	761
Floyd County v. Rome Street R. Co. 77 Ga. 614, 3 S. E. 3.....	128	Gentile v. State, 29 Ind. 409.....	406
Follansbee v. Walker, 74 Pa. 306.....	418	Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565.....	471
Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901.....	758	Georgia Midland & G. R. Co. v. Columbus Southern R. Co. 89 Ga. 205, 15 S. E. 305.....	180
v. Underhill, 36 Vt. 579.....	175	German Reformed Church v. Com. ex rel. Selbst, 3 Pa. St. 282.....	753
Ford v. Caldwell, 3 Hill, L. 248.....	265	German Sav. & L. Soc. v. De Lashmutt, 67 Fed. Rep. 399.....	916
v. First Nat. Bank (Tex. Civ. App.) 34 S. W. 684.....	404	German State Bank v. Northwestern Water & Light Co. 104 Iowa, 717, 74 N. W. 685.....	771
v. State (Tex. Crim. App.) 51 S. W. 935.....	274	Gibson v. Midland R. Co. 2 Ont. Rep. 658.....	839
Foreman v. Hennepin County Comrs. 64 Minn. 371, 67 N. W. 207.....	828	v. Soper, 6 Gray, 279, 66 Am. Dec. 414.....	915
Foster v. Abbot, 8 Met. 596.....	446	Giddings v. Blacker, 93 Mich. 1, 18 L. R. A. 402, 52 N. W. 944.....	231-283
v. Morse, 132 Mass. 354, 42 Am. Rep. 438.....	439	Gifford v. Yarrowborough, 3 Barn. & C. 91, 5 Bing. 163.....	427
v. Wright, L. R. 4 C. P. Div. 438.....	428	Gilbert, Re, 94 Wis. 108, 68 N. W. 863.....	64
Fowle v. Torrey, 185 Mass. 87.....	450	v. Eldridge, 47 Minn. 210, 13 L. R. A. 411, 49 N. W. 679.....	481
Fowler v. Lindsey, 3 Dall. 411, 1 L. ed. 658.....	68	v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045.....	916
Fox v. Carr, 16 Hun, 434.....	878	Gilder v. Brenham, 67 Tex. 345, 3 S. W. 309.....	175
v. Martin, 104 Wis. 581, 80 N. W. 921.....	909	Gillespie v. Palmer, 20 Wis. 544.....	730, 735
v. Territory, 2 Wash. Terr. 297, 5 Pac. 603.....	778	Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292.....	955
Francis v. Baker, 45 Minn. 88, 47 N. W. 452.....	512	Gillis v. Gillis, 96 Ga. 1, 30 L. R. A. 143, 23 S. E. 107.....	626
v. Wyatt, 8 Burr. 1498.....	158	Gilman v. Laconia, 55 N. H. 130, 20 Am. Rep. 176.....	384-386
Franco-Texan Land Co. v. Laigle, 59 Tex. 343.....	901	Gilmer v. Lime Point, 18 Cal. 229.....	944
Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398.....	450	Gilmore v. Herrick, 93 Fed. Rep. 525.....	650
Franklin v. Miller, 4 Ad. & El. 599.....	793	v. Watson, 23 Ga. 63.....	624
Franks v. State, 36 Tex. Crim. Rep. 149, 35 S. W. 977.....	275	Gindrat v. People, 138 Ill. 108, 27 N. E. 1085.....	757
Frazer v. Fulcher, 17 Ohio, 260.....	143	Gishwiler v. Dodez, 4 Ohio St. 615.....	845
Frazier v. Brown, 12 Ohio St. 294.....	282	Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 440, 67 N. Y. 563.....	241
Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165, 44, 445.....	794	Glidden v. Unity, 33 N. H. 571.....	387
v. Taylor, 8 Bing. 125.....	794	Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272.....	404
v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372.....	253	Gluck v. Baltimore, 81 Md. 326, 32 Atl. 515.....	774
Freeport v. Marks, 59 Pa. 253.....	896	Glynn v. Central R. Co. 175 Mass. 510, 56 N. E. 698.....	783
Freeth v. Burr (1874) L. R. 9 C. P. 208.....	794-797	Good v. Towns, 56 Vt. 410, 48 Am. Rep. 799.....	836, 839
French v. Shotwell, 5 Johns. Ch. 555.....	875	Goodale v. Tuttle, 29 N. Y. 459.....	282, 697
v. State ex rel. Harley, 141 Ind. 618, 29 L. R. A. 113, 41 N. E. 2.....	749	Gooden v. Rayl, 85 Iowa, 592, 52 N. W. 506.....	771
v. Vix, 143 N. Y. 90, 37 N. E. 612.....	245	Goodenough, Re, 19 Wis. 274.....	847
Fretwell v. Troy, 18 Kan. 271.....	898		
Friedman Bros. v. Fennell, 4 Ala. 570, 10 So. 648.....	114		
Fullilove v. Banks, 62 Miss. 11.....	847		
Furbush v. Collingwood, 18 R. I. 720.....	876		
51 L. R. A.			

- Goodlett v. Anderson, 7 Lea, 286..... 878
 Goods of Rippon, 3 Swabey & T. 177..... 425
 Goods of Walnwright, 1 Swabey & T. 257... 865
 Gosling v. Veley, 7 Q. B. 406..... 739
 Gosnell v. State, 52 Ark. 228, 12 S. W. 392 778
 Graham v. Fulford, 73 Ill. 596..... 863
 Granard v. Dunkin, 1 Ball & B. 207..... 758
 Grande v. State, 37 Tex. Crim. Rep. 51, 38 S. W. 613..... 275
 Grand Rapids & B. City R. Co. v. Van Dusen, 29 Mich. 443..... 799
 Graves v. Johnson, 156 Mass. 211, 15 L. E. A. 834, 30 N. E. 818, 32 Am. St. Rep. 450, note..... 891
 Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324..... 783
 v. Rollinsford, 58 N. H. 253..... 887
 Gray Bros. v. Blasingame, 110 Ga. 343, 85 S. E. 653..... 505
 Green v. Campbell, 35 W. Va. 698, 14 S. E. 212..... 847
 v. Holway, 101 Mass. 248, 3 Am. Rep. 389..... 317
 v. Spencer, 3 Mo. 318, 26 Am. Dec. 672..... 857
 v. State Bd. of Canvassers (Idaho) 47 Pac. 259..... 729
 v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599..... 177
 v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109..... 177
 v. Ward, 82 Va. 324..... 768
 v. Willingham, 100 Ga. 224, 28 S. E. 42..... 473
 Greene, Re, 52 Fed. Rep. 104..... 166
 Greengard v. St. Paul City R. Co. 72 Minn. 181, 75 N. W. 221..... 639
 Greenleaf v. Francis, 18 Pick. 117..... 843
 Greenwich Twp. v. Easton & A. R. Co. 24 N. J. Eq. 217, 25 N. J. Eq. 566 664
 Grether v. Clark, 75 Iowa, 383, 39 N. W. 655..... 411
 Gribben v. Maxwell, 84 Kan. 8, 7 Pac. 584 916
 Griffith v. Denver Consol. Tramway Co. 14 Colo. App. 504, 61 Pac. 46..... 639
 Griggs v. Day, 158 N. Y. 1, 52 N. E. 692... 954
 Grigaby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509..... 758
 Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690..... 753
 v. Keene, 52 N. H. 330..... 388
 Groesback v. Seeley, 13 Mich. 329..... 849
 Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256..... 885
 Groustra v. Bourges, 141 Mass. 7, 4 N. E. 623..... 848
 Gue v. Tide Water Canal Co. 24 How. 257, 16 L. ed. 635..... 769
 Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812..... 133
 Gwydir, Ex parte, 4 Madd. 281..... 444
- H.
- Haesley v. Winona & St. P. R. Co. 46 Minn. 233, 48 N. W. 1033..... 648
 Hager v. Burlington, 42 Iowa, 661..... 766
 Haggerty v. St. Louis Ice Mfg. & Storage Co. 143 Mo. 238, 40 L. R. A. 151, 44 S. W. 1114..... 406
 Hahn v. Bettingen (Minn.) 50 L. R. A. 669, 83 N. W. 467..... 857
 Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511..... 283
 v. Simonton, 55 Iowa, 144, 7 N. W. 493..... 413
 Halsey v. Rapid Transit Street R. Co. 47 N. J. Eq. 380, 20 Atl. 859..... 929
 Hall, Re (Ill.) 9 Cent. L. J. 381..... 865
 Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105..... 248
 Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585..... 445
 v. Eno, 81 N. Y. 116..... 454
 v. Rogers, 67 Mich. 135, 34 N. W. 278..... 716
 v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 756..... 123
 Hampshire County Comrs. Petitioners, 143 Mass. 424, 9 N. E. 756..... 769
 Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439..... 891
 Handly v. Anthony, 5 Wheat. 374, 5 L. ed. 113..... 186
 Hannibal & St. J. R. Co. v. Huseen, 95 U. S. 465, 24 L. ed. 527..... 349
 Hanover F. Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 774..... 702
 Hans v. State, 50 Neb. 150, 69 N. W. 888... 719
 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299..... 283
 Hardaker v. Idle Dist. Council (1896) 1 Q. B. 335..... 780
 Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808... 182
 Hardy v. Keene, 52 N. H. 370..... 385
 Harkins v. Philadelphia & R. R. Co. 15 Phila. 288..... 839
 Harlinger v. New York C. & H. R. R. Co. 92 N. Y. 661..... 238
 Harman v. Chicago, 147 U. S. 896, 37 L. ed. 218, 13 Sup. Ct. Rep. 806... 851
 Harmony v. Bingham, 12 N. Y. 99..... 955
 Harpes v. Harpes, 62 Ga. 394..... 628
 Harrington v. Smith, 28 Wis. 48..... 919
 Harris v. Atlanta, 62 Ga. 290..... 184
 v. Smith, 3 Serg. & R. 20..... 625
 v. White, 81 N. Y. loc. cit. 544..... 168
 Harrison v. Baltimore, 1 Gill, 264..... 809
 v. Burem, Thomp. Cas. 152..... 258
 v. State, 102 Ala. 170, 15 So. 563... 402
 Hart v. Niagara F. Ins. Co. 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213... 291
 Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666..... 480
 Hartwell v. Armstrong, 19 Barb. 166..... 944
 Haskell v. Champion, 30 Mo. 136..... 404
 Haskins v. Kendall, 158 Mass. 224, 33 N. E. 495..... 145
 Hatch v. Mutual L. Ins. Co. 120 Mass. 550, 21 Am. Rep. 541..... 144
 Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167..... 181
 Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244..... 747
 Hawkins v. Pearson, 96 Ala. 371, 11 So. 304 395
 Hayes v. State, 36 Tex. Crim. Rep. 146, 35 S. W. 983..... 275
 Heaton v. Hull, 28 Misc. 97, 59 N. Y. Supp. 281..... 753
 Heckmann v. Pinkney, 81 N. Y. 211..... 241
 Hedderich v. State, 101 Ind. 564, 1 N. E. 47..... 749
 Hegerich v. Keddle, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787..... 287
 Helts v. St. Louis, 110 Mo. 618, 19 S. W. 735..... 157
 Helber v. Spokane Street R. Co. 22 Wash. 319, 61 Pac. 40..... 639
 Hendrick v. Cook, 4 Ga. 255..... 181
 v. Whittemore, 105 Mass. 23..... 410
 Hennesdorf v. State, 25 Tex. App. 597, 8 S. W. 926..... 271
 Henry v. Sennett, 3 B. Mon. 311..... 190
 Herold v. State, 21 Neb. 50, 31 N. W. 258... 348
 Hess v. Newcomer, 7 Md. 387..... 775
 Hewitt v. State, 25 Tex. 725..... 279
 Heywood v. Buffalo, 14 N. Y. 534..... 664
 Hibbeler v. Gutheart, 12 Neb. 531, 12 N. W. 5..... 702
 Hickey v. St. Paul City R. Co. 60 Minn. 119, 61 N. W. 893..... 636
 Hickman v. Nassau Electric R. Co. 36 App. Div. 376, 56 N. Y. Supp. 751... 639
 Hier v. Abrahams, 82 N. Y. 519, 39 Am. Rep. 589..... 385
 Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332..... 384
 v. Maupin, 3 Mo. 324..... 857
 v. Palmer, 56 Wis. 130, 14 N. W. 23 506
 v. Smith, 32 Cal. 166..... 695
 v. Spear, 50 N. H. 253, 9 Am. Rep. 205..... 891
 Hilliard v. Richardson, 3 Gray, 349, 366... 780
 Hillyer v. Brogden, 67 Ga. 24..... 627
 Hine, The, v. Trevor, 4 Wall. 566, 18 L. ed. 451..... 444
 Hines v. Kimball, 47 Ga. 587..... 472
 Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387... 186
 Hirschl v. Clark, 81 Iowa, 200, 9 L. R. A. 841, 47 N. W. 73..... 144
 Hirschfeld v. Fitzgerald, 157 N. Y. 166, 46 L. R. A. 839, 51 N. E. 997..... 954
 Hiss v. Bartlett (Mass.) 63 Am. Dec. 772 763
 Hittinger v. Eames, 121 Mass. 539..... 835
 Hix v. Gardiner, 2 Bulstr. 195..... 158

- Hoare v. Bennie, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73..... 794, 796, 797
 Hobart v. Milwaukee City R. Co. 27 Wis. 194, 9 Am. Rep. 461..... 926-929
 Hobbitt v. London & N. W. R. Co. 4 Exch. 254..... 780
 Hoboken v. Pennsylvania R. Co. 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643..... 431
 Hochster v. De La Tour, 2 El. & Bl. 678..... 797
 Hodgkinson v. Ennor, 4 Best & S. 229..... 694
 Hogan v. Manhattan R. Co. 149 N. Y. 23, 43 N. E. 403..... 248, 246
 Hogg v. Link, 90 Ind. 346..... 875
 Holcomb v. Davis, 56 Ill. 413..... 729
 Hoiden v. Alton, 179 Ill. 318, 58 N. E. 556 338
 v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383..... 436
 Holderness v. Baker, 44 N. H. 414..... 387
 Hole v. Sittingbourne & S. R. Co. 6 Hurlst. & N. 488..... 245
 Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495..... 395
 Hollingsworth v. Des Moines & St. L. R. Co. 63 Iowa, 443, 19 N. W. 325 767, 770
 Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381..... 439
 v. Jersey City, 12 N. J. Eq. 299, 173, 175
 Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 274, 20 Sup. Ct. Rep. 272 682
 Holyoke v. Hadley Co. 174 Mass. 424, 54 N. E. 889..... 783
 Holyoke Water-Power Co. v. Lyman, 16 Wall. 500, 21 L. ed. 133..... 417
 Honck v. Muller, L. R. 7 Q. B. Div. 92 796, 797
 Hooper v. Stat, 56 Ind. 153..... 408
 Hopkinson v. Burghley, L. R. 2 Ch. 447..... 758
 Horgan v. New York, 160 N. Y. 516, 55 N. E. 204..... 955
 Horn v. Sims, 92 Ga. 421, 17 S. E. 670..... 480
 Horner v. United States, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409 499
 Horton v. Johnson, 13 Ga. 397..... 626
 Houghkirk v. Delaware & H. Canal Co. 92 N. Y. 219, 44 Am. Rep. 370..... 238
 Houghton County Supers. v. Blacker, 92 Mich. 638, 16 L. R. A. 482, 52 N. W. 951..... 238
 Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565..... 278
 Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705..... 916
 v. State ex rel. Carson, 119 Ind. 395, 21 N. E. 21..... 749
 Howard v. Dickie, 120 Mich. 238, 79 N. W. 131..... 456, 457
 Howard-Harrison Iron Co. Ex parte, 119 Ala. 484, 24 So. 516..... 401
 Howe v. West End Street R. Co. 167 Mass. 46, 4 N. E. 886..... 929
 Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 764..... 136-135, 141
 Howland v. San Joaquin County Supers. 109 Cal. 152, 41 Pac. 864..... 737
 Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129 846
 Hoyt v. Mackenzie (N. Y.) 49 Am. Dec. 180..... 758
 Hubbardston Lumber Co. v. Bates, 31 Mich. 168..... 799
 Hudelson v. State, 94 Ind. 426..... 499
 Hudson v. Home, W. & O. R. Co. 145 N. Y. 408, 40 N. E. 8..... 692
 Huff v. Watkins, 20 S. C. 477..... 265, 269
 Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603..... 447
 Hull & S. R. Co. Re, 6 Mees. & W. 353..... 428
 Hunlocke v. Blacklowe, 2 Wms. Saund. 156 793
 Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294..... 892
 Hunt v. Acre, 28 Ala. 580..... 895
 v. Bennett, 19 N. Y. 173..... 454
 v. Divine, 37 Ill. 137..... 411
 v. Hayes, 64 Vt. 89, 15 L. R. A. 661, 23 Atl. 920..... 227, 228
 v. Morris, 44 Miss. 314..... 507
 Huntsman v. State, 12 Tex. App. 619..... 279
 Hurford's Case, 91 Tenn. 669, 20 S. W. 201..... 255
 Hurlburt v. State, 52 Neb. 428, 72 N. W. 471..... 719
 Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111..... 248, 249, 435
 51 L. R. A.
- Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 813..... 852, 853
 Hutchins v. Kimmel, 31 Mich. 126, 18 Am. Rep. 164..... 791
 Hutchinson v. Ulrich, 145 Ill. 836, 21 L. R. A. 391, 84 N. E. 556..... 312
 Hyde v. Chapman, 33 Wis. 391..... 912
 v. Woods, 94 U. S. 523, 24 L. ed. 264 295
 Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677..... 790
- J
- Illinois C. R. Co. v. Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315..... 769, 770
 v. Decatur, 147 U. S. 190, 37 L. ed. 132, 18 Sup. Ct. Rep. 293..... 770
 v. Johnson, 77 Miss. 727, 51 L. R. A. 837, 28 So. 753..... 836, 837
 Indiana v. Milk, 11 Biss. 197, 11 Fed. Rep. 389..... 182
 Ingersoll v. Minge, 50 La. Ann. 748, 23 So. 889..... 111
 Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 48 L. R. A. 568, 56 N. E. 822..... 169
 Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896..... 168
 Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 498, 3 So. 449..... 155
 Irvin v. Sprigg, 6 Gill, 200..... 774
- J.
- Jackson v. Griswold, 4 Hill, 522..... 761
 v. Stevenson, 156 Mass. 496, 31 N. E. 691..... 312
 Jackson ex dem. Teed v. Halstead, 5 Cow. 216..... 183
 Jacksonville R. Co. v. Lamb, 86 Ill. App. 487..... 639
 Jacobs, Re, 98 N. Y. 98, 50 Am. Rep. 636..... 849
 Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 Am. Rep. 360 889
 Jaffe v. Hartau, 56 N. Y. 398, 15 Am. Rep. 438..... 775
 Jager v. Adams, 123 Mass. 26, 25 Am. Rep. 7..... 246
 Jakeway v. Barrett, 38 Vt. 323..... 181
 James v. Townsend, 104 Mass. 367..... 439, 440
 v. Wood, 82 Me. 173, 8 L. R. A. 448, 19 Atl. 180..... 409
 Janes v. Cleghorn, 54 Ga. 9..... 844
 Janvrin v. Janvrin, 59 N. H. 23..... 228
 Jaques v. Stewart, 81 Ga. 81, 6 S. E. 615 624
 Jaynes v. Omaha Street R. Co. 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67 926, 928, 929
 Jeffers v. East Omaha Land Co. 134 U. S. 173, 33 L. ed. 872, 10 Sup. Ct. Rep. 518..... 429
 v. Great Western R. Co. 25 1 J. Q. B. N. S. 109..... 624, 627, 628
 Jeffery v. Fitch, 46 Conn. 601..... 440, 875
 Jenkins v. Ballantyne, 8 Utah, 245, 16 L. R. A. 689, 30 Pac. 760..... 684
 v. Bennett, 40 S. C. 393, 18 S. E. 929 265
 Jennings v. Scarborough, 56 N. J. L. 401, 23 Atl. 559..... 753
 Jetter v. New York & H. R. Co. 2 Abb. App. Dec. 458..... 636
 Jochem v. Dutcher, 104 Wis. 611, 80 N. W. 949..... 920
 Johns v. State, 55 Md. 362..... 349
 Johnson v. Britton, 23 Ind. 105..... 908, 909
 v. Collins, 14 Iowa, 68..... 771
 v. DePeyster, 50 N. Y. 666..... 241
 v. Harmon, 94 U. S. 371, 24 L. ed. 271..... 916
 v. Knapp, 36 Iowa, 616..... 721
 v. Long Island R. Co. 80 Hun, 306, 30 N. Y. Supp. 818, Aff'd in 144 N. Y. 719, 39 N. E. 857..... 238
 v. Merithew, 80 Me. 111, 13 Atl. 132 865
 v. St. Paul & D. R. Co. 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156..... 589
 v. St. Paul City R. Co. 67 Minn. 260, 36 L. R. A. 556, 69 N. W. 900..... 636
 Johnston v. Bloomfield, Ir. Rep. 8 C. L. 68 184

- Johnston v. Jones, 1 Black, 209, 17 L. ed. 429
 117..... 227
 v. Sumner, 3 Hurst. & N. 261..... 481
 Joiner v. Ocean S. S. Co. 86 Ga. 238, 12 S. E. 361..... 794, 795
 Jonassohn v. Young, 4 Best & S. 296, 32 L. J. Q. B. N. S. 385..... 784
 Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 46 N. W. 444..... 729
 v. Com. 20 Ky. L. Rep. 651, 47 S. W. 323..... 846
 v. Darnell, 108 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229..... 401
 v. Hutchinson, 43 Ala. 721..... 439
 v. Robbins, 8 Gray, 329..... 429
 v. Soulard, 24 How. 41, 16 L. ed. 604
 v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658..... 758
 v. Surprise, 64 N. H. 243, 9 Atl. 384
 v. Water Lot Co. 18 Ga. 539..... 181
 Jordan v. Lewis, 2 Strange, 1122..... 757
 Junker v. Fobes, 45 Fed. Rep. 840..... 259
- K.
- Kalley v. Baker, 132 N. Y. 1, 29 N. E. 1091 511
 Kanavan's Case, 1 Me. 226..... 883
 Kansas City v. Marsh Oil Co. 140 Mo. 458, 41 S. W. 943..... 947
 Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co. 97 Mo. 457, 3 L. R. A. 240, 10 S. W. 826..... 129
 Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co. 118 Mo. 599, 24 S. W. 478..... 947
 Kansas P. R. Co. v. Twombly, 3 Colo. 125..... 123
 Kay v. Allen, 9 Pa. 320..... 761
 Kayser v. Lindell, 78 Minn. 123, 75 N. W. 1038..... 648
 Kearney v. London, B. & S. Coast R. Co. L. R. 5 Q. B. 411..... 243
 Kearns v. Howley (Pa.) 68 Am. St. Rep. 856, note..... 758
 Keenan v. Brooklyn City R. Co. 145 N. Y. 348, 40 N. E. 15..... 237
 Keene v. Wheatley, 9 Am. L. Reg. 33, Fed. Cas. No. 7,644..... 360
 Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543..... 144
 Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393..... 648
 Keith v. Bingham, 100 Mo. 300, 13 S. W. 683..... 767
 Kelley v. Cook, 21 R. I. 29, 41 Atl. 571..... 138
 Kellogg v. New York C. & H. R. R. Co. 79 N. Y. 72..... 238
 v. Stockton, 29 Pa. 460..... 761
 Kelly v. Shuey, 143 Mo. loc. cit. 435, 45 S. W. 300..... 156
 Kemmler, Re, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930..... 248
 Kendig v. Knight, 60 Iowa, 33, 14 N. W. 78 770
 Kennayde v. Pacific R. Co. 45 Mo. 255..... 636
 Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33 391
 Kenyon v. Saunders, 18 R. I. 590, 26 L. R. A. 232, 30 Atl. 470..... 143
 Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377..... 852
 Kerr v. Moon, 9 Wheat. 565, 6 L. ed. 161..... 424
 Ketchum, Re, 1 Fed. Rep. 815..... 474
 Keys v. Johnson, 68 Pa. 42..... 512
 Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6..... 350
 Kieley v. McGlynn, 21 Wall. 503, 22 L. ed. 599..... 424
 Kimberly & C. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373..... 832
 Kimmell v. State, 104 Tenn. 184, 56 S. W. 854..... 255
 Kincheloe v. Holmes, 7 B. Mon. 5, 45 Am. Dec. 41..... 761
 King v. Barham, 8 Barn. & C. 99..... 922
 v. Livermore, 9 Hun, 298, Aff'd in 71 N. Y. 605..... 245
 v. Lynn, 2 T. R. 734, 1 Leach C. L. 407..... 883
 v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37..... 245
 King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603..... 799
 Kinsley v. Norris, 62 N. H. 652..... 387
 Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089.. 475
 51 L. R. A.
- Kirk v. State, 35 Tex. Crim. Rep. 224, 32 S. W. 1045..... 275
 Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 857..... 411
 Klaus v. Green Bay, 34 Wis. 628..... 920, 921
 Klein v. Valerius, 37 Wis. 54, 22 L. R. A. 609, 57 N. W. 1112..... 69
 Knapp v. Wallace, 41 N. Y. 477..... 511
 Knoker v. Canal & C. R. Co. 52 La. Ann. 806, 27 So. 279..... 639
 Knox County v. Ninth Nat. Bank, 147 U. S. 91, 37 L. ed. 96, 13 Sup. Ct. Rep. 267..... 730, 736
 Kobbe v. New Brighton, 20 Misc. 477, 45 N. Y. Supp. 777..... 309
 Koehler v. Hughes, 148 N. Y. 507, 42 N. E. 1051..... 240
 Kohler v. Matlage, 72 N. Y. 259..... 908
 Kolshorn v. State, 97 Ga. 343, 23 S. E. 829 408
 Rooms v. Lucas, 52 Iowa, 181, 8 N. W. 84..... 767
 Krueger v. Wisconsin Telephone Co. 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041..... 925, 926
 Kuhn v. Chicago, M. & St. P. R. Co. 74 Iowa, 141, 37 N. W. 116..... 363
 Kuns v. Robertson, 154 Ill. 394, 40 N. E. 843..... 740
 Kurts v. People, 33 Mich. 279..... 456
- L.
- Lachemeyer, Re, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966..... 352
 La Clef v. Concordia, 41 Kan. 323, 21 Pac. 272..... 132
 Ladd v. Granite State Brick Co. 68 N. H. 185, 37 Atl. 1041..... 388
 v. Southern Cotton Press & Mfg. Co. 53 Tex. 172..... 168
 Lake Shore & M. S. R. Co. v. Richards (Ill.) 30 L. R. A. 33..... 799
 Lamar v. McLaren, 107 Ga. 591, 34 S. E. 116..... 626
 Lamb v. Cain, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13..... 739, 740
 Lambert, Ex parte, 37 Tex. Crim. Rep. 435, 36 S. W. 81..... 656
 Lambertson v. Hogan, 2 Pa. St. 25..... 349
 Lamkin v. Baldwin & L. Mfg. Co. 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593 654
 Lamprey v. State, 52 Minn. 198, 18 L. R. A. 670, 53 N. W. 1139..... 833
 Lancashire Ins. Co. v. Corbetta, 185 Ill. 592, 36 L. R. A. 640, 46 N. E. 631..... 716
 Lander v. State, 12 Tex. 478..... 279
 Landford v. Dunklin, 71 Ala. 609..... 394
 Landis v. Hamilton, 77 Mo. loc. cit. 568.. 175
 Lange, Ex parte, 18 Wall. 163, 21 L. ed. 372 68
 Langhoff v. Milwaukee & P. du Ch. R. Co. 19 Wis. 490..... 636
 Lapointe v. Middlesex R. Co. 144 Mass. 18, 10 N. E. 407..... 784
 Lathrop v. Atwood, 21 Conn. 125..... 908
 Lau v. Lake Shore & M. S. R. Co. 120 Mich. 115, 79 N. W. 13..... 639
 Laughter v. Pointer, 5 Barn. & C. 547..... 780
 Lavalley v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974..... 539
 Lawrence v. Great Northern R. Co. 20 L. J. Q. B. N. S. 293, 4 Eng. L. & Eq. 265..... 163
 Learned v. Bishop, 42 Wis. 470..... 909
 Leavitt v. Dover, 67 N. H. 94, 32 Atl. 156 885
 Lee v. Dick, 10 Pet. 482, 9 L. ed. 503 761, 762
 v. Haley, L. R. 5 Ch. 155..... 334
 v. J. B. Suckles Saddlery Co. 38 Mo. App. 201..... 799
 v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563..... 462
 Leete v. State Bank, 115 Mo. 184, 21 S. W. 788..... 178
 v. State Bank, 141 Mo. 584, 42 S. W. 927..... 178
 Legate v. Legate, 87 Tex. 243, 28 S. W. 281 846
 Legatt v. Tolliver, 14 East. 302..... 757
 Lehigh Zinc & I. Co. v. Trotter, 43 N. J. Eq. 185, 7 Atl. 650, 10 Atl. 607 666
 Lehman v. Robinson, 59 Ala. 235..... 396
 Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86, 10 Sup. Ct. Rep. 681..... 139

<p> Lembeck v. Nye, 47 Ohio St. 336, 8 L. R. A. 575, 24 N. E. 686. 184 Leonard v. First Cong. Soc. 2 Cush. 462. 450 Lester v. Hoskins, 26 Ark. 63. 875 Lester v. McIntosh, 101 Ga. 676, 29 S. E. 7 627 Leverett v. State, 3 Tex. App. 217. 275 Lewis v. Few, 5 Johns. 1. 454 Latham, 74 N. C. 283. 891 Monohan, 173 Mass. 122, 58 N. E. 150. 450 Raleigh, 77 N. C. 230. 183 License Cases, 5 How. 504, 12 L. ed. 258. 157 Liddlow v. Wilmot, 2 Starkie, 86. 227, 228 Liese v. Meyer, 143 Mo. loc. cit. 562, 45 S. W. 232. 857 Lindsay v. United States Sav. & L. Asso. 120 Ala. 156, 42 L. R. A. 783, 24 So. 171. 895 Lindsay Irrig. Co. v. Mehrtens, 97 Cal. 676, 82 Pac. 802. 944 Lindvall v. Woods, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020. 589 Linnell v. Battey, 17 R. I. 241, 21 Atl. 606 876 Linscott v. Trank, 35 Me. 150. 625 Litson v. Brown, 26 Ind. 489. 227, 228 Little v. Price, 1 Md. Ch. 182. 875 Little v. Jayne, 124 Ill. 123, 16 N. E. 374 338 Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. Rep. 559. 168 Little Schuylkill Nav. R. & Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209. 189 Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271. 287 Livingston v. Wolf, 136 Pa. 519, 20 Atl. 551 958 Lockhart v. Craig Street R. Co., 139 Pa. 419, 21 Atl. 26. 929 Western & A. R. Co. 73 Ga. 472, 54 Am. Rep. 883. 624, 629 Lockwood v. Halsey, 41 Kan. 166, 21 Pac. 98. 512 New York, L. E. & W. R. Co. 98 N. Y. 523. 238 London v. Bolt, 5 Ves. Jr. 129. 665 London & N. W. R. Co. v. St. Pancras, 17 L. T. N. S. 654. 771 Long v. Emsley, 57 Iowa, 11, 10 N. W. 280 411 Lonsdale v. Lafayette Bank, 18 Ohio, 128. 761 Loosemore v. Radford, 9 Mees. & W. 657 908, 909 Lord v. Pueblo Smelting & Ref. Co. 12 Colo. 890, 21 Pac. 148. 123 Sydney Comra. 12 Moore, P. C. C. 473. 185 Lorillard v. Clyde, 142 N. Y. 450, 24 L. R. A. 113, 37 N. E. 489. 955 Lorimer v. Lorimer (Mich.) 7 Det. L. N. 367, 83 N. W. 608. 791 Loring v. Hildreth, 170 Mass. 328, 40 L. R. A. 127, 49 N. E. 652. 437 Loubat v. Le Roy, 40 Hun. 546. 753 Loucks v. Chicago, M. & St. P. R. Co. 81 Minn. 526, 18 N. W. 651. 636 Louisville & N. R. Co. v. Davidson County Ct. 1 Sneed, 637, 62 Am. Dec. 452. 786 Dooley, 78 Ala. 525. 716 Halley, 94 Tenn. 383, 27 L. R. A. 549, 29 S. W. 367. 888 Wilson, 88 Tenn. 316, 12 S. W. 720. 888 Louisville Bagging Mfg. Co. v. Central Pass. R. Co. 95 Ky. 50, 23 S. W. 592 926, 929 Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265. 751 Louisville Mfg. Co. v. Welch, 10 How. 473, 13 L. ed. 497. 762 Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432. 771 Smith, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775. 670 State use of Beckman, 122 Ind. 443, 24 N. E. 350. 769, 771 Love v. Atlanta, 95 Ga. 129, 22 S. E. 29. 132 Miller, 53 Ind. 294, 21 Am. Rep. 192. 512 White County Comrs. (Ind.) 59 N. E. 466. 749 Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 83. 245 </p>	<p> Lowrie, Re, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 480. 250 Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049. 411 Lucke v. Clothing Cutters & Trimmers' Assembly, No. 7,507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505. 344 Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45. 625 Ludlow v. Cincinnati Southern R. Co. 78 Ky. 357. 769, 770 Lynch v. Goldsmith, 64 Ga. 42. 411 Lynn, Ex parte, 19 Tex. App. 120. 636 Turner, 1 Cowp. 87. 384 Lyons v. Bay Cities Consol. R. Co. 115 Mich. 114, 73 N. W. 139. 639 Lytton v. Devey, 54 L. J. Ch. N. S. 298. 758 </p>
---	---

M.

<p> Mabin v. Webster, 129 Ind. 430, 28 N. E. 863. 856 McBain v. Smith, 13 Ga. 315. 623 McBeth v. Smith, 2 Treadway Const. 676, 3 Brev. 511. 268 Macaulay Bros. v. Tierney, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1. 843 McCafferty v. Spurten Duvvill & P. M. R. Co. 61 N. Y. 178, 19 Am. Rep. 267. 245 McCandless v. State, 57 S. W. 672. 279 McCann v. Day, 57 Ill. 101. 305 McCarty v. State, 36 Tex. Crim. Rep. 135, 35 S. W. 994. 275 McCollum v. Cushing, 22 Ark. 540. 761 McClelland v. Pettigrew, 44 La. Ann. 356, 10 So. 533. 140 McClelland's Case, 96 Ga. 749, 22 S. E. 329, 140 McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217. 146 McCulloch v. Maryland, 4 Wheat. 421, 4 L. ed. 606. 750 McDermott v. Jackson, 102 Wis. 419, 78 N. W. 589. 909 McDonald v. Pittsburgh, C. C. & St. L. R. Co. 144 Ind. 459, 32 L. R. A. 309, 43 N. E. 447. 837 McDuffie v. Irvine, 91 Ga. 748, 17 S. E. 1028. 627 McElhannon v. Farmers' Alliance Warehouse & Commission Co. 95 Ga. 670, 22 S. E. 686. 623 McElroy v. Albany, 65 Ga. 387, 38 Am. Rep. 791. 134 McFadden v. Haynes & D. Ice Co. 86 Me. 319, 29 Atl. 1068. 835 McFadin v. Catron, 120 Mo. 252, 25 S. W. 506. 510 McGehee v. George, 38 Ala. 323. 395 McGough v. Jamison, 107 Pa. 336. 411 McGovern v. New York C. & H. R. R. Co. 67 N. Y. 417. 237 McGregor v. Ross, 96 Mich. 108, 55 N. W. 658. 800 McIlroy v. Adams, 32 Ark. 315. 474 McIntyre v. New York C. R. Co. 37 N. Y. 287. 237 McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057. 677, 678 McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406. 110 McLean v. Camak, 97 Ga. 804, 25 S. E. 493 502, 503 Speed, 52 Mich. 257, 18 N. W. 386. 460 McLean County Precinct v. Deposit Bank, 81 Ky. 254. 904 McMillan v. Free Church, 23 Sess. Cas. 1314. 758 McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839. 786 McNamara v. Estes, 22 Iowa, 246. 767 McNichol v. United States Mercantile Reporting Agency, 74 Mo. 457. 170 Mc</p>

- Madison County v. Priestly, 42 Fed. Rep. 817..... 736
- Magner v. People, 97 Ill. 320..... 406
- Maier, Ex parte, 103 Cal. 470, 37 Pac. 402 406
- Makepeace v. Worden, 1 N. H. 16..... 958
- Malcomson v. Wappoo Mills, 88 Fed. Rep. 850..... 151
- Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410..... 253
- Mandeville v. Parker, 31 N. J. Eq. 242..... 644
- Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251..... 664
- Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030..... 435, 436
- Manlove v. State, 153 Ind. 80, 53 N. E. 385 462, 463
- Mann v. Betsor Min. Co. 49 App. Div. 454, 63 N. Y. Supp. 752..... 694
- Mansur v. Blake, 62 Me. 38..... 181
- Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362..... 875
- Marion County Comrs. v. Winkley, 29 Kan. 86..... 729, 737
- Marks, Ex parte, 64 Cal. 29, 28 Pac. 109..... 463
- v. Baker, 28 Minn. 162, 9 N. W. 678 457
- v. Hastings, 101 Ala. 165, 13 So. 297 475
- Marsh v. Fairbury, 163 Ill. 401, 45 N. E. 236..... 312
- Marshall v. Reams, 32 Fla. 499, 14 So. 95..... 844
- v. Ulleswater Steam Nav. Co. 3 Beat & S. 742..... 184
- v. Wabash R. Co. 120 Mo. 275, 25 S. W. 179..... 837, 839
- Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603..... 526
- v. Blattner, 68 Iowa, 292, 25 N. W. 131, 27 N. W. 244..... 418
- v. Parsons, 49 Cal. 94..... 875
- v. State, 21 Tex. App. 1, 17 S. W. 430..... 278
- Mary, The, 9 Cranch, 126, 3 L. ed. 678..... 435
- Marzetti v. Williams, 1 Barn. & Ad. 415..... 258
- Masonic Mut. Soc. v. Burkhardt, 110 Ind. 139, 10 N. E. 79, 11 N. E. 449..... 144
- Matthews v. Associated Press, 61 Hun, 199, 15 N. Y. Supp. 887..... 167, 169
- v. Smith, 13 Neb. 178, 12 N. W. 821 716
- Matthewson v. Moulton, 135 Mass. 122..... 440
- Maurer v. Mitchell, 53 Cal. 289..... 959
- Maus v. Springfield, 101 Mo. 613, 14 S. W. 630..... 174, 175
- Maxim Nordenfelt Guns & A. Co. v. Nordenfelt [1893] 1 Ch. 630..... 787
- Maxwell v. Kennedy, 50 Wis. 649, 7 N. W. 657..... 363
- May v. Bermel, 20 App. Div. 53, 46 N. Y. Supp. 622..... 739
- v. Metropolitan Street R. Co. 26 Misc. 748, 57 N. Y. Supp. 277..... 639
- v. Wood, 172 Mass. 11, 51 N. E. 191 345
- Mayberry v. Standish, 56 Me. 342..... 175
- Mayfield v. Wheeler, 37 Tex. 256..... 761
- Mechanics' & T. Ins. Co. v. Floyd, 20 Ky. L. Rep. 1538, 49 S. W. 543..... 705
- Mechanics' Bank v. Heard, 37 Ga. 401..... 626
- Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225..... 654
- Melnors v. St. Louis, 130 Mo. loc. cit. 284, 32 S. W. 637..... 173, 175
- Melchert v. Smith Brewing Co. 140 Pa. 448, 21 Atl. 755..... 882
- Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128..... 481
- Menzie v. Anderson, 65 Ind. 239..... 352
- Merced Min. Co. v. Fremont, 7 Cal. 130..... 65
- Merck v. American Freehold Land Mortg. Co. 79 Ga. 213, 7 S. E. 265..... 501
- Merriam v. Pine City Lumber Co. 23 Minn. 314..... 908
- Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404..... 694
- v. Todd (N. Y.) 80 Am. Dec. 243..... 411
- Mersey Steel & I. Co. v. Naylor, L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434..... 795, 798
- Messenger v. Votaw, 75 Iowa, 225, 39 N. W. 280..... 769, 771
- Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911 282
- Metcalfe v. Seattle, 1 Wash. 297, 25 Pac. 1010..... 736
- Methodist Episcopal Church v. Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696 175, 665
- Meyer v. Mosier, 64 Miss. 610, 1 So. 837... 627
- 51 L. R. A.
- Middleton v. Robinson, 1 Bay, 58, 1 Am. Dec. 596..... 265, 269
- Milburn, Re, 59 Wis. 24, 17 N. W. 965..... 863
- Miller v. Detroit, Y. & A. A. R. Co. (Mich.) 84 N. W. 49..... 347
- v. Highland Ditch Co. 87 Cal. 430, 25 Pac. 550..... 190
- Millsaps v. State, 38 Tex. Crim. Rep. 570, 43 S. W. 1015..... 275
- Milner v. Patton, 49 Ala. 423..... 591
- Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374..... 363
- Minneapolis Mill Co. v. St. Paul Water Comrs. 56 Minn. 485, 58 N. W. 83..... 832, 834
- Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468, Gil. 424..... 768
- Minnesota Tribune Co. v. Associated Press, 27 C. C. A. 542, 55 U. S. App. 136, 83 Fed. Rep. 350..... 169
- Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 357, 43 L. ed. 476, 19 Sup. Ct. Rep. 179..... 395
- Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910..... 411
- v. Holder, 8 Bush, 362..... 424
- v. Plover, 53 Wis. 548, 11 N. W. 27..... 921
- v. Reynolds, 1 P. Wms. 181..... 787
- v. Williams, 27 Ind. 62..... 684
- Mobile v. Yulise, 3 Ala. 137, 36 Am. Dec. 441..... 157
- Mobile Sav. Bank v. Oktibbeha County Supers. 22 Fed. Rep. 580, 24 Fed. Rep. 110..... 736
- Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348..... 123
- Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695..... 133
- Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598..... 166
- v. McGregor [1892] A. C. 25..... 343
- Momsen v. Noyes, 105 Wis. 565, 81 N. W. 860..... 909
- Montgomery v. Crosstwhait, 90 Ala. 553, 12 L. R. A. 140, 8 So. 498..... 404
- Montgomery County Fiscal Ct. v. Trimble, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773..... 729, 737
- Montgomery R. Co. v. Hurst, 9 Ala. 513..... 404
- Moody v. State, 48 Ala. 115, 17 Am. Rep. 28..... 401
- v. Trimble, 22 Ky. L. Rep. 692, 50 L. R. A. 810, 58 S. W. 504..... 673
- Moog v. Randolph, 77 Ala. 599..... 401
- Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375..... 845
- v. Quirk, 105 Mass. 49, 7 Am. Rep. 499..... 317
- v. Watson, 20 R. I. 495, 40 Atl. 345 627
- v. Woolsey, 4 El. & Bl. 243..... 143
- Morewood v. Wakefield, 133 Mass. 240..... 684
- Morey v. Brown, 42 N. H. 373..... 684
- Morris Canal & Bkg. Co. v. Jersey City, 12 N. J. Eq. 252..... 663, 664
- v. Colman, 18 Ves. Jr. 487..... 166
- v. Palmer, 39 N. H. 123..... 227
- Morrison v. Morrison, 49 N. H. 69..... 228
- Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 516..... 927
- Mosler v. Caldwell, 7 Nev. 363..... 283
- Mots v. Detroit, 18 Mich. 495..... 767
- Mount v. Larkins, 8 Bing. 108..... 794
- Mowbray v. Merryweather [1895] 1 Q. B. 857, [1895] 2 Q. B. 640..... 783
- Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63..... 384
- Moynihan v. Allyn, 162 Mass. 272, 38 N. E. 497..... 775, 776
- Muhl v. Michigan Southern R. Co. 10 Ohio St. 276..... 839
- Mullaly v. People, 86 N. Y. 365..... 684
- Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530..... 243, 246
- Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581..... 429
- Mundt v. Glökner, 24 App. Div. 110, 48 N. Y. Supp. 940..... 233
- Munger v. Albany City Nat. Bank. 85 N. Y. 580..... 411
- Munn v. Illinois, 94 U. S. 126, 24 L. ed. 84..... 156, 157, 161, 164, 165, 168, 169
- Murphy, Re, 12 How. 17, 513..... 845
- v. Chicago, M. & St. P. R. Co. 80 Iowa, 26, 45 N. W. 392..... 411

Murphy v. New York C. & H. R. R. Co. 88 N. Y. 445.....	238	New York, L. E. & W. R. Co. v. Ball, 58 N. J. L. 286, 21 Atl. 1052.....	784
Murray v. Albertson, 60 N. J. L. 167, 13 Atl. 394.....	775	v. Burns, 51 N. J. L. 340, 17 Atl. 630	889
v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 778.....	695	v. Marlon County Comrs. 48 Ohio St. 249, 27 N. E. 548.....	770
v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372.....	435	New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877.....	143
Muscatine v. Chicago, R. I. & P. R. Co. 79 Iowa, 645, 44 N. W. 909 767, 770		New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841.....	694
v. Chicago, R. I. & P. R. Co. 88 Iowa, 291, 55 N. W. 100.....	767, 768, 771	Nichol v. Thomas, 53 Ind. 42.....	916
v. Mississippi & M. R. Co. 1 Dill. 536, Fed. Cas. No. 9,971.....	876	Nichols v. Ann Arbor & Y. Street R. Co. 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538.....	927, 929
Mussey v. Rayner, 22 Pick. 223.....	761	v. Walter, 37 Minn. 264, 33 N. W. 800.....	829
Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877.....	143	Niklaus v. Conkling, 118 Ind. 289, 20 N. E. 707.....	766
Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692.....	799	Nisbet v. Atlanta, 97 Ga. 650, 25 S. E. 173	132
Myers v. St. Louis, 82 Mo. 369.....	162	Nolan v. Whitney, 88 N. Y. 648.....	240, 241
N.		Norrington v. Wright, 115 U. S. 138, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.....	799
Names v. Dwelling House Ins. Co. 95 Iowa, 642, 64 N. W. 628.....	143	North v. North, 1 Barb. Ch. 241, 43 Am. Dec. 778.....	790
Nance v. Busby, 91 Tenn. 330, 15 L. R. A. 801, 18 S. W. 874.....	261	North Beach & M. R. Co.'s Appeal, 32 Cal. 499.....	770
v. Busby (Tenn.) 15 L. R. A. 801, note.....	753	North Carolina R. Co. v. Alamance Comrs. 82 N. C. 259.....	920
Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159.....	783	North Cheshire & M. Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83.....	334, 335
National Biscuit Co. v. Baker, 95 Fed. Rep. 135.....	335	Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159.....	769, 770
National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755.....	942-944	Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.....	525
National Granite Bank v. Whicher, 173 Mass. 517, 53 N. E. 1004.....	449	Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.....	296
Nebraska v. Iowa, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396.....	430	Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423, 25 L. ed. 688.....	852
Neeb v. Hope, 111 Pa. 145, 2 Atl. 568.....	457	Noyes v. Collins, 92 Iowa, 568, 26 L. R. A. 909, 61 N. W. 250.....	181
Needham v. Thayer, 147 Mass. 536, 18 N. E. 429.....	440	v. Hubbard, 64 Vt. 302, 15 L. R. A. 394, 23 Atl. 727.....	352
Nebbe v. Price, 2 Nott & M'C. 328.....	268	Nutt v. Manchester, 58 N. H. 226.....	385
Nelson v. Butterfield, 21 Me. 238.....	181	O.	
v. Chicago, M. & St. P. R. Co. 80 Minn. 74, 14 N. W. 360.....	647	Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583.....	761, 762
v. State, 25 Tex. App. 599, 8 S. W. 927.....	271	O'Brien v. East River Bridge Co. 161 N. Y. 539, 48 L. R. A. 122, 56 N. E. 74.....	954
Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.....	163	v. Miller, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140.....	955
Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 394, 18 Atl. 106, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55	665	Ocean Grove Camp Meeting Assn. v. Asbury Park Comrs. 40 N. J. Eq. 447, 3 Atl. 168.....	283
Newark Lime & Cement Mfg. Co. v. Newark, 15 N. J. Eq. 64.....	663, 664	Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987.....	783
New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537.....	943	O'Connell v. Chicago Terminal Transfer R. Co. 184 Ill. 308, 56 N. E. 355.....	306
Newell v. Minneapolis, L. & M. R. Co. 35 Minn. 112, 27 N. W. 839.....	927	Odum v. Riddick, 104 N. C. 515, 7 L. R. A. 118, 10 S. E. 609.....	916
v. Nichols, 12 Hun. 604, 75 N. Y. 78, 31 Am. Rep. 424.....	865	O'Donnell v. Allegheny Valley R. Co. 59 Pa. 239, 98 Am. Dec. 336.....	889
v. Sass, 142 Ill. 104, 31 N. E. 176.....	306	O'Donovan v. Chatard, 97 Ind. 421, 49 Am. Rep. 462.....	753
New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85.....	525, 526, 528, 529	Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288.....	929
New Haven v. Fair Haven & W. R. Co. 38 Conn. 422, 9 Am. Rep. 399.....	770	O'Hara v. Stack, 90 Pa. 477.....	753
New Home Sewing Mach. Co. v. Simon, 104 Wis. 120, 80 N. W. 71.....	909	Old Colony R. Co. v. Slavons, 148 Mass. 363, 19 N. E. 372.....	783
New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426.....	132	Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394.....	512
Newman v. Covenant Mut. Ins. Co. 76 Iowa, 61, 1 L. R. A. 659, 40 N. W. 87	145	Oldfield v. New York & H. R. Co. 14 N. Y. 310.....	236
New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328.....	895	Oldknow v. Wainwright, 2 Burr. 1017.....	739
v. United States, 10 Pet. 662, 9 L. ed. 673.....	428, 430	Oliver v. Bailey, 85 Me. 161, 27 Atl. 90.....	417
New Orleans City & L. R. Co. v. State Bd. of Arbitration, 47 La. Ann. 879, 17 So. 418.....	460	v. Worcester, 102 Mass. 489, 3 Am. Rep. 485.....	308
Newton v. Atchison, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288.....	895	Olson v. McMullen, 34 Minn. 94, 24 N. W. 318.....	540
v. Mahoning County Comrs. 100 U. S. 548, 25 L. ed. 710.....	417	O'Mara v. Hudson River R. Co. 38 N. Y. 445, 98 Am. Dec. 61.....	237
New York v. Starin, 106 N. Y. 1, 12 N. E. 631.....	158	O'Neill v. Abney, 2 Ball. L. 317.....	268
New York & C. Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855	169	O'Neill v. Bradford, 1 Pinney (Wis.) 390, 42 Am. Dec. 575.....	411
New York C. & H. R. R. Co. v. Metropolitan Gaslight Co. 63 N. Y. 326.....	947	v. Lynn & B. R. Co. 155 Mass. 371, 29 N. E. 630.....	784
New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954.....	123	Opinion of Justices, 18 Me. 458.....	234
51 L. R. A.		Opinion of the Justices, 66 N. H. 629, 33 Atl. 1076.....	947

Orange & A. R. Co. v. Alexandria, 17 Gratt. 178.
 O'Relley v. Kankakee Valley Draining Co. 32 Ind. 169.
 O'Rourke v. Hart, 7 Bosw. 511.
 Orr v. Johnston, L. R. 13 Ch. Div. 434.
 Osborne v. Knox & L. R. Co. 68 Me. 49, 28 Am. Rep. 16.
 Oswego v. Oswego Canal Co. 6 N. Y. 257.
 Otten v. Manhattan R. Co. 150 N. Y. 395, 44 N. E. 1038.
 Ottumwa v. Zekind, 95 Iowa, 622, 29 L. R. A. 784, 64 N. W. 646.
 Overman Silver Min. Co. v. Corcoran, 15 Nev. 147.
 Owen v. Dewey, 107 Mich. 67, 65 N. W. 8.
 Owens v. Owens, 100 N. C. 240, 6 S. E. 794.
 Owings v. Jones, 9 Md. 108.
 Owsley v. Woolhopper, 14 Ga. 124.
 Osborn v. Woolworth, 106 Ga. 459, 32 S. E. 581.

P.

Page v. Murray, 46 N. J. Eq. 325, 19 Atl. 11.
 Paine v. Woods, 108 Mass. 170.
 Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480.
 v. Welch, 132 Ill. 141, 23 N. E. 412.
 Palmour v. Durham Fertilizer Co. 97 Ga. 244, 22 S. E. 931.
 Pardoning Power, Re, 85 Me. 547, 27 Atl. 463.
 Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739.
 v. Kane, 4 Wis. 1, 65 Am. Dec. 283.
 v. Marco, 76 Fed. Rep. 510.
 v. Nashua, 59 N. H. 402.
 v. Overman, 18 How. 137, 15 L. ed. 318.
 v. Plummer, Cro. Eliz. 190.
 v. State ex rel. Powell, 133 Ind. 178, 18 L. R. A. 567, 32 N. E. 886, 33 N. E. 119.
 Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732.
 Parry, Re, L. R. 2 Eq. 95.
 Parsons v. McLane, 64 N. H. 478, 13 Atl. 588.
 Patten v. Northern C. R. Co. 38 Pa. 426, 75 Am. Dec. 812.
 Patterson v. Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632.
 v. Point Dexter, 6 Watts & S. 127, 40 Am. Dec. 554.
 Pattison v. Adams, 7 Hill, 126, 42 Am. Dec. 59.
 Pearson v. Bailey, 28 Ala. 567.
 v. Chicago, M. & St. P. R. Co. 47 Minn. 9, 49 N. W. 302.
 Peel v. Bryson, 72 Ga. 332.
 Peoples v. Byrd, 98 Ga. 688, 25 S. E. 677.
 Peet v. Peet, 52 Mich. 464, 18 N. W. 220.
 Pena v. State, 38 Tex. Crim. Rep. 338, 42 S. W. 991.
 Penford v. Universal L. Ins. Co. 85 N. Y. 817, 39 Am. Rep. 660.
 Pennington v. Brinsop Hall Coal Co. L. R. 5 Ch. Div. 769.
 Penn Mut. L. Ins. Co. v. Helms, 141 Ill. 35, 31 N. E. 188.
 Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 566.
 Pennsylvania Coal Co. v. Sanderson, 86 Pa. 408, 27 Am. Rep. 717.
 v. Sanderson, 94 Pa. 302, 39 Am. Rep. 785.
 v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.
 Pennsylvania R. Co.'s Appeal, 93 Pa. 150.
 People v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277.
 v. Berkeley, 102 Cal. 298, 23 L. R. A. 838, 36 Pac. 591.
 v. Biggins, 96 Ill. 481.
 v. Bud, 117 N. Y. 1, 15 L. R. A. 559, 22 N. E. 670.
 v. Clipperly, 101 N. Y. 634, 4 N. E. 107.
 v. Foss, 80 Mich. 559, 8 L. R. A. 472, 45 N. W. 480.
 v. Gillson, 109 N. Y. 889, 17 N. E. 343.
 People v. Globe Mut. L. Ins. Co. 91 N. Y. 174.
 v. Guldici, 100 N. Y. 503, 3 N. E. 493.
 v. Kelly, 113 N. Y. 647, 21 N. E. 122.
 v. Kerr, 27 N. Y. 188.
 v. Kerr, 37 Barb. 399.
 v. Kibler, 106 N. Y. 321, 12 N. E. 795.
 v. King, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245.
 v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.
 v. Mendenhall, 119 Mich. 404, 78 N. W. 325.
 v. Moore, 62 Mich. 503, 29 N. W. 80.
 v. O'Neill, 71 Mich. 325, 39 N. W. 1.
 v. Otis, 90 N. Y. 48.
 v. Phipplin, 70 Mich. 8, 37 N. W. 886.
 v. Pinckney, 32 N. Y. 392.
 v. Richmond, 16 Colo. 285, 26 Pac. 933.
 v. Smith, 108 Mich. 527, 32 L. R. A. 853, 66 N. W. 382.
 v. Thurber, 13 Ill. 554.
 People ex rel. Davenport v. Brown, 11 Ill. 478.
 Percival v. Cram, 164 N. Y. 167, 58 N. E. 112.
 National Cigar Co. v. Dulaney, 96 Ill. 503.
 Taylor v. Election Comrs. 54 Cal. 404.
 Johnson v. Erbert, 17 Abb. Pr. 395.
 Hetfield v. Fort Edward Trustees, 70 N. Y. 28.
 Gaiues v. Garner, 47 Ill. 246.
 Davidson v. Gilson, 128 N. Y. 147, 27 N. E. 409.
 Gilman, C. & S. R. Co. v. Harp, 67 Ill. 62.
 Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 108.
 Fleming v. Livingston, 6 Wend. 526.
 Bartlett v. Medical Soc. 32 N. Y. 187.
 Einsfeld v. Murray, 149 N. Y. 374, 32 L. R. A. 344, 44 N. E. 146.
 Pickney v. New York Bd. of Fire Underwriters, 7 Hun. 248.
 Mutual L. Ins. Co. v. New York City & County Supers. 16 N. Y. 424.
 State Bd. of Charities v. New York Soc. for Prevention of Cruelty to Children, 161 N. Y. 233, 55 N. E. 1063.
 Manhattan Sav. Inst. v. Otis, 90 N. Y. 48.
 Carter v. Rice, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921.
 Deneen v. Simon, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910, 437, 442, 447.
 Woodyatt v. Thompson, 155 Ill. 451, 40 N. E. 307.
 Wheaton v. Wiant, 48 Ill. 263.
 Shurtz v. Worth Twp. Highway Comrs. 52 Ill. 498.
 People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101.
 v. Winslow, 102 U. S. 256, 26 L. ed. 101.
 People's Ice Co. v. Davenport, 149 Mass. 324, 21 N. E. 886.
 Peoria v. Johnston, 56 Ill. 45.
 Perry, Re, 80 Wis. 269.
 Persons v. State, 90 Tenn. 291, 16 S. W. 726.
 Peru & I. R. Co. v. Hanna, 68 Ind. 562.
 Peters v. Myers, 22 Wis. 602.
 Peterson v. Smart, 70 Mo. 34.
 Petit v. Minnesota. 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 606.
 Petri v. Third Ave. R. Co. 80 Misc. 264, 68 N. Y. Supp. 315.
 Petrie v. Hamilton College, 158 N. Y. 456, 53 N. E. 216.
 Pettes v. Bank of Whitehall, 17 Vt. 444.
 Phadenhauer v. Germania L. Ins. Co. 7 Helsk. 567, 19 Am. Rep. 623.
 Phelps v. Nowlen, 72 N. Y. 40, 28 Am. Rep. 93.
 v. Piper, 48 Neb. 724, 33 L. R. A. 55, 67 N. W. 755.
 v. Racey, 60 N. Y. 10, 19 Am. Rep. 140.

Phoenix Ins. Co. v. Holcomb, 57 Neb. 622, 78 N. W. 300.....	702	Providence Rubber Co. v. Goodyear, 9 Wall. 803, 19 L. ed. 571.....	804
Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41.....	768	Pulcifer v. Page (Me.), 54 Am. Dec. 582.....	934
Philadelphia Co. v. Park Bros. 188 Pa. 846, 22 Atl. 86.....	747	Pullen v. Whitfield, 56 Ga. 174.....	472
Phillips v. Robinson, 4 Bing. 106.....	625	Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 168, 20 L. ed. 557.....	162
Phillip v. Gallant, 62 N. Y. 256.....	241	Purcell v. English, 85 Ind. 34, 44 Am. Rep. 255.....	775
Phillips v. Carpenter, 79 Iowa, 600, 44 N. W. 898.....	144	Q.	
v. Solomon, 42 Ga. 192.....	626	Quarles v. State, 5 Humph. 561.....	498
v. Watson, 68 Iowa, 28, 18 N. W. 659.....	943, 944	Quarman v. Burnett, 6 Mees. & W. 499.....	780
Phoenix Bessemer Steel Co., Re, L. R. 4 Ch. Div. 108.....	796	Quick v. Minnesota Iron Co. 47 Minn. 361, 50 N. W. 244.....	540
Phoenix Ins. Co. v. Angel, 18 Ky. L. Rep. 1034, 38 S. W. 1067.....	705	Quin v. Moore, 15 N. Y. 432.....	236
Pickard v. Smith, 10 C. B. N. S. 470.....	780	R.	
Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134.....	440	Rahrer, Re, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.....	351
Pidgeon v. Cram, 8 N. H. 350.....	227	Rahrer's Case, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.....	139
Pierce v. Connors, 20 Colo. 178, 37 Pac. 721 v. Ellis, 6 Ir. C. L. Rep. 55.....	454	Ralston v. Boady, 20 Ga. 449.....	891
Pigott v. Cascade County Bd. of Canvassers, 12 Mont. 537, 81 Pac. 536.....	960	Rankin v. Childs, 9 Mo. 673.....	761
Pittsburg & W. R. Co. v. Patterson, 107 Pa. 464.....	323	Rapson v. Cubitt, 9 Mees. & W. 710.....	780
Pittsburgh, B. & B. R. Co. v. McCloakey, 110 Pa. 436, 1 Atl. 555.....	326	Raritan Twp. v. Port Reading R. Co. 49 N. J. Eq. 11, 28 Atl. 127.....	666
Pittsburgh, C. C. & St. L. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324.....	789	Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965.....	648
Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72.....	697	Rawstron v. Taylor, 33 Eng. L. & Eq. 435.....	282
Platner v. Sherwood, 6 Johns. Ch. 118.....	143	Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175 v. Peirce, 81 Fed. Rep. 881.....	650
Platt v. Forty-second Street & G. Street Ferry R. Co. 4 Thomp. & C. 406, 2 Hun, 124.....	886	Raynes v. Bennett, 114 Mass. 424.....	227
Plum v. Fond du Lac, 51 Wis. 393, 8 N. W. 283.....	920, 921	Read v. Legard, 6 Exch. 636.....	227
Plumer v. Marathon County Supers. 46 Wis. 171, 50 N. W. 416.....	921	Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Intern. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.....	164
Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Intern. Com. Rep. 590, 15 Sup. Ct. Rep. 154.....	351	Reddaway v. Banham [1896] A. C. 199.....	334
Pocantico Waterworks Co. v. Bird, 130 N. Y. 249, 29 N. E. 246.....	944	Redfield v. Haight, 27 Conn. 31.....	908
Polhemus v. Bateman, 60 N. J. L. 163, 37 Atl. 1015.....	431, 432	Reed v. Madison, 88 Wis. 171, 17 L. R. A. 733, 53 N. W. 547.....	921
Polk County Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416.....	766	v. Reed, 91 Ky. 287, 11 L. R. A. 513, 15 S. W. 525.....	424
Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308.....	258	v. Toledo, 18 Ohio, 161.....	766
v. State, 33 Tex. Crim. Rep. 197, 26 S. W. 70.....	275	Reeves v. Delaware, L. & W. R. Co. 30 Pa. 454, 72 Am. Dec. 713.....	636
Pomeroy v. Pomeroy, 54 How. Pr. 228.....	859	v. State, 105 Ala. 120, 17 So. 104.....	498
Pool v. Gott (Mass.), 14 Law Rep. 269.....	845	Reg. v. Bennett, 4 Foat. & F. 1105.....	857
Pope v. Union, 18 N. J. Eq. 282.....	663, 664	v. Druffit, 10 Cox, C. C. 592.....	344
Pordage v. Cole (1871) 1 Wms. Saund. 820b.....	797, 798	v. Feist, Dears. & B. C. C. 590, 27 L. J. M. C. N. S. 164.....	884
Porter v. Porter, 7 How. (Miss.) 110 836, 37 L. ed. 815.....	839	v. Sinclair, 18 Cox, C. C. 28.....	857
v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008.....	651	Regina Flour Mill Co. v. Holmes, 156 Mass. 11, 30 N. E. 176.....	433
Portland Natural Gas & Oil Co. v. State ex rel. Keen, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818.....	747	Relche v. Smythe, 13 Wall. 162, 20 L. ed. 566.....	288
Potter v. Howe, 141 Mass. 357, 6 N. E. 233 v. Seymour, 4 Bosw. 140.....	833, 246	Reid v. Gifford, Hopk. Ch. 416.....	695
Pounder v. Ashe, 36 Neb. 564, 54 N. W. 847.....	757	v. Norfolk City R. Co. 94 Va. 117, 36 L. R. A. 274, 26 S. E. 428.....	926
Poussard v. Spiers, L. R. 1 Q. B. Div. 410.....	708	Reiger v. Beaufort Comrs. 70 N. C. 319.....	736
Powell v. Pennsylvania, 127 U. S. 679, 32 L. ed. 254, 8 Sup. Ct. Rep. 992.....	351	Reiser v. William Tell Sav. Fund Assn. 39 Pa. 137.....	349
v. State, 17 Tex. App. 345.....	278	Relyea v. Tomahawk Paper & Pulp Co. 102 Wis. 306, 78 N. W. 412.....	921
Powers v. Hale, 26 N. H. 145.....	229	Rex v. Collins, Palmer. 367, 2 Rolfe, Rep. 345.....	158
v. Hazelton & L. R. Co. 33 Ohio St. 429.....	943	v. Dixon, 3 Maule & S. 11.....	349
Pratt v. Jones, 22 Vt. 345, 54 Am. Dec. 80 v. State (Tex. Crim. App.) 57 S. W. 850.....	874, 498	v. Gilles, Russ. & R. C. C. 366, note.....	883
Prentice v. Gelger, 74 N. Y. 841.....	694	v. Yarborough, 3 Barn. & C. 91, 5 Bing. 163.....	427
Price v. Riverside Land & Irrigating Co. 56 Cal. 431.....	155	Reynolds v. Van Beuren, 155 N. Y. 120, 42 L. R. A. 129, 49 N. E. 763.....	244
Price Co. v. Atlanta, 106 Ga. 558, 31 S. E. 619.....	140	Rhyner v. Menasha (Wis.) 83 N. W. 305.....	909
Prince of Wales etc. Assn. Co. v. Palmer, 26 Beav. 605.....	148	Rice v. Mayo, 107 Mass. 550.....	512
Proctor v. Andover, 42 N. H. 362.....	384	v. Savery, 22 Iowa, 470.....	771
Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 9 L. ed. 773.....	166	Rich v. Basterfield, 4 C. B. 783.....	780
Proprietors of Cornish v. Kenrick, Smith (N. H.) 270.....	387	v. Chicago, 152 Ill. 18, 38 N. E. 255.....	767
Prouty v. Stover, 11 Kan. 285.....	234	Richards v. Collins, 45 N. J. Eq. 286, 17 Atl. 831.....	845
51 L. R. A.		Riche v. Bar Harbor Water Co. 75 Me. 91.....	914
		Richmond v. Dubuque & S. City R. Co. 26 Iowa, 191, And in 19 Wall. 584, 22 L. ed. 173.....	166
		Richmond & D. R. Co. v. Bedell, 88 Ga. 591, 15 S. E. 676.....	627
		Rider v. Portsmouth, 67 N. H. 298, 38 Atl. 385.....	385
		Ridgefield Park, Re, 54 N. J. L. 288, 23 Atl. 674.....	662
		Ridgeway v. Bank of Tennessee, 11 Humph. 523.....	876

Riggs v. American Tract Soc. 95 N. Y. 503..	915	St. Louis v. Consolidated Coal Co. 118 Mo.	831
v. Palmer, 115 N. Y. 506, 5 L. R. A.		83, 20 S. W. 699.....	
340, 22 N. E. 188.....	144	v. Russell, 115 Mo. 248, 20 L. R. A.	656
v. Riggs, 135 Mass. 238, 46 Am. Rep.		721, 22 S. W. 470.....	
464.....	645	St. Louis & S. F. R. Co. v. Gill, 156 U. S.	164
Rigney v. Chicago, 102 Ill. 64.....	308, 309	649, 39 L. ed. 567, 15 Sup. Ct.	
Riley v. Johnston, 13 Ga. 260.....	481	Rep. 484.....	
Rindge v. New England Mut. Aid Soc. 146		St. Louis, H. & K. City R. Co. v. Hannibal	947
Mass. 256, 15 N. E. 628.....	144	Union Depot Co. 125 Mo. 82, 28	
Risser v. Hoyt, 58 Mich. 185, 18 N. W. 611	459	S. W. 483.....	943, 945
Ritter v. Mutual L. Ins. Co. 169 U. S. 139,		359, 21 S. W. 884.....	943
42 L. ed. 693, 18 Sup. Ct. Rep.		St. Louis, K. & S. R. Co. v. Wear, 185 Mo.	
302.....	144	230, 33 L. R. A. 341, 86 S. W.	60
Roath v. Driscoll, 20 Conn. 533, 52 Conn.		357.....	
Dec. 352.....	283	St. Louis, V. & T. H. R. Co. v. Dunn, 78	636
Robb v. Carnegie Bros. 145 Pa. 338, 14 L. R.		Ill. 197.....	
A. 329, 22 Atl. 649.....	694	St. Sepulchre, Ex parte, 33 L. J. Ch. N. S.	922
Robbins v. Chicago City, 4 Wall. 679, 18 L.		372.....	
ed. 432.....	780	Salem v. Eastern R. Co. 98 Mass. 431, 96	443
v. Jones, 15 C. B. N. S. 240.....	775	Am. Dec. 650.....	439-441
v. Shelby County Taxing Dist. 120		Salter v. Jonas, 39 N. J. L. 469, 23 Am.	427
U. S. 489, 30 L. ed. 694, 1 Inters.		Rep. 229.....	
Com. Rep. 45, 7 Sup. Ct.		Salters v. Tobias, 3 Paige, 338.....	349
Rep. 592.....	136, 138, 141	Samuel v. Bond, Litt. Sel. Cas. 158.....	457
Roberts v. Lane, 64 Me. 108, 18 Am. Rep.		Sanborn v. Deerfield, 2 N. H. 251.....	385
242.....	483	Sanders v. Coleman, 97 Va. 690, 47 L. R.	
v. Winton, 100 Tenn. 484, 41 La.		A. 581, 34 S. E. 621.....	856
Ann. 275, 45 S. W. 673.....	115	Sanford v. Prentice, 28 Wis. 358.....	720, 736
Robertson v. Northern R. Co. 63 N. H. 544,		Sanford Mfg. Co. v. Wiggin, 14 N. H. 441,	
3 Atl. 621.....	229	40 Am. Dec. 198.....	623, 629
Robinson v. Duvall, 79 Ky. 83, 42 Am. Rep.		Sargent v. Gilford, 66 N. H. 543, 27 Atl.	
208.....	144	306.....	384-386
v. Greinoid, 1 Salk. 119.....	228	Saulet v. Shepherd, 4 Wall. 502, 18 L. ed.	
v. Holt, 39 N. H. 557, 75 Am. Dec.		442.....	428, 420
233, note.....	934	Sauner v. Brooklyn Phoenix Ins. Co. 41 Mo.	
v. Lake Shore & M. S. R. Co. 103		App. 480.....	857
Mich. 607, 61 N. W. 1014.....	800	Savannah v. Hines, 53 Ga. 616.....	472
v. Schenck, 102 Ind. 307, 1 N. E. 698	749	Sawyer v. Dodge County Mut. Ins. Co. 37	
v. Walter, 3 Bulstr. 289.....	158	Wis. 524.....	730
v. Western P. R. Co. 48 Cal. 409.....	638	Sayers v. Collyer, L. R. 24 Ch. Div. 180.....	312
Roby v. Phelon, 118 Mass. 541.....	450	Sayre v. Helme, 61 Pa. 299.....	870
Rockwell v. Nearing, 35 N. Y. 302.....	684	Scarritt Case, 76 Mo. 565, 43 Am. Rep. 768	845
v. Saunders, 19 Barb. 473.....	625	Scera v. True, 53 N. H. 627.....	227
Rodabaugh v. Pitkin, 46 Iowa, 544.....	762	Schaffner v. Ehrman, 139 Ill. 109, 15 L. R.	
Rogers v. Randall, 29 Mich. 41.....	346	A. 134, 28 N. E. 917.....	258, 259
v. Rogers, 17 R. I. 623, 24 Atl. 46.....	876	Schankel v. Moffatt, 53 Ill. App. 382.....	891
v. Spence, 13 Mees. & W. 579.....	627	Scharenbroich v. St. Cloud Fibre-ware Co.	
Bolin v. Steward, 14 C. B. 596.....	258, 259	59 Minn. 116, 60 N. W. 1093.....	540
Rome Grocery Co. v. Greenwich Ins. Co. 110		Scheible v. Klein, 89 Mich. 385, 50 N. W.	
Ga. 618, 36 S. E. 63.....	626	857.....	799, 800
Root v. King, 7 Cow. 613, 4 Wend. 113, 21		Schlichter v. Keiter, 156 Pa. 119, 22 L. R.	
Am. Dec. 102.....	454	A. 161, 27 Atl. 45.....	740
Rose v. Cash, 58 Ind. 273.....	269	Schoep v. Bankers' Alliance Ins. Co. 104	
v. Rose, 67 Mich. 618, 35 N. W. 802	790	Iowa, 354, 73 N. W. 825.....	146
Rosenkrans v. Barker, 115 Ill. 331, 56 Am.		Schollenberger v. Pennsylvania, 171 U. S.	
Rep. 169, 3 N. E. 93.....	474	143 L. ed. 49, 18 Sup. Ct. Rep.	139, 351
Rosentreter v. Brady, 63 Mo. App. 398.....	625	Schreiner v. High Court of Illinois C. O. of	
Ross v. Davis, 97 Ind. 79.....	944	F. 35 Ill. App. 576.....	143
Roth v. State, 51 Ohio St. 209, 37 N. E.		Schumpert, Ex parte, 6 Rich. L. 344.....	846
259.....	406	Schwabacker v. Riddle, 84 Ill. 517.....	474
Rowan v. State, 30 Wis. 129, 11 Am. Rep.		Schweiker v. Husser, 146 Ill. 399, 34 N. E.	
559.....	248	1022.....	753
Rowe v. Portsmouth, 56 N. H. 293, 22 Am.		Scott v. Carothers, 17 Ind. App. 673, 47	
Rep. 464.....	384, 385	N. E. 389.....	228
Royall, Ex parte, 112 U. S. 181, 28 L. ed.		v. Donald, 165 U. S. 58, 14 L. ed.	
690, 5 Sup. Ct. Rep. 98.....	68	632, 17 Sup. Ct. Rep. 265.....	138
Rumney v. Keyes, 7 N. H. 571.....	227	v. Elliott, 61 N. C. (Phill. L.) 104.....	625
Rush v. Com. 20 Ky. L. Rep. 775, 47 S. W.		v. Shearman, 2 W. Bl. 977.....	436
586.....	729	Scott's Case, 98 Tenn. 254, 36 L. R. A. 461,	
Rushville v. Rushville Natural Gas Co. 132		39 S. W. 1.....	255
Ind. 575, 15 L. R. A. 321, 28		Scrutton v. Brown, 4 Barn. & C. 485.....	427
N. E. 853.....	747	Scribner v. Rutherford, 65 Iowa, 551, 22 N.	
Rushville Gas Co. v. Rushville, 121 Ind.		W. 670.....	762
206, 6 L. R. A. 315, 23 N. E. 72	739	Scrutton v. Pattillo, L. R. 19 Eq. 369.....	865
Russell v. Allerton, 108 N. Y. 288, 15 N. E.		Seaman v. Smith, 24 Ill. 521.....	181
391.....	955	Seamans v. Carter, 15 Wis. 548, 82 Am.	
v. Clarke, 7 Cranch. 69, 3 L. ed. 271	761	Dec. 696.....	920
v. Hallett, 23 Kan. 276.....	865	Seaver v. Adams, 66 N. H. 142, 19 Atl. 776	228
v. Men of Devon, 2 T. R. 667.....	384	Second Nat. Bank v. Gaylord, 34 Iowa, 246	762
Ryan v. Allen, 120 Ill. 648, 12 N. E. 65.....	162	Selby v. Hutchinson, 9 Ill. 319.....	799
v. Rothweiler, 50 Ohio St. 593, 35		Selleck v. Griswold, 57 Wis. 291, 15 N. W.	
N. E. 681.....	144	151.....	909
Ryder v. Wilcox, 103 Mass. 24.....	507	Semmes v. Columbus, 19 Ga. 471.....	337
S.			
St. Albans v. Shore, 1 H. Bl. 270.....	793	Sentell v. New Orleans & C. R. Co. 166 U.	
St. Clair County v. Livingston, 23 Wall.		S. 698, 41 L. ed. 1169, 17 Sup.	
46, 23 L. ed. 59.....	429	Ct. Rep. 693.....	684
St. Helen's Smelting Co. v. Tipping, 11 H.		Setzler v. Pennsylvania S. Valley R. Co. 112	
L. Cas. 642.....	694	Pa. 56, 3 Atl. 370.....	326
St. Joseph Twp. v. Rogers, 16 Wall. 644,		Sewell v. State, 61 Ga. 490.....	481
21 L. ed. 328.....	730, 736	Shackelford v. Hamilton, 93 Ky. 80, 15 L.	
51 L. R. A.		R. A. 531, 19 S. W. 5.....	856
		Shanklin v. McCracken, 140 Mo. 348, 41 S.	510
		W. 898.....	

Shannon v. Frost, 3 B. Mon. 253.....	753	Spader v. Mural Decoration Mfg. Co. 47 N. J. Eq. 18, 20 Atl. 378.....	150
Shaw v. Peckett, 26 Vt. 482.....	904	Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.....	295
Shawnee County Comrs. v. Beckwith, 10 Kan. 603.....	346	Spears v. Snell, 74 N. C. 215.....	845
Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 35 N. E. 855.....	144	Speir v. New Utrecht, 121 N. Y. loc. cit. 429, 24 N. E. 692.....	175
v. St. Paul City R. Co. 50 Minn. 395, 52 N. W. 902.....	636	Spice v. Steinruck, 14 Ohio St. 213.....	863
v. Wellington, 163 Mass. 364, 40 N. E. 173.....	783	Spier v. Baker, 120 Cal. 370, 41 La. Ann. 196, 52 Pac. 659.....	117
Sheers v. Stein, 75 Wis. 44, 5 L. R. A. 781, 43 N. W. 728.....	843	Spinney, Ex parte, 10 Nev. 323.....	778
Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935.....	144, 411	Spofford v. Norton, 126 Mass. 533.....	433
Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479.....	747	Spooner v. Leland, 5 R. I. 348.....	875
Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773.....	437, 446	Springer v. Orr, 82 Ill. App. 558.....	512
Sherman v. Fall River Ironworks Co. 5 Allen, 213, 79 Am. Dec. 799.....	695	Springfield F. & M. Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171.....	702
Sherry v. Perkins, 147 Mass. 214, 17 N. E. 307.....	344	Spring Valley Waterworks v. Bartlett, 63 Cal. 245.....	959
Shields v. Durham, 116 N. C. 394, 21 S. E. 402.....	133	Stacy v. Portland Pub. Co. 68 Me. 287.....	363
Shores v. Hooper, 153 Mass. 228, 11 L. R. A. 308, 23 N. E. 846.....	441, 443	v. Thrasher, 6 How. 44, 12 L. ed. 337	424
Short v. Caldwell, 153 Mass. 57, 28 N. E. 1124.....	437, 446, 447	Stahelin v. Sowle, 87 Mich. 124, 49 N. W. 529.....	799
Shumate v. Williams, 34 Ga. 245.....	626	Stanford v. Mangin, 30 Ga. 355.....	181
Shumate's Case, 15 Gratt. 653.....	498	Staples's Appeal, 52 Conn. 425.....	227
Shurbun v. Hooper, 40 Mich. 503.....	459	Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145.....	312
Shute v. Pacific Nat. Bank, 136 Mass. 487.....	411	Starr v. Burlington, 45 Iowa, 87.....	768
Siek v. Toledo Consol. Street R. Co. 16 Ohio C. C. 393.....	639	State v. Armstrong, 46 Mo. 588.....	276
Simpson v. Crippen, L. R. 8 Q. B. 14.....	796, 799	v. Arnold, 55 Mo. 89.....	510
v. Downs, 16 L. T. N. S. 391.....	454	v. Atkinson, 40 S. C. 363, 18 S. E. 1021.....	757
Simrall v. Covington, 90 Ky. 444, 9 L. R. A. 556, 14 S. W. 369.....	894	v. Balch, 31 Kan. 465, 2 Pac. 609.....	457
Sinclair v. Tallmadge, 35 Barb. 602.....	241	v. Baltimore & O. E. Co. 41 W. Va. 81, 23 S. E. 677.....	905
Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.....	335	v. Barnett, 63 Mo. 300.....	276
v. Littler, 58 Iowa, 601, 9 N. W. 905	762	v. Barnett, 3 Kan. 250, 87 Am. Dec. 471.....	249
v. Wright, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249.....	140	v. Barrett, 45 N. H. 15.....	545
Sipe, Re, 49 Ohio St. 536, 17 L. R. A. 184, 31 N. E. 884.....	894	v. Bayne, 88 Mo. 604.....	275
v. Murphy, 49 Ohio St. 536, 17 L. R. A. 184, 31 N. E. 884.....	894	v. Beardsley, 108 Iowa, 396, 79 N. W. 138.....	416
Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.....	750	v. Behrens, 109 Iowa, 58, 79 N. W. 387.....	143
Slingerland v. Norton, 59 Minn. 351, 61 N. W. 322.....	728, 729	v. Berlin, 42 Mo. 572.....	510
Smith, Ex parte, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. 628.....	176	v. Blinder, 38 Mo. 455.....	736
v. Bangs, 15 Ill. 399.....	305	v. Bittick, 103 Mo. 183, 11 L. R. A. 587, 15 S. W. 325.....	856
v. Brady, 17 N. Y. 185, 72 Am. Dec. 442.....	240	v. Boswell, 104 Ind. 541, 4 N. E. 675	240
v. Bragg, 68 Ga. 650.....	844	v. Boyd, 2 Hill L. 288, 27 Am. Dec. 376.....	510
v. Brooklyn, 13 App. Div. 340, 46 N. Y. Supp. 141.....	698	v. Buswell, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728.....	719
v. Brooklyn, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787.....	694, 697	v. Campbell, 64 N. H. 402, 13 Atl. 583.....	350
v. Chicago & N. W. R. Co. 18 Wis. 17.....	908	v. Cassidy, 22 Minn. 321, 21 Am. Rep. 765.....	829
v. Heath, 102 Ill. 130.....	312	v. Compton, 84 Wis. 355, 54 N. W. 578.....	277
v. Newcastle, 48 N. H. 70.....	385	v. Creditor, 44 Kan. 565, 24 Pac. 346	778
v. Pedigo, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838, 33 N. E. 777, 44 N. E. 363.....	753	v. Davidson, 73 Mo. 428.....	275, 276
v. Proctor, 130 N. Y. 319, 14 L. R. A. 403, 29 N. E. 312.....	729, 739	v. Dent, 25 W. Va. 1.....	778
v. Renville County Comrs. 64 Minn. 16, 65 N. W. 956.....	728, 729	v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.....	344
v. Rice, 11 Mass. 514.....	440	v. Dunn, 73 Mo. 586.....	275
v. Richardson, Willes, 20.....	457	v. Dyer, 67 Vt. 690, 32 Atl. 814.....	344
v. Smith, 8 N. J. Eq. 515.....	859	v. Emory, 79 Mo. 461.....	275
v. State, 28 Ind. 321.....	349	v. Engle, 58 N. E. 698.....	407
v. Tromanhauser, 63 Minn. 98, 65 N. W. 144.....	540	v. Evans, 138 Mo. 116, 39 S. W. 462	510
v. Young, 160 Ill. 163, 43 N. E. 486	312	v. Frahm, 73 Iowa, 355, 35 N. W. 451	252
Solomous v. Bank of England, 13 East, 130	625	v. Franklin Falls Co. 49 N. H. 240, 6 Am. Rep. 513.....	417
Soon Hing v. Crowley, 113 U. S. 710, 28 L. ed. 1147, 6 Sup. Ct. Rep. 734.....	271	v. French, 96 Iowa, 255, 65 N. W. 156.....	631
South Bend v. Lewis, 138 Ind. 512, 37 N. E. 968.....	740	v. Garbroski (Iowa) 82 N. W. 959.....	778
Southland v. Goldsboro, 96 N. C. 49, 1 S. E. 760.....	729	v. Gilman, 9 N. H. 461.....	181
Southern Bell Teleph. Co. v. Francia, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1.....	957, 958	v. Gilmore, 141 Mo. 506, 42 S. W. 817.....	417
Southern P. R. Co. v. DuFour, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783.....	283	v. Glidden, 55 Conn. 46, 8 Atl. 890.....	344
51 L. R. A.		v. Griswold, 87 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046.....	757
		v. Gritzner, 134 Mo. 512, 36 S. W. 89.....	168
		v. Hall, 32 N. J. L. 158.....	656
		v. Hinman, 65 N. H. 103, 18 Atl. 194	778
		v. Hopper, 71 Mo. 425.....	276
		v. Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.....	510
		v. Judy, 7 Mo. App. 524.....	406
		v. Julow, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.....	166, 178
		v. Krohne, 4 Wyo. 347, 34 Pac. 3.....	249, 251
		v. Lawrence, 12 Or. 297, 7 Pac. 116	250
		v. Lewis, 134 Ind. 250, 20 L. R. A. 52, 33 N. E. 1024.....	406

State v. Loomis , 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 850.....	166	State ex rel. Witter v Forkner , 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772	351
v. McCray , 74 Mo. 303.....	275	Wear v. Francis , 95 Mo. 44, 8 S. W. 1.....	728
v. McGuire , 24 Or. 368, 21 L. R. A. 478, 33 Pac. 666.....	409	Durkheimer v. Grace , 20 Or. 154, 25 Pac. 382.....	730
v. McLean (N. C.) , 42 L. R. A. 733, 140 Mo. loc. cit. 677, 41 S. W. 973, 43 S. W. 1097.....	857	Walker v. Green , 112 Ind. 462, 14 N. E. 352.....	778
v. Mathers , 64 Vt. 101, 15 L. R. A. 268, 23 Atl. 590.....	757	Atty. Gen. v. Guilbert , 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551.....	447
v. Mosher , 78 Iowa, 321, 43 N. W. 202.....	778	Moyse Bros. v. Guilon , 50 La. Ann. 402, 23 So. 614.....	86
v. Mullen , 85 Iowa, 207.....	632	Roth v. Iberville Dist. Judge , 38 La. Ann. 49.....	93
v. Mumford , 73 Mo. 647, 39 Am. Rep. 532.....	499	Dardenne v. Iberville Dist. Judge , 28 La. Ann. 889.....	85
v. Otis , 135 Ind. 267, 21 L. R. A. 733, 34 N. E. 954.....	462	Buchanan v. Kellogg , 95 Wis. 672, 70 N. W. 800.....	66
v. Pennoyer , 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 879.....	778	Atty. Gen. v. Kennon , 7 Ohio St. 547, 402, 23 So. 614.....	685
v. Phelps , 2 Tyler (Vt.) 374.....	510	Lehman v. King , 46 La. Ann. 163, 15 So. 283.....	85
v. Pomeroy , 30 Or. 16, 46 Pac. 797.....	251	Violet v. King , 46 La. Ann. 78, 14 So. 423.....	85
v. Preston , 77 Mo. 294.....	275	Pyne v. La Grave , 22 Nev. 417, 41 Pac. 115.....	234
v. Raby , 121 N. C. 682, 28 S. E. 490	510	Jones v. Lancaster County Comrs. 6 Neb. 474.....	728
v. Randall , 87 N. C. 571.....	68	Little v. Langlie , 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958.....	729, 737
v. Randolph , 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201.....	777, 778	Murray v. Lazarus , 36 La. Ann. 578, 86 So. 223.....	86
v. Reed , 89 Mo. 171, 1 S. W. 225.....	275, 276	Hodgden v. Libbey , 44 N. H. 324, 82 Am. Dec. 223.....	845
v. Rivers , 68 Iowa, 611, 27 N. W. 781	252	Brownell v. McArthur , 13 Wis. 407.....	59
v. Rodman , 58 Minn. 393, 59 N. W. 1098.....	406, 407	Litson v. McGowan , 138 Mo. 187, 39 S. W. 771.....	728, 731
v. Schmitt , 49 N. J. L. 579, 9 Atl. 774.....	454	Guinan v. Meder , 22 Nev. 265, 38 Pac. 668.....	234
v. Schuchmann , 133 Mo. 111, 33 S. W. 35, 34 S. W. 842.....	170	Capitol City Oil Mills Co. v. Monroe , 50 La. Ann. 266, 23 So. 839.....	86
v. Shorts , 32 N. J. L. 398, 90 Am. Dec. 668.....	499	Gray v. Oconomowoc , 104 Wis. 622, 80 N. W. 942.....	919
v. Smith , 10 R. I. 268.....	350	Barthe v. Orleans Dist. Judge , 28 La. Ann. 903.....	77
v. Smyth , 14 R. I. 100, 51 Am. Rep. 344.....	350	Doullut v. Orleans Dist. Judge , 29 La. Ann. 869.....	77, 94
v. Snow , 81 Iowa, 642, 11 L. R. A. 355, 47 N. W. 777.....	351	Laftie v. Orleans Dist. Judge , 51 La. Ann. 1768, 26 So. 374.....	88
v. Stewart , 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.....	344	Lanier v. Padgett , 19 Fla. 539.....	736
v. Swift , 69 Ind. 505.....	728, 731, 732, 742	Harvey v. Philbrick , 49 N. J. L. 874, 8 Atl. 122.....	663
v. Taft , 118 N. C. 1190, 32 L. R. A. 122, 23 S. E. 970.....	895	Bayha v. Phillips , 97 Mo. 331, 3 L. R. A. 476, note, 10 S. W. 855.....	60
v. Vandersluits , 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789.....	778	Snyder v. Portland Natural Gas & Oil Co. 153 Ind. 483, 53 N. E. 1089.....	747
v. Wheeler , 23 Nev. 148, 44 Pac. 430	234	McClurg v. Powell , 77 Miss. 543, 48 L. R. A. 652, 27 So. 927.....	728, 729, 731, 732
v. Willis , 119 Mo. 485, 24 S. W. 1008	510	Bassett v. Renick , 37 Mo. 272.....	736
v. Wilson , 42 Me. 24.....	175	Douglas v. Ritt , 78 Minn. 531, 79 N. W. 538.....	829
v. Winkelmeler , 35 Mo. 103, 728, 729, 731	729	Covenant Mut. Ben. Asso. v. Root , 83 Wis. 667, 19 L. R. A. 271, 54 N. W. 33.....	70
State ex rel. Mann v. Anderson , 28 Neb. 517, 42 N. W. 421.....	729	Heiden v. Ryan , 99 Wis. 123, 74 N. W. 544.....	922
Stevenson v. Babcock , 17 Neb. 188, 22 N. W. 372.....	728, 729, 731-733	Fieid v. Saxton , 14 Wis. 123.....	70
Larabee v. Barnes , 3 N. D. 319, 55 N. W. 883.....	729, 735	Boston & M. Consol. Copper & Min. Co. v. Second Judicial Dist. Ct. 22 Mont. 220, 56 Pac. 281.....	959
Omaha & S. O. Street R. Co. v. Bechel , 22 Neb. 158, 34 N. W. 342.....	729	Herron v. Smith , 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.....	401
Atty. Gen. v. Buckley , 54 Ala. 613.....	400	Clark v. Stanley , 66 N. C. 59, 8 Am. Rep. 488.....	685
Gallagher v. Campbell , 48 Ohio St. 485, 27 N. E. 884.....	234	Powell v. State Medical Examining Board , 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.....	778
Huey v. Cape Girardeau Common Pleas Ct. 73 Mo. 560.....	104	Saizan v. St. Landry Dist. Judge , 48 La. Ann. 1501, 21 So. 94.....	82
Strother v. Chase , 42 Mo. App. 343	173	Allen v. St. Louis , 73 Mo. 435.....	728
Courthouse & City Hall Comrs. v. Cooley , 56 Minn. 540, 58 N. W. 150.....	829	Dobbins v. Sutterfield , 54 Mo. 391.....	728
Douglas County v. Cornell , 53 Neb. 558, 39 L. R. A. 513, 74 N. W. 59.....	729	Morgan's L. & T. R. & S. S. Co. v. Twenty-first Dist. Judge , 36 La. Ann. 394.....	93
Lamb v. Cunningham , 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724	231	Norton v. Van Camp , 36 Neb. 91, 54 N. W. 113.....	729
Lamb v. Cunningham , 83 Wis. 90, 17 L. R. A. 145, 53 N. W. 48.....	231	Walden v. Vanosdal , 131 Ind. 388, 15 L. R. A. 832, 31 N. E. 79.....	739
Sweet v. Cunningham , 88 Wis. 81, 57 N. W. 1119, 59 N. W. 504.....	921	Steelman v. Vickers , 51 N. J. L. 180, 17 Atl. 153.....	663
Spence v. Dick , 103 Wis. 407, 79 N. W. 421.....	59, 64	Marsh v. Whittet , 61 Wis. 351, 21 N. W. 245.....	60
Drummond v. Dillon , 125 Ind. 65, 25 N. E. 136.....	739	Brickman v. Wilson , 123 Ala. 299, 45 L. R. A. 772, 26 So. 485 399-402	
Atty. Gen. v. Eau Claire County Circuit Ct. 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 193.....	59		
Crocker v. Echols , 41 Kan. 1, 20 Pac. 523.....	729, 737		
New Orleans & H. S. S. & Lottery Co. v. Eighth Dist. Judge , 23 La. Ann. 766.....	89, 93, 94		
Cope v. Foraker , 46 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491.....	729, 731, 732		

State ex rel. Gaynor v. Young, 38 La. Ann. 923.....	88	Swift v. Witchard, 103 Ga. 193, 29 S. E. 762.....	479
State, Bott, Prosecutor, v. Wurts, 62 N. J. L. 107, 40 Atl. 740.....	729		
Bott, Prosecutor, v. Wurts, 61 N. J. L. 183, 38 Atl. 1099.....	729	T.	
De Camp, Prosecutor, v. Hibernia Underground R. Co. 47 N. J. L. 44.....	943, 944	Taendsticksfabriks Aktiebolaget Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904.....	335
Morgan, Prosecutor, v. Orange, 50 N. J. L. 389, 13 Atl. 240.....	895	Taggart v. Newport Street R. Co. 16 R. I. 603, 7 L. R. A. 205, 19 Atl. 326.....	928, 929
New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth, 37 N. J. L. 330.....	769	Talbot v. Gay, 18 Pick. 534.....	761
Oakley, Prosecutor, v. Atlantic City, 63 N. J. L. 127, 44 Atl. 651.....	338	v. Hudson, 16 Gray, 417.....	944
Paterson & H. River R. Co., Prosecutor, v. Passaic, 54 N. J. L. 340, 23 Atl. 945.....	770	Tallman v. Janesville, 17 Wis. 71.....	919
Roebing, Prosecutrix, v. Trenton Pass. R. Co. 58 N. J. L. 666, 33 L. R. A. 129, 34 Atl. 1090.....	926	Tarry v. Ashton, L. R. 1 Q. B. Div. 314.....	780
Van Helpen, Prosecutor, v. Jersey City, 58 N. J. L. 262, 83 Atl. 740.....	338	Tasker v. Stanley, 153 Mass. 148, 10 L. R. A. 468, 26 N. E. 417.....	343
Waterbury, Prosecutor, v. Newton, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604.....	350	Tate v. Greensboro, 114 N. C. 393, 24 L. R. A. 671, 19 S. E. 767.....	958
State use of Abell v. Western Maryland R. Co. 63 Md. 433.....	889	Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717.....	891
Bashe v. Boyce, 73 Md. 469, 21 Atl. 322.....	774	Taylor v. Binney, 7 Mass. 479.....	433
State Ins. Co. v. Schreck, 27 Neb. 527, 6 L. R. A. 524, 43 N. W. 340.....	708	v. Caldwell, 3 Best & S. 826.....	955
v. Waterhouse, 78 Iowa, 674, 43 N. W. 611.....	875	v. Coon, 79 Wis. 83, 48 N. W. 123.....	908
Steadman v. Guthrie, 4 Met. (Ky.) 147.....	761	v. Life Assn. of America, 13 Fed. Rep. 493.....	716
Stebbins v. Grand Rapids Super. Judge, 108 Mich. 693, 66 N. W. 594.....	728, 729	v. McClung, 2 Houst. (Del.) 24.....	761
Steele v. Curie, 4 Dana, 381.....	891	v. McFadden, 84 Iowa, 269, 50 N. W. 1070.....	736
Steffy v. Monroe City, 135 Ind. 466, 35 N. E. 121.....	895	v. Portsmouth, K. & Y. Street R. Co. 91 Me. 193, 39 Atl. 560.....	929
Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899.....	648	v. Taylor, 10 Minn. 107, Gil. 81.....	736
Stephenson v. Little, 10 Mich. 433.....	625	v. Welch, 6 Or. 199.....	283
Sterling's Appeal, 111 Pa. 35, 56 Am. Rep. 248, 2 Atl. 105.....	305	Tebbets v. Hapgood, 34 N. H. 420.....	227
Stevenot v. Eastern R. Co. 81 Minn. 104, 28 L. R. A. 600, 63 N. W. 256.....	641	Tecumseh Nat. Bank v. Saunders, 51 Neb. 801, 71 N. W. 779.....	729, 731
Stevens v. King, 76 Me. 197, 49 Am. Rep. 609.....	181	Tenney v. Lenz, 16 Wis. 566.....	684
v. State, 89 Md. 669, 43 Atl. 929.....	406	Terlen v. St. Paul City R. Co. 70 Minn. 532, 73 N. W. 412.....	636, 639
Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163.....	905	Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752.....	670
v. Stone, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 559.....	955	Territory v. Stroud, 6 Okla. 106, 50 Pac. 205.....	251
Stickney v. Davis, 17 Pick. 169.....	440	Terry v. Jewett, 78 N. Y. 338.....	238
Stockfeth v. De Tastet, 4 Campb. 10.....	757	Texas & P. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.....	652
Stockman, Re, 71 Mich. 180, 38 N. W. 876.....	845	v. Rosedale Street R. Co. 64 Tex. 80, 53 Am. Rep. 739.....	129
Stokely, Re, 19 Pa. 482.....	879	Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211.....	859
Stone v. Wendover, 2 Mo. App. 247.....	507	Theobald v. Louisville, N. O. & T. R. Co. 66 Miss. 279, 4 L. R. A. 735, 6 So. 230.....	958
Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437.....	244, 245	Thomas v. Utica & B. R. R. Co. 6 N. Y. Civ. Proc. Rep. 353, 34 Hun, 626, 98 N. Y. 649.....	237
Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236.....	417	Thompson v. Chicago, S. F. & C. R. Co. 110 Mo. loc. cit. 160, 19 S. W. 77.....	948
Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.....	136	v. Esty, 69 N. H. 55, 45 Atl. 566.....	887
Streeter v. Paton, 7 Mich. 341.....	459	v. Paterson & H. River R. Co. 9 N. J. Eq. 560.....	665
v. Western Union Mut. Life & Acci. Soc. 65 Mich. 199, 31 N. W. 779.....	253	v. Taylor, 30 Wis. 68.....	908
Stringfellow v. Somerville, 95 Va. 701, 40 L. R. A. 623, 29 S. E. 685.....	847	Thorp v. Burling, 11 Johns. 285.....	625
Stubbs v. Leavitt, 30 Ala. 352.....	875	Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625.....	159
Studley v. St. Paul & D. R. Co. 48 Minn. 249, 51 N. W. 115.....	639	v. Wray, 68 Ga. 359.....	481
Sturdivant v. Birchett, 10 Gratt. 67.....	645	Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 332.....	635
Sturges v. Carter, 114 U. S. 811, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.....	919, 921	Tilghman v. Proctor, 125 U. S. 161, 31 L. ed. 672, 8 Sup. Ct. Rep. 894.....	806
Sturtevant v. State ex rel. Havens, 15 Neb. 459, 8 Am. Rep. 349, 19 N. W. 617.....	845	Tilley v. Hudson River R. Co. 24 N. Y. 471, 29 N. Y. 252, 36 Am. Dec. 297.....	237
Sullivan v. Haug, 82 Mich. 555, 10 L. R. A. 265, 46 N. W. 797.....	460	Titus v. Bradford, B. & K. R. Co. 136 Pa. 626, 20 Atl. 518.....	882
Sullivan v. Weaver, 10 Ohio. 276.....	446	Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415.....	123
Sunderland Bridge Case, 122 Mass. 459.....	947	Todd v. Myres, 40 Cal. 357.....	301
Sunman v. Brewin, 52 Ind. 140.....	457	Toogood v. Spyring, 1 Cromp. M. & R. 181.....	457
Sutton v. Buck, 2 Taunt. 302.....	458	Toomer v. Rutland, 57 Ala. 385, 29 Am. Rep. 722.....	403
v. Toomer, 7 Barn. & C. 416.....	620	Towne v. Thompson, 68 N. H. 317, 46 L. R. A. 748, 44 Atl. 492.....	387, 775
Svendsen v. State Bank, 64 Minn. 40, 31 L. R. A. 552, 65 N. W. 1086.....	258	Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132.....	891
Swaine v. Perline, 5 Johns. Ch. 482, 9 Am. Dec. 318.....	859	Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360.....	253
Sweeny v. Hunter, 145 Pa. 363, 14 L. R. A. 594, 22 Atl. 653.....	177	Travers v. Abbey, 104 Tenn. 665, 51 L. R. A. 260, 58 S. W. 247.....	753
51 L. R. A.		Treat v. Stanton, 14 Conn. 445.....	654
		Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610.....	411
		Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.....	798

True v. Fuller, 21 Pick. 140.....	433
Trustees of Schools v. Schroll, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243.....	181, 182, 185
Tuckerman v. French, 7 Me. 115.....	761
Tuigg v. Sheehan, 101 Pa. 363, 47 Am. Rep. 727.....	261
Turnbull v. Farnsworth, 1 Wash. Terr. 444 892.....	394
Turner v. Merchants' Bank, 28 So. 469.....	435
v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38.....	716
v. Sioux City & P. R. Co. 19 Neb. 241, 27 N. W. 103.....	625
Tuthill v. Wheeler, 6 Barb. 362.....	438
Tuttle v. Bartholomew, 12 Met. 452.....	770
v. Polk, 92 Iowa, 447, 60 N. W. 733	947
Twelfth Street Market Co. v. Philadelphia R. Terminal R. Co. 142 Pa. 580, 21 Atl. 902.....	648
Twist v. Winona & St. P. R. Co. 39 Minn. 164, 39 N. W. 402.....	694
Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312.....	

U.

Uhlfelder v. Carter, 64 Ala. 527.....	395
Underwood v. Wing, 19 Beav. 459, 4 De G. M. & G. 633.....	865
Union Bank v. Coster, 3 N. Y. 303.....	761
Union P. R. Co. v. Fort, 17 Wall. 553, 21 L. ed. 739.....	523
United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.....	787
v. Green, 3 Mason, 482, Fed. Cas. No. 15,256.....	843
v. Hays, 20 Fed. Rep. 710.....	790
v. Jaedicke, 73 Fed. Rep. 100.....	418
v. Thomasson, 4 Bliss. 99, Fed. Cas. No. 16,478.....	474
v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.....	168
v. Wallis, 58 Fed. Rep. 942.....	499
v. Wilson, 7 Pet. 150, 8 L. ed. 640.....	462
Upham v. Prince, 12 Mass. 14.....	433

V.

Vale Mills v. Nashua, 147 Briefs & Cases 239.....	385
v. Nashua, 63 N. H. 136.....	385
Valentine v. Lunt, 115 N. Y. 496, 22 N. E. 209.....	915
Valpey v. Rea, 130 Mass. 384.....	916
Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.....	138
Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017.....	241
Vanderhurst v. Tholcke, 113 Cal. 147, 36 L. R. A. 267, 45 Pac. 266.....	957
Vanderpool v. Husson, 28 Barb. 196.....	245
v. La Crosse & M. R. Co. 44 Wis. 663 920.....	915-917
Van Deusen v. Sweet, 51 N. Y. 378.....	663, 664
Van Doren v. New York, 9 Paige, 388.....	790
Van Dusan v. Van Dusan, 97 Mich. 70, 66 N. W. 234.....	352
Van Orden, Re, 1 N. B. N. 475, 96 Fed. Rep. 86.....	697
Van Wycklen v. Brooklyn, 118 N. Y. 424, 24 N. E. 170.....	278
Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751 v. Havens, 8 Johns. 109.....	457
Vawter v. Missouri P. R. Co. 84 Mo. 679, 54 Am. Rep. 104.....	168
Veazie v. Parker, 72 Me. 443.....	512
Vegelahn v. Guntner, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077.....	344, 345
Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499 Verser v. Ford, 37 Ark. 27.....	857
Vicksburg v. Tobin, 100 U. S. 430, 25 L. ed. 690.....	852
Vilas v. Jones, 1 N. Y. 274.....	875
v. Prattsburgh & M. R. Co. 123 N. Y. 440, 9 L. R. A. 844, 25 N. E. 941	440
Vinal v. West Virginia Oil & Oil Land Co. 110 U. S. 215, 28 L. ed. 124, 4 Sup. Ct. Rep. 4.....	507
Vinton v. Welsh, 9 Pick. 87.....	417
Vogel v. New York, 92 N. Y. 10, 44 Am. Rep. 349.....	244
51 L. R. A.	

Voght v. Ticknor, 47 N. H. 543.....	229
Volkmar v. Manhattan R. Co. 134 N. Y. 418, 31 N. E. 870.....	243, 246
Volts v. Blackmar, 64 N. Y. 440.....	365

W.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 In- ters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.....	164
Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704.....	385
Walcott v. Metropolitan L. Ins. Co. 64 Vt. 221, 24 Atl. 992.....	253
Waldron v. Harring, 28 Mich. 493.....	433
Waldron Case, 13 Johns. 418.....	845
Walker v. Cronin, 107 Mass. 555.....	342
v. Laighton, 31 N. H. 111.....	227
v. Mayo, 143 Mass. 42, 8 N. E. 873.....	450
v. Old Colony & N. R. Co. 103 Mass. 10, 4 Am. Rep. 509.....	163
v. Oswald, 68 Md. 146, 11 Atl. 711 729, 738.....	229
v. Richards, 41 N. H. 388.....	410
v. Robbins, 14 How. 584, 14 L. ed. 552.....	753
v. Wainwright, 16 Barb. 486.....	753
Wallace v. United Presby. Church, 194 Pa. 178, 45 Atl. 84.....	753
Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796.....	895
Wallworth v. Holt, 4 Myl. & C. 619.....	508
Walpole v. Smith, 4 Blackf. 304.....	623
Walsh v. St. Paul & D. R. Co. 37 Minn. 367, 8 N. W. 145.....	540
Walton v. Augusta, 104 Ga. 757, 30 S. E. 964.....	140
War v. Huntley, 1 Salk. 118.....	228
Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442.....	909
v. Cobb, 148 Mass. 518, 20 N. E. 174 v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256.....	512
v. Maryland, 12 Wall. 418, 20 L. ed. 449.....	955
Warden v. Fond du Lac Supers. 14 Wis. 618 Warnebold v. Grand Lodge, A. O. U. W. 83 Iowa, 23, 48 N. W. 1069.....	136
Warren v. Henly, 31 Iowa, 31.....	919
Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389 Washburn v. Interstate Investment Co. 26 Or. 436, 36 Pac. 533, 38 Pac. 620.....	767
v. Nashville & C. R. Co. 3 Head, 638, 75 Am. Dec. 784.....	771
Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.....	889
Waterman v. Johnson, 13 Pick. 265.....	783
v. Robinson, 5 Mass. 303.....	181, 185, 186
Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 122.....	625
Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.....	440, 443, 444
Watkins v. Union Traction Co. 194 Pa. 564, 45 Atl. 321.....	27 Am.
Watson v. Minneapolis Street R. Co. 53 Minn. 557, 55 N. W. 742.....	665
Webster, Ex parte, 6 Ves. Jr. 809.....	639
v. Munger, 8 Gray, 584.....	636
v. Reid, 11 How. 437, 13 L. ed. 761.....	444
Weir v. Marley, 99 Mo. 494, 6 L. R. A. 672, 12 S. W. 798.....	891
Welsel v. Eastern R. Co. 79 Minn. 245, 82 N. W. 576.....	447
Welsmer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586.....	843, 845
Welles v. Bailey, 55 Conn. 292, 10 Atl. 565 Wells, Re, 18 How. 307, 15 L. ed. 421.....	540
v. Atlanta, 43 Ga. 67.....	686
Welton v. Missouri, 91 U. S. 275, 23 L. ed. 847.....	430
Westerman v. Westerman, 25 Ohio St. 500 Western Horse & Cattle Ins. Co. v. O'Neill, 21 Neb. 548, 32 N. W. 581.....	463
Western Wooden Ware Asso. v. Starkey, 84 Mich. 76, 11 L. R. A. 503, 47 N. W. 604.....	357
Westfield Gas & Mill Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033.....	787
Weston v. Barnicoat, 175 Mass. 454, 49 L. R. A. 612, 56 N. E. 619.....	747
	845

- West Roxbury v. Stoddard, 7 Allen, 158... 835
 Wetherbee v. Partridge, 175 Mass. 185, 55 N. E. 894... 780
 Wheatley v. Chrisman, 24 Pa. 298, 64 Am. Dec. 657... 695
 Wheaton v. Beecher, 66 Mich. 310, 33 N. W. 503... 455
 v. Peters, 8 Pet. 657, 8 L. ed. 1079... 380
 Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76... 434
 v. Spinola, 54 N. Y. 377... 186
 v. State, 34 Tex. Crim. Rep. 850, 30 S. W. 913... 275
 v. State, 38 Tex. Crim. Rep. 71, 41 S. W. 615... 275
 Whipple v. Broad, 25 Colo. 407, 55 Pac. 172 119
 White v. Casenave, 14 La. Ann. 57... 83, 85
 v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502... 625
 v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018... 650-652
 v. Gates, 42 Ohio St. 109... 862, 803
 v. Jameson, L. R. 18 Eq. 303... 780
 v. White, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 278... 790
 White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136... 753
 Whitesides v. State, 11 Lea, 474... 884, 885
 Whitford v. Panama R. Co. 23 N. Y. 489... 237, 238
 Whitmore v. Orono Pulp & Paper Co. 91 Me. 297, 40 L. R. A. 377, 39 Atl. 1032... 775
 Whitney v. Groot, 24 Wend. 82... 761
 Wightman v. Wightman, 45 Ill. 167... 852
 Wilbur v. Johnson, 58 Mo. loc. cit. 303... 857
 Wilcox v. Eagle Twp. 81 Mich. 271, 45 N. W. 987... 919
 v. Hausch, 64 Cal. 461, 3 Pac. 108... 934
 Wilde v. Lynn & B. R. Co. 163 Mass. 533, 40 N. E. 851... 784
 Wilder v. Secor, 72 Iowa, 161, 33 N. W. 448... 411
 Wilkerson v. Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865... 139, 351
 Wilkins v. State, 113 Ind. 514, 16 N. E. 192 749
 Wilkinson v. Leland, 2 Pet. 657, 7 L. ed. 553... 160
 Willey v. People, 36 Ill. App. loc. cit. 615... 175
 v. Portsmouth, 64 N. H. 214, 9 Atl. 220... 385
 Williams v. City Electric Street R. Co. 41 Fed. Rep. 556... 926, 929
 v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128... 166
 v. Kimball, 35 Fla. 49, 26 L. R. A. 746, 16 So. 783... 837
 v. Ladew, 161 Pa. 283, 29 Atl. 54... 283
 v. Lewis, 54 Pac. 619... 959
 v. Millington, 1 H. Bl. 81... 625
 v. State, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624... 757
 v. State, 61 Wis. 290, 21 N. W. 56... 275
 Willingham v. King, 23 Fla. 478, 2 So. 851 143
 Willis v. Lynn & B. R. Co. 129 Mass. 351... 784
 v. Simmonds, 8 Hun, 189... 507
 Wilmington & R. R. Co. v. Stauffer, 60 Pa. 374, 100 Am. Dec. 574... 326
 Wilson v. Duncan, 114 Ala. 688, 21 So. 1017... 401
 v. Huggins, 11 Rich. L. 410... 268
 v. Knox, 12 N. H. 347... 229
 v. Merry, L. R. 1 H. L. Sc. App. Cas. 326... 529
 v. Simmons, 89 Me. 242, 36 Atl. 380 907
 v. State, 67 Ga. 658... 598
 v. Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477... 908
 v. Vaughan, 23 Fed. Rep. 229... 364
 Winchester v. Newton, 2 Allen, 492... 798
 Wing v. Angrave, 8 H. L. Cas. 183... 865
 Wingate v. Haywood, 40 N. E. 437... 875
 Winkler v. Summers, 22 Abb. N. C. 80, 5 N. Y. Supp. 723... 338
 Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678... 958
 Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115... 155
 Wistar v. McManes, 54 Pa. 326, 93 Am. Dec. 700... 875
 Withers v. Reynolds, 2 Barn. & Ad. 882... 794-798
 Wolf v. Smith, 112 Mich. 860, 70 N. W. 1010... 455
 Wollaston v. Berkeley, L. R. 2 Ch. Div. 213 865
 Wood v. Faut, 55 Mich. 185, 20 N. W. 897 418
 v. Fowler, 26 Kan. 682, 40 Am. Rep. 330... 835
 v. Kelley, 30 Me. 47... 181, 185, 186
 v. Steele, 6 Wall. 80, 18 L. ed. 725... 404
 Woodbridge Twp. v. Inslee, 37 N. J. Eq. 397 665
 Wooden v. Western N. Y. & P. R. Co. 126 N. Y. 10, 13 L. R. A. 458, 26 N. E. 1050... 236
 Woodman v. Pittman, 79 Me. 456, 10 Atl. 321... 835
 Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382... 136, 138
 v. Woodruff, 22 Ga. 237... 480
 Woodward v. Fuller, 80 N. Y. 312... 240
 v. Spurr, 141 Mass. 283, 6 N. E. 521 450
 Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419... 695
 Woolsey v. Judd, 4 Duer, 380... 758
 Wooster v. Plymouth, 62 N. H. 193... 383
 Worcester Co., Re. 42 C. C. A. 637, 102 Fed. Rep. 808... 294
 Worth v. Edmonds, 52 Barb. 40... 955
 Wosika v. St. Paul City R. Co. (Minn.) 83 N. W. 386... 639
 Wray v. Carpenter, 16 Colo. 271, 27 Pac. 248... 512
 Wright, Re. 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 565... 249-251
 v. Chicago, B. & Q. R. Co. 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90... 716
 v. Griffith, 121 Ind. 478, 6 L. R. A. 639, 23 N. E. 281... 761
 v. Lindsay, 20 Ala. 428... 457
 v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106... 391
 v. Ryder, 36 Cal. 342, 95 Am. Dec. 186... 787
 v. Stewart, 19 Wash. 179, 52 Pac. 1020... 291
 Wrought Iron Range Co. v. Johnson, 84 Ga. 738, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 233... 139, 141
 Wyant v. Central Telephone Co. 47 L. R. A. 497, 81 N. W. 928... 340, 347
 v. Central Telephone Co. 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928... 957
 Wynehamer v. People, 13 N. Y. 378... 163
- Y.
- Yancey v. Brown, 3 Sneed, 89... 761
 Yates v. Houston, 3 Tex. 433... 790
 Yerger, Ex parte, 8 Wall. 85, 19 L. ed. 332 68
 Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014 736
 Young v. Bankler Distillery Co. [1893] A. C. 691... 694
 v. Boston, 104 Mass. 95... 747
 Youngs v. Carter, 50 How. Pr. 410, Aff'd in 10 Hun, 104... 859, 860
- Z.
- Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L. R. A. 575, 74 N. W. 538... 926, 929
 Zimmerman v. Jourgensen, 38 N. Y. S. R. 414, 14 N. Y. Supp. 548... 241
 v. Jourgensen, 70 Hun, 222, 24 N. Y. Supp. 170, Aff'd in 144 N. Y. 656, 39 N. E. 859... 241
- 51 L. R. A.

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.
Statutes.

51 Hen. III. Sale of impure and unwholesome foods.....	349
18 Edw. I. Fine.....	485
4 Edw. III. chap. 7. Right of executors to sue trespassers.....	269
34 Edw. III. chap. 16. Fine.....	435
4 Hen. VII. chap. 24. Fine.....	435
32 Hen. VIII. chap. 36. Fine.....	435
5 Eliz. chap. 4. Artisans.....	164
8 Eliz. chap. 3. Exportation of wool.....	165
1 James I. chap. 6. Power of justices to fix wages.....	164
12 & 14 Chas. II. chap. 18. Exportation of wool.....	165
12 Geo. I. chap. 29. Service of process.....	440
5 Geo. II. chap. 25. Service of process.....	441
1846. Lord Campbell's act.....	838
1857, 20 & 21 Vict. chap. 77. Administration.....	880
24 & 25 Vict. chap. 114. Lord Kingdown's act.....	424
1875, chap. 63. Sale of foods and drugs..	350

United States.
Constitution.

Art. 1, § 8. Power of Congress to regulate commerce.....	850
Art. 1, § 8, ¶ 3. Power of Congress to regulate commerce..	135
Art. 1, § 10. Prohibiting states from exercising certain powers.....	415
Laying duty or tonnage.....	850
Art. 4, § 2. Privileges of citizens.....	177
Art. 5. No state shall be deprived of equal suffrage.....	162
Art. 6, § 2. Supreme law of the land.....	720
Amend. 5. No person to be deprived of life, etc.....	162
Amend. 14. Equal protection of the laws. 156, 166, 248, 350, 406, 435, 684, 749, 776	
Amend. 14, § 1. Due process of law.....	177

Treaties.

1870, Sept. 16. With Great Britain.....	422
<i>Statutes.</i>	
1831, Feb. 3, § 9. Copyright statute.....	360
1868, July 27. Right of expatriation.....	422
1875, March 3. Suits against Federal court receivers.....	650
1887, March 3. Suits against Federal court receivers.....	650
1888, August 13. Suits against Federal court receivers.....	650
1889, February 22. Enabling act.....	735
1898, June 13. Revenue law.....	316
1898, July 1, § 25. Bankrupt act.....	294

Statutes at Large.

Vol. 4, pp. 436, 438, chap. 16. Copyright statute.....	360
Vol. 25, p. 433, chap. 866. Suits against Federal court receivers.....	650
Vol. 25, p. 434, chap. 866, § 2. Removal of suits.....	651
Vol. 26, p. 209, chap. 647. Protection against unlawful restraints and monopolies.....	787
Vol. 30, p. 448, chap. 448, § 13. Revenue law.....	316
Vol. 30, p. 553, chap. 541. Bankrupt act.....	294
Vol. 30, pp. 565, 566, § 70. Transfer of property by bankrupt.....	295

Revised Statutes.

§ 1999. Right of expatriation.....	422
§ 3421. Record of instrument not stamped.	318
§ 4321. Form of coasting license.....	850
§ 4967. Copyright; publication without consent.....	360

51 L. R. A.

Alabama.
Constitution.

Art. 4, § 13. Each house to keep a journal of its proceedings...	400
Art. 4, § 21. Entry on journal of voters' names.....	400
Art. 4, § 22. Amendments.....	398
Art. 4, § 27. Signing of bills and joint resolutions; entry on journals; entry on journals.....	400
Art. 5, § 13. Veto of governor.....	400
<i>Statutes.</i>	
1899, Feb. 23, p. 164. Revenue law.....	398
<i>Code, 1896.</i>	
§ 1974. Duties of secretary of state.....	400
§ 2221. Deposit of papers of general assembly.....	400
§ 2222. Preservation of engrossed copies of law.....	400
§ 2223. Filing of papers and documents..	400
§ 2240. Officers to file papers and furnish copy of journal.....	400
§ 2535. Insurance on husband's life.....	114
§ 2607. Proceeds of life insurance exempt from creditors.....	114
§ 2630. Enforcement of usurious contracts.	394

California.
Constitution.

Art. 1, § 10. Rights of the people.....	118
Art. 1, § 11. Uniform operation of laws..	118
Art. 1, § 21. Equal privileges and immunities.....	118
Art. 1, § 23. Enumeration of rights not to impair other rights.	120
Art. 11, § 18. Incurring indebtedness....	787
<i>Statutes.</i>	
1865-66, p. 438. Porter primary law.....	117
1897, p. 115. Primary elections.....	117
1899, March 3, p. 47. Primary election law.....	117

Colorado.
Constitution.

Art. 2, § 8. Procedure against persons charged with felony.	250
Art. 2, § 23. Grand jury.....	250
Art. 2, § 25. Due process of law.....	250
Art. 6, § 2. General superintending control of supreme court.....	110
Art. 6, § 28. Uniform operation of laws..	250

Connecticut.
General Statutes.

§ 983. Holder of mortgage may sue for mortgage debt.....	654
--	-----

Georgia.
Constitution.

Art. 12, § 1, ¶¶ 1, 2, 3. Laws in force....	720
<i>Statutes.</i>	
1858, Dec. 9. Codification of laws.....	626
1881, Sept. 27. Incorporation of railroads.	126
1890-91, vol. 1, p. 169. Incorporation of railroads.....	126
1898, p. 26. Tax act.....	135
<i>Code, 1882.</i>	

§ 1689 (a) <i>et seq.</i> Railroad law.....	126
§ 1793. Loss of parental power.....	844
§ 1899. Suits by and against partnerships.	472
§ 1913. Disposition of assets of insolvent partnership.....	472
§ 1939. Restrictions on limited partnerships.....	472
§ 1940. Restrictions on limiting partnership.....	472
§ 3576. Judgments in favor of or against firms.....	472

Civil Code.

§ 2219. Railroad crossing.....	120
§ 2638. Suits by and against partnerships.....	472
§ 2660. Disposition of assets of insolvent partnership.....	472
§ 2681. Restrictions on limited partnerships.....	472
§ 2682. Restrictions on limited partnerships.....	472
§ 2998. Words of description.....	627
§ 3038. Agent's right of action.....	625
§ 3058. Boundary on streams.....	181
§ 3059. Navigable stream.....	181
§ 3247. Establishing dividing line.....	186
§ 3849. Inquiry before committing court.....	479
§ 3850. When right of action accrues.....	479
§ 3852. False imprisonment under warrant.....	482
§ 3880. Possession of chattel.....	624
§ 4944. Joining different claims.....	480
§ 5335. Plaintiff may choose verdict.....	623
§ 5346. Judgments in favor of or against firms.....	472

Political Code.

§ 744. City not liable for illegal arrest.....	134
§ 748. Municipal liability.....	134
§ 899. Right to interpose claim.....	141

Penal Code.

§ 407. Lotteries.....	497
§ 455. Assisting desertion of sailors.....	720
§ 1243 et seq. Compliance with affidavit.....	481

*Idaho.**Constitution.*

Art. 20, §§ 1, 2. Proposed amendments....	734
---	-----

*Illinois.**Constitution.*

Art. 2, § 12. Imprisonment for debt.....	352
Art. 2, § 13. Compensation for property taken.....	307

Statutes.

1893, June 15. Apportionment act.....	233
---------------------------------------	-----

*Indiana.**Constitution.*

Art. 1, § 21. Compensation for property taken.....	406
Art. 1, § 23. Forbidding exclusive privileges.....	749
Art. 3, § 1. Distribution of powers.....	749
Art. 5, § 1. Executive powers.....	749
Art. 5, § 18. Filling vacancies.....	749
Art. 6, § 3. Election of county and township officers.....	749
Art. 7, § 2. Supreme court; terms of judges.....	730
Art. 7, § 21. Voters entitled to practice law.....	724
Art. 15, § 1. Appointment of officers.....	750
Art. 16, §§ 1, 2. Amendments.....	724, 740

Statutes.

1857, p. 39. Protection of wild game.....	406
1867, p. 128. Protection of fish and of wild game.....	406
1871, p. 24. Protection of fish.....	406
1875, p. 120. Appointment of trustees for Purdue University.....	751
1875, p. 130. State board of education.....	751
1875, p. 172. Appointment of grain inspector.....	751
1877, p. 69. Protection of wild game.....	407
1879, p. 242. Protection of wild game.....	407
1881, p. 174. Powers of church sextons and officers of fairs.....	751
1881, p. 511. State chemist.....	751
1887, p. 58, § 2. Regulating practice of dentistry.....	749
1889, p. 22. Gas companies, right of eminent domain.....	746
1889, p. 184, § 62. Election law.....	725
1889, p. 380. State live-stock sanitary commission.....	751
1897, p. 122. Destruction of quail.....	407
1899, March 6, p. 479. Regulating practice of dentistry.....	749
1899, March 6, p. 560. Submission of proposed amendments.....	724

51 I. R. A.

Revised Statutes, 1881.

§ 2106. Hunting quails.....	407
§ 2112-2115. Keeping, carrying, and selling of quail.....	407
§ 3233-3242. Union of cities and towns.....	733

Revised Statutes, 1894.

§ 2074. Powers of church sextons and officers of fairs.....	751
§ 2209. Prohibiting possession of quail.....	405
§ 2871. State live-stock sanitary commission.....	751
§ 4208-4217. Union of cities and towns.....	733
§ 5103. Gas companies; right of eminent domain.....	746
§ 5506. Regulating practice of dentistry.....	749
§ 5849. State board of education.....	751
§ 6176. Appointment of trustees for Purdue University.....	751
§ 6258. Election law; amendments.....	725
§ 6618. State chemist.....	751
§ 8718. Appointment of grain inspector.....	751

Horner's Revised Statutes.

§ 2106. Hunting quails.....	405
§ 3233-3242. Union of cities and towns.....	733

*Iowa.**Constitution.*

Art. 1, § 6. Forbidding exclusive privileges.....	776
Art. 1, § 18. Compensation for property taken.....	416

Statutes.

1st Gen. Assem. chap. 113. Improvement of Des Moines river.....	414
8th Gen. Assem. chap. 25. Conveyance of dam, etc.....	414
17th Gen. Assem. chap. 188, §§ 1, 2. Fishways in dams.....	418
21st Gen. Assem. chap. 65, § 7. Insurance.....	144
23d Gen. Assem. chap. 14, §§ 10, 11. Assessment for street pavement.....	767
25th Gen. Assem. chap. 7. Assessment for street pavement.....	767

Code.

§ 345. Limitation; absence from state....	411
---	-----

Code, 1873.

§ 45, ¶ 2. Construction of words and phrases.....	768
§ 462. Licensing transient merchants.....	895
§ 463. License tax.....	895
§ 466. Assessment for street pavement.....	763
§ 478, 479. Recovery of assessments.....	769
§ 809. Assessment of railroad real estate.....	768
§ 4092. Penalty for maintaining nuisance.....	418
§ 4094. Warrant for abatement of nuisance.....	418

Code, 1897.

§ 968. Assessment of railway property.....	768
§ 1344. Taxation of railroad property.....	770
§ 2384. Liquor nuisance; indictment.....	419
§ 2548. Fishways in dams.....	416
Tit. 12, chap. 17. Practice of medicine.....	777
§ 2579. Qualifications of physician.....	778
§ 3465. Joint and several obligations.....	413
§ 4989, 4990. Prohibiting adulteration of milk.....	348

*Kentucky.**Constitution.*

§ 157. Incurring indebtedness.....	737
------------------------------------	-----

Statutes.

§ 12. Judgments against trespassers.....	190
§ 3490, subs. 27. License fee to sell spirituous liquors.....	898

Code.

§ 25. When one may sue for others.....	672
--	-----

*Louisiana.**Constitution, 1879.*

Art. 90. Powers of supreme court.....	85
Art. 165. Duty of general assembly to pass arbitration laws.....	460

Constitution, 1898.

Art. 94. Supervising jurisdiction.....	76
Art. 101. Review of decisions of courts of appeal.....	76

Code Practice.

Art. 298. Granting injunctions.....	94
Art. 307. Dissolution of injunctions.....	93
Art. 566. Remedy by appeal.....	77
Art. 839. Restriction as to appellate jurisdiction.....	81
Art. 846. Prohibition issues from appellate court.....	81

Maryland.**Code of Public General Laws.**

Art. 16, § 33. Deed to be recorded.....	318
Art. 21, §§ 78-82. Conveyancing; curative statute.....	319

Massachusetts.**Bill of Rights.**

Art. 12. Due process of law.....	485
----------------------------------	-----

Body of Liberties, 1641.

Art. 10. Forfeiture of lands.....	445
-----------------------------------	-----

Provincial Laws.

1700-01, vol. 1, pp. 447, 448. Attachment.....	439
1742-43, chap. 24 (vol. 3, p. 42). Partition.....	446

Statutes.

1783, chap. 41. Partition.....	446
1786, chap. 53. Partition.....	446
1791, chap. 17, § 3. Writ of review.....	439
1797, chap. 50, §§ 1-5. Service of process.....	439
1804, chap. 105, § 5. Bill of exceptions.....	462
1820, chap. 53. Writ of review.....	439
1820, chap. 79, § 5. Bill of exceptions.....	462
1882, chap. 237. Quietting titles to real estate.....	447
1885, chap. 83, § 1. Power of police commissioners to issue licenses.....	294
1885, chap. 283. Quietting titles to real estate.....	447
1889, chap. 442. Quietting titles to real estate.....	447
1891, chap. 323. Highways in city of Boston.....	511
1892, chap. 418. Highways in city of Boston.....	511
1893, chap. 340. Quietting titles to real estate.....	447
1894, chap. 508, § 2. Prohibiting intimidation of employees.....	344
1894, chap. 522, § 29. Insurance; damage from boiler explosions.....	783
1895, chap. 449. Revision of Boston charter.....	511
1897, chap. 402. Actions upon assigned claims.....	433
1897, chap. 522. Quietting titles to real estate.....	447
1898, chap. 562. Land registration act.....	434
1899, chap. 131. Land registration act.....	436

Revised Statutes.

Chap. 90, §§ 41, 45, 48. Service of process.....	439
Chap. 92, §§ 3-9. Service on defendant.....	439
Chap. 99, § 17, 27. Writ of review.....	439
Chap. 99, §§ 18-20. Writ of review.....	439
Chap. 103, §§ 30-47. Partition of lands.....	446
Chap. 131, § 1. Sale of pure food.....	350

General Statutes.

Chap. 123, §§ 25, 28. Service on defendant.....	439
Chap. 126, §§ 6-8, 10. Service on defendant.....	439
Chap. 146, §§ 20, 21, 24. Writ of review.....	439

Public Statutes.

Chap. 100, § 1. Sale of liquors.....	294
Chap. 100, § 5. License for sale of intoxicating liquor.....	294
Chap. 100, §§ 30-39. Liquor sales; property condemned.....	445
Chap. 161, §§ 31, 34. Service on defendant.....	439
Chap. 164, §§ 6, 8, 10. Service on defendant.....	439
Chap. 178, §§ 35-44. Partition of lands.....	446
51 L. R. A.	

Chap. 187, §§ 21, 22, 25. Writ of review.....	439
Chap. 212. Search warrants.....	445

Michigan.**Constitution.**

Art. 5, § 11. Governor may grant pardons.....	461
Art. 6, § 1. Judicial power.....	459
Art. 6, § 23. Courts of conciliation.....	459
Art. 12. Impeachments and removals from office.....	459
Art. 12, § 4. Judicial officer not to exercise office.....	459
Art. 12, § 5. Filling vacancy.....	459

Statutes.

1875, p. 97. Shade trees.....	957
<i>Revised Statutes, 1846.</i>	

Chap. 28. Planting of shade trees.....	957
<i>Compiled Laws, 1871.</i>	

§ 1317. Penalty for injury of shade trees.....	957
<i>Compiled Laws.</i>	

§ 191. Superintending control of supreme court.....	460
§§ 559-568. Court of mediation and arbitration.....	460
§§ 4163 et seq. Shade trees.....	957
§ 9977. Issuance of writs of prohibition.....	460
§§ 11, 377. Unlawful contracts and combinations.....	787
Chap. 87. Incorporation act.....	346

Howell's Statutes.

§§ 1408 et seq. Shade trees.....	957
----------------------------------	-----

Minnesota.**Constitution.**

Art. 4, § 33. Prohibiting enactment of special or private laws.....	828
Art. 4, § 34. Uniform operation of laws.....	828
Art. 14, § 1. Proposed constitutional amendments.....	734

Statutes.

1897, chap. 260. Treatment of inebriates by counties.....	828
1899, chap. 359. Prohibiting organization and trusts.....	827

Special Laws.

1881, chap. 410. Public rights in White Bear Lake.....	832
--	-----

General Statutes, 1894.

§ 2701. "Fellow servants act".....	539
§ 4426. Attestation of wills.....	643
§ 5206. When defendant may appear.....	446
§ 5325. Delivery of garnished property.....	641

Mississippi.**Statutes.**

1898, pp. 82, 83. Action for death of person.....	837, 838
<i>Code, 1892.</i>	

§ 1549. Illegitimates; descent and distribution.....	838
--	-----

Missouri.**Constitution, 1865.**

Art. 11, § 14. Prohibiting township subscriptions.....	738
--	-----

Constitution.

Art. 2, § 20. Taking private property for public use.....	943
Art. 2, § 30. Due process of law.....	166, 177
Art. 4, § 53. Exclusive privileges or immunities.....	177
Art. 6, § 3. General superintending control of supreme court.....	104
Art. 12, § 4. Right of eminent domain.....	946
Art. 12, § 14. Railroads, public highways.....	944

Statutes.

1887, p. 227. Approval of plats by common council.....	173
--	-----

Wagner's Statutes.

Vol. 2, p. 1066, § 22. Dismissal for failure to assign errors....	276
Vol. 2, p. 1067, § 31. Statement of case to be made out....	276
Vol. 2, p. 1069, § 49. Filing transcript....	276
Vol. 2, p. 1115, § 20. Procedure on return of appeal....	276

Revised Statutes, 1865.

Chap. 66, § 7. Forbidding appropriation of buildings....	946
Chap. 66, § 8. Appropriation for railroad lands....	946

Revised Statutes, 1879.

§ 1234. Trial for murder....	276
Chap. 189. Plat law....	173
§ 6569. Duty of owner to make out map....	172
§ 6573. When plat shall vest title....	173

Revised Statutes, 1889.

§ 1119. Switch connection with existing railroad....	945
Chap. 42, art. 2. Railroad companies....	941
Chap. 42, art. 6. Appropriation of land for railroad....	741
§ 2740. Appropriation of buildings forbidden....	946
§ 2741. Appropriation for railroad lands....	942
Chap. 42, art. 8. Manufacturing and business companies....	941
§ 2802. Interference with rights of other corporations....	950
§ 4218. Husband and wife may testify for each other....	510
§ 4297. Assignment of error not necessary....	273
§ 7313. When plat shall vest title....	173
§ 8018. Witness....	510
§ 8922. When married woman may testify....	510

Revised Statutes, 1899.

§ 1122. Punishment for refusal to receive freight or passengers....	944
Chap. 12, art. 2, §§ 1126 et seq. Law to prevent unjust discrimination....	944
§§ 1145 et seq. Enforcement of law by railroad commissioners....	944
§ 1154. Mandamus for enforcement of rights....	944
§ 1272. Appropriation for railroad lands....	946
§ 1349. Interference with rights of other corporations....	950
§ 2356. Sending chosse in action out of state for suit....	176
§ 3435. Persons not liable to be summoned as garnishee....	176
§ 8965. Prohibiting trusts....	170
§§ 9459 et seq. Establishment of private road....	945
§ 9559. Construction of tramway....	945
§ 9560. Construction of tramway....	945

Montana.**Constitution.**

Art. 3, § 2. Appellate jurisdiction of supreme court....	959
Art. 8, § 3. Power of supreme court as to writs of prohibition....	959
Art. 8, § 11. Jurisdiction of district courts....	960

Code of Civil Procedure.

Chap. 3, tit. 13, div. 1, § 579. Writ of prohibition....	959
--	-----

Code of Civil Procedure, 1895.

§ 1980. Writ of prohibition....	959
---------------------------------	-----

Political Code.

§§ 1312, 1316. Filing certificate of nomination....	959
§ 1317. Certification by secretary of state....	959

Nebraska.**Constitution.**

Art. 15, § 1. Amendments....	731
------------------------------	-----

Compiled Statutes.

Art. 1, chap. 55. Practice of medicine....	718
51 L. R. A.	

Art. 1, chap. 55, § 17. Practitioner of medicine defined....	719
--	-----

Nevada.**Constitution.**

Art. 1, § 13. Apportionment....	231
Art. 15, § 13. Enumeration of inhabitants....	231

Statutes.

1891, p. 23. Apportionment act....	231
1899, p. 121. Apportionment act....	231

Compiled Laws, 1900.

§ 1588. Notice of elections....	231
---------------------------------	-----

New Hampshire.**Statutes.**

1871, chap. 69, § 5. Establishment of waterworks....	388
--	-----

Revised Statutes.

Chap. 188, § 22. Failure to take deposition, remedy for....	229
---	-----

Public Statutes.

Chap. 176, § 4. Allowance for support of wife and children....	228
Chap. 225, § 12. Failure to take deposition....	229

General Laws.

Chap. 229, § 10. Failure to take deposition; remedy for....	229
---	-----

New Jersey.**Constitution.**

Art. 9. Amendments....	736
------------------------	-----

Statutes.

1864, April 11. Riparian grants....	432
1869 (Pamph. Laws, p. 1017). Riparian act....	431
1871, March 21. Riparian grants....	431
1873, March 27. Riparian grants....	431
1875, p. 100. Incorporation of improvement company....	658
1891, Apr. 2. Formation and government of boroughs....	661
1897, p. 280. Borough act....	662

General Statutes.

P. 2790. Riparian act....	431
P. 2791. Riparian grants....	431

New York.**Constitution.**

Art. 1, § 18. Personal injuries....	236
Art. 8, § 18. Exclusive privileges and immunities forbidden....	686
Art. 3, § 20. Mode of passing bill imposing tax....	684
Art. 8, § 9. Credit or money of state not to be given....	685
Art. 8, § 10. Prohibiting loaning money or credit....	685
Art. 8, § 11. State board of charities....	686
Art. 8, § 14. Maintenance and support of poor....	685
Art. 10, § 2. Appointment or election of officers....	679

Statutes.

1847, chap. 450. Survival of action for causing death....	236
1867, chap. 754. Associated Press of New York state....	167
1880, chap. 142. Registry law....	676
1882, chap. 154. Chapin act....	676
1883, chap. 380. Primary election law....	676
1887, chap. 265. Primary election law....	676
1890, chap. 232. Election law....	676
1890, chap. 321. Registry law....	676
1894, chap. 292. Consolidation of humane societies....	683
1896, chap. 178, § 69. County law....	739
1896, chap. 448. Prevention of cruelty to animals....	683
1898, chap. 179. Primary election law....	677
1890, chap. 473. Primary election law....	676

<i>Revised Laws, 1813.</i>	
P. 169, §§ 1, 7. Killing dog for chasing sheep.....	684
<i>Revised Statutes.</i>	
Tit. 17, chap. 20, pt. 1. Taxation of dogs.....	684
Tit. 17, chap. 20, pt. 1, § 6. Killing dog for neglect to pay tax.....	684
Tit. 17, chap. 20, pt. 1, § 15. Killing dog for chasing sheep.....	684
Vol. 2 (9th ed.) p. 1907. Right of action for wrongs done.....	236
<i>Code of Civil Procedure.</i>	
§ 1838. Reversal of judgment.....	240
§ 1902. Action for causing death.....	236
§ 1903. Damages for whose benefit.....	236
§ 1904. Amount of recovery.....	236
North Dakota.	
<i>Constitution.</i>	
Art. 20. Prohibiting intoxicating liquors.....	735
Ohio.	
<i>Bill of Rights.</i>	
§ 15. Imprisonment for debts.....	862
<i>Revised Statutes.</i>	
§ 5556. Proceedings in contempt.....	863
§ 5640. Proceedings in contempt.....	863
§ 5646. Proceedings in contempt.....	863
§ 7130. Arrest without a warrant.....	202
§ 7143. Adjournment of examination.....	202
Oregon.	
<i>Constitution.</i>	
Art. 1, § 11. Rights of accused.....	251
Art. 7, § 18. Grand juries.....	248
<i>Statutes.</i>	
1899, Feb. 17, p. 99. Accusation by information.....	248
<i>Criminal Code.</i>	
§ 1269. Form of information.....	249
Pennsylvania.	
<i>Statutes.</i>	
1832, March 15 (P. L. 136, § 6). Foreign administration.....	879
South Carolina.	
<i>Revised Statutes, 1893.</i>	
§ 2319. Right of executors to sue trespassers.....	269
Tennessee.	
<i>Statutes.</i>	
1859-1860, chap. 81, § 4. Sale of pure food.....	350
1899, chap. 206. Disposition of unclaimed bodies.....	884
<i>Shannon's Code.</i>	
§ 4468. Slander; limitation of actions.....	257
§ 6775. Dissection authorized by consent of relation.....	884
Texas.	
<i>Bill of Rights.</i>	
Art. 1, § 10. Rights of accused in criminal prosecutions.....	278
Art. 1, § 15. Right of trial by jury.....	278
Art. 1, § 19. Citizens not to be deprived of rights.....	278
Art. 1, § 28. Suspension of laws.....	280
Art. 1, § 29. "Bill of Rights" shall remain inviolate.....	280
<i>Constitution.</i>	
Art. 2, § 1. Division of powers of government.....	278
51 L. R. A.	
<i>Revised Statutes.</i>	
Tit. 18. Cities and towns.....	655
<i>Taschal's Digest.</i>	
Art. 3658. Escheated property; filing petition.....	444
Art. 3671. Sale of escheated property.....	443
<i>Penal Code.</i>	
Art. 196. Sunday labor forbidden.....	270
<i>Code of Criminal Procedure.</i>	
Art. 22. Jury trial cannot be waived.....	279
Art. 714. Jury, judges of facts but not of the law.....	277
Art. 715. Judge shall give written charge to jury.....	272
Art. 716. Judge not to discuss facts.....	272
Art. 717. Either party may ask written instructions.....	272
Art. 718. Charge to be certified by judge.....	272
Art. 719. Charge to be given on request.....	272
Art. 720. Verbal charge.....	272
Art. 721. Reading charge to jury.....	272
Art. 722. Charges taken by jury, when.....	272
Art. 723. Error in charge of court.....	272
Art. 766. Jury, judges of facts.....	277
Art. 767. Court not to discuss evidence.....	277
Art. 817. Granting new trial.....	277
<i>White's Annotated Code Criminal Procedure.</i>	
§ 809. Instructions to jury.....	275
Utah.	
<i>Compiled Laws, 1888.</i>	
§ 2780. Appropriation and use of water... ..	281
<i>Revised Statutes.</i>	
§ 3286. Bill of exceptions.....	936
Virginia.	
<i>Code, 1887.</i>	
§ 437. Appointment of assessors.....	285
§ 441. Duties of assessors.....	285
§ 447. Extension of tax on basis of assessment.....	285
§ 456. Lien for taxes and levies.....	285
§ 465. Entry in land book.....	285
§ 466. Entry in land book.....	285
§ 479. Assessment of omitted lands.....	903
§ 605. Return of uncollected taxes.....	285
§ 606. Form of lists.....	285
§ 622. What may be distrained for taxes.....	285
§ 624. Property liable to distress.....	285
§ 627. Procedure by officer.....	285
§ 632. Taxes barred from collection.....	903
§ 636. Lien on real estate for taxes.....	285
§ 637. Sale of land for taxes.....	286
§ 638. Sale of land for taxes.....	286
§ 639. How sold.....	286
§ 650. Redemption of lands.....	286
§ 655. Deed to purchaser.....	286
§ 661. Title vested in grantee.....	286
§ 662. Purchase of land in name of auditor.....	286
§ 666. Sale of unredeemed lands.....	286
§ 927. Use of county jail by town.....	183
Washington.	
<i>Constitution.</i>	
Art. 7, §§ 1, 2, 9. Uniform taxation.....	895
<i>Ballinger's Annotated Codes and Statutes.</i>	
§ 7239. Keeping house of ill-fame.....	892
§ 7261. Fine for keeping house of ill-fame.....	892
Wisconsin.	
<i>Constitution.</i>	
Art. 1, § 8. Indictment by grand jury.....	248
Art. 3, § 1. Right of suffrage.....	735
Art. 7, § 3. Jurisdiction of supreme court.....	51
Art. 7, § 8. Jurisdiction of circuit courts.....	59
<i>Statutes.</i>	
1885, chap. 222. Public sale of lands.....	921
1899, chap. 50. Reassessment of omitted property.....	919

<i>Revised Statutes, 1889.</i>		§§ 1699, 1700. Indebtedness of assignor...	44
§ 4720. Allowance of exceptions.....	275	§ 1701. Assignee's final account.....	61
<i>Revised Statutes, 1898.</i>		§ 1702. Removal of assignee by court....	61
§ 1055. Ordinary assessments to be made		§ 1702½. Assignment proceedings.	64
on actual view.....	920	§ 2320. Fraudulent conveyances of prop-	
erty.....	919	erty by debtors.....	912
§ 1059. Reassessment of omitted prop-		§ 2406. Power of supreme court to issue	
erty.....	921	writs.....	58
§ 1210b. Reassessment in suits.....	921	§ 2902. Money judgment a lien.....	911
§ 1693b. Inspection of books of assignor...	61	§ 2978. Issuance of execution.....	912
§ 1697. Inventory of assets.....	39	§ 3452. Trial of issues in circuit court....	69

51 L. R. A.

LAWYERS' REPORTS

ANNOTATED.

WISCONSIN SUPREME COURT.

STATE of Wisconsin *ex rel.* FOURTH NATIONAL BANK of Philadelphia *et al.*

v.
D. H. JOHNSON *et al.*

(103 Wis. 591.)

1. A constitutional grant of superintending control over inferior courts vests in the supreme court an independent and separate jurisdiction, enabling it to restrain the excesses and quicken the neglects of inferior courts in the absence of other adequate remedy, and authorizes the use of all the ancient writs necessary to the exercise of that high power, including mandamus, prohibition, certiorari, and procedendo.

NOTE.—Superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

I. Introductory.

II. Inherent power of supervisory or superintending control over inferior tribunals.

a. Existence and derivation of power.
b. In what courts the inherent power exists.

1. In the highest law court of original general jurisdiction.

2. In courts of appellate jurisdiction.

3. In courts of local jurisdiction.

III. Constitutional and statutory grants of superintending control, general supervision, etc.

IV. In states which have no express constitutional or statutory grants of the power.

V. In courts of the United States.

VI. Where the application to correct should be first made.

a. To the court sought to be controlled.
b. To an inferior jurisdiction having the power.

VII. When the power is exercised without designating it as such.

a. By courts of original jurisdiction as successors of the King's bench.

b. By courts having no grant of the specific power.

c. By courts having grants of the jurisdiction.

VIII. Use in place of appeal or other remedy.

IX. For what purposes exercised.

a. Compelling lower court to act.

b. Controlling lower court's discretion or judgment.

c. To aid appellate jurisdiction.

d. In exercise of revisory jurisdiction.

2. Creditors for whose benefit the debtor has made an assignment of all his property are entitled, at all reasonable times and in all reasonable ways, to be informed of the progress of affairs and the state of the business.

3. Any creditor for whose benefit a debtor has made a general assignment of his property may demand that the assignee make and file an account answering the requirements of the statute, before he is required to make special objection to any particular items of such account.

4. Appeal is not an adequate remedy which will bar a writ of mandamus to compel a trial court to require a statutory account by an assignee for creditors, and per-

X. Power of legislature to interfere.

a. To enlarge the power.

b. To encroach upon the power.

XI. Exercise of the power by courts of local jurisdiction.

XII. Conclusion.

I. Introductory.

The power asserted in the principal case is ancient in its inception. It may be said to be nearly, if not quite, as much so as the common law, of which it is a part, itself.

It was inherent in the court of King's bench, which, by virtue of it, might remove all matters for review from inferior jurisdictions by certiorari (Bacon, *Abr. Certiorari*); restrain them within their bounds, and compel them to execute their jurisdiction by mandamus (*Id. Mandamus*); and cause them to desist from further proceedings in any matter when the same were without or in excess of jurisdiction by prohibition. *Id. Prohibition*.

The same author states, as the origin of the power, that it had existed in the Wittingham Mote (or Wittenagemot) of the Saxons, which is said to have been a combination of court and legislature. This was abolished at, or shortly after, the Conquest: the King taking all the power to himself until, "the Normans growing up English, they became fond of those liberties and privileges which the English had enjoyed in the Saxon times. Hence, it was necessary to introduce a new policy, and hence the original of our courts as we have them at this day in Westminster Hall. To give countenance to this new erection and division of courts (which was completed by E. 1) as also that it might still be seen that all justice flowed from the King, the King himself sat in person in the court of the King's bench; and hence the power of this court, which it still retains, of exercise

mit creditors to examine the transactions of the assignee, after it has entered an order refusing to do so, where the assigned property consists of assets of a bank, and by lapse of time prompt action is necessary to prevent claims from being barred by the statute of limitations.

5. A trial judge has no discretionary power to deny creditors for whose benefit a general assignment has been made the right to an account by, and examination of, the assignee, given by statute, which is beyond the control of mandamus.

6. Mandamus to compel the granting of a right by the trial court will not be defeated by the fact that that court has entered an order denying the right, which stands unreversed and unappealed from; and, if necessary to meet the exigencies of the case, the ancient writ will be modified and enlarged in terms.

7. A writ of certiorari may be issued

to compel the sending to the supreme court of the record of proceedings in a trial court, which is necessary for the information of the supreme court upon the question of the issuance of a writ of mandamus to compel the trial court to accord suitors a statutory right which it has denied them.

8. The right to hear and determine the cause, involved in the constitutional grant to the supreme court of superintending control over inferior courts, cannot be taken away by the legislature by directing that issues of fact arising during the attempted exercise of such control shall be tried in certain designated inferior courts.

(September 5, 1899.)

APPPLICATION for a mandamus to compel defendant to permit relators to ex-

ists is a question. As has been stated, it did exist originally in the court of King's bench. It so existed, not because of any grant, but because the King himself, the fountain of justice, sat there in person and in power, and the superintending power of the court of which he was the head passed to that court as an attribute of the Crown; and the writs which that court employed, and which have ever since been employed, in its exercise were denominated prerogative writs. *State, Dufford, Prosecutor, v. Decue, 31 N. J. L. 302.*

ing a superintendency over other jurisdictions."

2 Bacon, *Abr. Courts* (A).

The highest courts of the several colonies of England in America succeeded to this power of the King's bench, and retained it after their separation from the British Crown, and the colonies had been erected states; either by constitutional grant or statutory enactment granting the power specifically, or by provisions in their several constitutions or statutes including it in a general statement that all the powers that the colonial court had possessed directly previous to the separation were continued.

The "superintendency" of the King's bench was originally most comprehensive in its character. It extended to all manner of supervision, revision, and control, including that of an appellate nature, and the writ of error was utilized in its exercise as well as the prerogative and other original writs. *Carnall v. Crawford County, 11 Ark. 604.*

As the jurisdiction of the King's bench came to be exercised by the superior common-law courts of each of the several colonies by virtue either of acts of Parliament (Connecticut *River R. Co. v. Franklin County Comrs. 127 Mass. 50, 34 Am. Rep. 338*), gubernatorial ordinance (*State, Dufford, Prosecutor, v. Decue, 31 N. J. L. 302*), or acts of the colonial legislature (*Com. v. Balph, 111 Pa. 365, 8 Atl. 220*), the jurisdiction by writ of error and appeal came to be regarded as distinct from that exercised by the superior over the inferior tribunal by means of the original and prerogative writs of certiorari, mandamus, and prohibition; and the power thereby exerted by the highest court of original jurisdiction to and over inferior courts and tribunals exercising judicial functions came to be used in the colonies, and afterwards in the states, as a peculiar, distinctive and discretionary authority only to be exercised under extraordinary circumstances, or when all other remedies either failed or were slow, difficult, and inadequate.

The province or office of this note will be to endeavor to give a judicial history and description of this power, which is designated in the principal case as "superintending control" as it has existed and now exists in the courts of the several states, and (if at all) in the courts of the United States under its various names and designations.

II. Inherent power of supervisory or superintending control over inferior tribunals.

a. Existence and derivation of power.

Strictly speaking, whether such a power exists L. R. A.

ists is a question. As has been stated, it did exist originally in the court of King's bench. It so existed, not because of any grant, but because the King himself, the fountain of justice, sat there in person and in power, and the superintending power of the court of which he was the head passed to that court as an attribute of the Crown; and the writs which that court employed, and which have ever since been employed, in its exercise were denominated prerogative writs. *State, Dufford, Prosecutor, v. Decue, 31 N. J. L. 302.*

If the adoption of the common law, by the several states which have adopted it, either by constitutional or statutory provision, or in the same manner of the powers and practice of the court of King's bench, can be called a grant of the "superintendency" which appertains to that court, then it is not purely and in the abstract inherent.

But the same may be said of the power of the court to punish for contempt, which is derived from the same source. And yet, in speaking of the latter power, the courts universally allude to it as inherent. And, in a like sense, the power under discussion may be said to be so.

The power thus attained is illustrated in the following: *Carnall v. Crawford County, 11 Ark. 604*; *People ex rel. Church v. Hester, 6 Cal. 679*; *Milliken v. Huber, 21 Cal. 166*; *People ex rel. Green v. De La Guerra, 43 Cal. 225*; *Faut v. Mason, 47 Cal. 7*; *People v. Jordan, 65 Cal. 648*; *Bailey v. Luff, 2 Harr. (Del.) 292*, note; *Cloud v. State, 2 Harr. (Del.) 361*; *State ex rel. Richardson v. Swift, 7 Houst. (Del.) 187, 30 Atl. 781*; *Swift v. State ex rel. Richardson, 7 Houst. (Del.) 338, 32 Atl. 143*; *Beaubien v. Brinckerhoff, 3 Ill. 269*; *Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439*; *People ex rel. Loomis v. Wilkinson, 13 Ill. 660*; *Chicago & R. I. R. Co. v. Whipple, 22 Ill. 105*; *Mason & T. Special Drainage Dist. Comrs. v. Griffin, 134 Ill. 330, 25 N. E. 995*; *White v. Wagar, 185 Ill. 195, 50 L. R. A. 60, 57 N. E. 56*; *Arnold v. Shields, 5 Dana, 18, 30 Am. Dec. 669*; *Runkel v. Winemiller, 4 Harr. & M'H. 429, 1 Am. Dec. 411*; *Little v. Cochran, 24 Me. 509*; *State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534*; *Price v. State, 8 Gill, 295*; *Parks v. Boston, 8 Pick. 218, 19 Am. Dec. 322*; *Cooke, Petitioner, 15 Pick. 234*; *Atty. Gen. v. Boston, 123 Mass. 460*; *Connecticut River R. Co. v. Franklin County Comrs. 127 Mass. 50, 34 Am. Rep. 338*; *Planters' Ins. Co. v. Cramer, 47 Miss. 200*; *Robinson v. Mhoon, 68 Miss. 712, 9 So. 887*; *State ex rel. Fuller v. Beall, 48 Neb. 817, 67 N. W. 868*; *Ackerman v. Taylor, 9 N. J. L.*

amine under oath the assignee and others as to the settlement of the affairs of the insolvent Plankinton Bank. *Granted.*

Statement by Winslow, J.:

On the 1st day of June, 1893, the Plankinton Bank, a state banking corporation of Milwaukee, executed to William Plankinton, its vice president, a voluntary assignment for the benefit of its creditors, and the assignee qualified, and entered upon the duties of his trust. On the 21st of the same month the assignee filed schedules showing the face values of the assets of the bank to be \$1,846,851.67, and its liabilities to be \$1,430,343.68. Thereafter the assignee proceeded with the administration of the assigned estate, but rendered no account of his administration until July 1, 1898, when, pursuant to an order of court, he filed what purported

to be an account of his receipts and disbursements, with a statement of the dividends paid to creditors. The account came up for hearing, after notice by mail to the creditors who had proven their claims, on August 10, 1898. On that day general objections to the account were made by certain creditors, and a motion made to require the account to be made more definite and certain, and the court made no decision, but took the whole matter under advisement until May 9, 1899, when the court, without notice, made an order confirming the report and account of the assignee (except as to the compensation of the assignee) as a full accounting of all acts up to July 1, 1898, and extended the time for settlement of the estate until January 1, 1900. On the following day the assignee presented to the court his resignation, and the same was accepted, but not to take ef-

69; *Ludlow v. Ludlow*, 4 N. J. L. 387; *Morris Canal & Bkg. Co. v. State*, 14 N. J. L. 411; *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. L. 25; *State, Van Vorst, Prosecutor, v. Qualife*, 23 N. J. L. 89; *State, Dufford, Prosecutor, v. Decue*, 31 N. J. L. 302; *Traphagen v. West Hoboken Twp.* 39 N. J. L. 232; *Tucker v. Burlington County Freeholders*, 1 N. J. Eq. 282; *Harris v. Vanderveer*, 21 N. J. Eq. 424; *State v. Thompson*, 2 N. H. 236; *Hall v. Somersworth*, 39 N. H. 511; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *People v. Chenango County Justices*, 1 Johns. Cas. 179; *Lawton v. Cambridge Highway Comrs.* 2 Cal. 182; *Lynde v. Noble*, 20 Johns. 80; *Le Roy v. New York*, 20 Johns. 434, 11 Am. Dec. 289; *Bradhurst v. First Great Southwestern Turnp. Road Co.* 16 Johns. 18; *People ex rel. New York Consol. Stage Co. v. New York City & County Common Pleas Ct.* 48 Barb. 278; *Niblo v. Post*, 25 Wend. 280; *Appo v. People*, 20 N. Y. 531; *Jones v. People*, 79 N. Y. 45; *People ex rel. Adams v. Westbrook*, 89 N. Y. 152; *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 81 N. E. 1009; *Raleigh Comrs. v. Kane*, 47 N. C. (2 Jones L.) 288; *Re Turner*, 5 Ohio, 542; *Hollister v. Lucas County Dist. Ct. Judges*, 8 Ohio St. 201; *Hummel's Case*, 9 Watts, 418; *Com. ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393; *Com. v. Balph*, 111 Pa. 365, 8 Atl. 220; *State v. Nathan*, 4 Rich. L. 513; *Murfree v. Leeper*, 1 Overt. 1; *May v. Campbell*, 1 Overt. 61; *Kendrick v. State, Cooke (Tenn.)* 474; *Rogers v. Ferrell*, 10 Yerg. 254; *Nashville v. Pearl*, 11 Humph. 249; *Cooper v. Summers*, 1 Sneed, 453; *Wade v. Murry*, 2 Sneed, 50; *State v. Green*, 2 Head, 356; *Friedman Broa. v. Mathea*, 8 Helsk. 488; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182; *Ex parte Knight*, 3 Lea, 401; *Durham v. United States*, 4 Hayw. (Tenn.) 54; *Bob v. State*, 2 Yerg. 173; *State ex rel. Sneed v. Hall*, 3 Coldw. 255; *Saunders v. Russell*, 10 Lea, 293; *Kuechler v. Wright*, 40 Tex. 600; *Bullard v. Thorpe*, 66 Vt. 599, 25 L. R. A. 605, 30 Atl. 36; *Mayo v. James*, 12 Gratt. 17; *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770; *Dryden v. Swinburne*, 20 W. Va. 89.

The inherent power is derived from the King's bench, either expressly by constitutional grant or by implication from the general adoption of the common law by constitution or statute.

The supreme court of the colony of New York was invested with the jurisdiction of the King's bench, common pleas, and exchequer in England to all intents and purposes whatsoever. Ordinances of 16th of May, 1699.

The authorities are numerous that this power 51 L. R. A.

existed and was exercised by the King's bench in England, and that it was transmitted by the several constitutions to, and is now possessed by, the supreme court of New York. *Jones v. People*, 79 N. Y. 45.

All these great powers (of the King's bench) were by the ordinance of the first provincial governor of New Jersey transferred to the supreme court, and these extraordinary powers were continued by the Constitution to that court. *State, Dufford, Prosecutor, v. Decue*, 31 N. J. L. 302.

The common law has been adopted by several state Constitutions. *Del. Const.* 1776, art. 25; *Md. Declaration of Rights*, art. 5; *Mich. Schedule*, § 1; *W. Va. Const.* art. 8, § 21.

It has been adopted by every state in the United States except Louisiana (and there in criminal matters), either indirectly by provisions of state constitution or statute conferring and continuing former laws and ordinances of the colonies and states, or of the United States, or by express statutes of the several states.

For the manner in which the several states have adopted the common law, see note to *McKennon v. Winn (Okla.)* 22 L. R. A. 501.

It is hardly necessary to say that the adoption of the common law comprehends all the powers and practice of the court of King's bench, including that of "general superintendency." *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9 L. ed. 1181.

It would seem from the foregoing that in all the states except Louisiana the highest court of original general jurisdiction possessed this extraordinary power of the King's bench, which is thus described by the great English commentator: "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the Kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes." 2 Bl. Com. 42.

b. In what courts the inherent power exists.

1. In the highest law court of original jurisdiction.

Generally speaking, the inherent power of "general superintendency" has its seat in the highest law court of original jurisdiction.

fect until the final confirmation of the assignee's account; and the matter was referred to Court Commissioner Ryan to state and report the assignee's account since July 1, 1898, and also the amount of compensation which the assignee should receive; and it was further ordered that until "the allowance and confirmation of said account" and the final discharge of the assignee he continue to perform the duties of his office. On the said 9th day of May, upon petition of certain creditors, Hon. Fred Scheiber, a circuit court commissioner, made an order requiring the assignee and Frederick T. Day and others, who were alleged to be officers of the insolvent bank, to appear before him on the 17th of the same month, and submit to an examination under oath as to the business affairs and condition of the assignor before and since the assignment. Imme-

diately following these orders, motion was made by the assignee to set aside the order of Court Commissioner Scheiber, and counter motions were made by the creditors to set aside the orders of May 9th and 10th, and to allow examination of the books and of the bank officers before the court. Numerous affidavits were submitted on both sides upon the several motions, and on June 9th following the court vacated the order of Court Commissioner Scheiber, denied the motion for examination of the bank officers before the court, and denied the motion to vacate the orders of May 9th and 10th. On the 7th day of June the court also denied the motion to require the assignee's account to be made more definite and certain, which had been held under advisement since August 10, 1898. On the 14th of June a further order was made, amending the order of June 7th so as

While, as will be seen later, in some of the states, a power akin to it is used by the ultimate courts of appeal, and by the United States courts, in aid of their appellate jurisdiction, yet the transmitted power of the King's bench, pure, comprehensive, and simple, may be said to be lodged in the courts first mentioned. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9 L. ed. 1181; *Carnall v. Crawford County*, 11 Ark. 604; *Payne v. McCabe*, 37 Ark. 318; *People ex rel. Church v. Hester*, 6 Cal. 679; *Milliken v. Huber*, 21 Cal. 166; *Meacham v. Austin*, 5 Day, 233; *Balliey v. Luff*, 2 Harr. (Del.) 292 note; *Cloud v. State*, 2 Harr. (Del.) 361; *Swift v. State ex rel. Richardson*, 7 Houst. (Del.) 338, 32 Atl. 143; *Beaubien v. Brinckerhoff*, 3 Ill. 269; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *People ex rel. Loomis v. Wilkinson*, 13 Ill. 662; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *Mason & T. Special Drainage Dist. Comrs. v. Griffin*, 134 Ill. 330, 25 N. E. 995; *Warren County Comrs. v. State ex rel. Ennis*, 15 Ind. 250; *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669; *Little v. Cochran*, 24 Me. 509; *Runkel v. Winemiller*, 4 Harr. & M'H. 429, 1 Am. Dec. 411; *State v. Buchanan*, 5 Harr. & J. 317, 9 Am. Dec. 534; *Price v. State*, 8 Gill, 295; *Com. v. Hampden County Justices*, 2 Pick. 414; *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322; *Strong, Petitioner*, 20 Pick. 484; *Atty. Gen. v. Boston*, 123 Mass. 460; *Connecticut River R. Co. v. Franklin County Comrs.* 127 Mass. 50, 34 Am. Rep. 338; *Robinson v. Mhoon*, 68 Miss. 712, 9 So. 887; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *State ex rel. Fuller v. Beall*, 48 Neb. 817, 67 N. W. 868; *State v. Thompson*, 2 N. H. 286; *Hall v. Somersworth*, 39 N. H. 511; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 744; *State v. Davis*, 4 N. J. L. 311; *Mills v. Sleght*, 5 N. J. L. 565; *Terhune v. Barcalow*, 11 N. J. L. 38; *Combs v. Johnson*, 12 N. J. L. 244; *Krumelck v. Krumelck*, 14 N. J. L. 39; *Ackerman v. Taylor*, 9 N. J. L. 69; *Ludlow v. Ludlow*, 4 N. J. L. 387; *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. L. 25; *State, Van Vorst, Prosecutor, v. Qualfe*, 23 N. J. L. 89; *State, Dufford, Prosecutor, v. Decue*, 31 N. J. L. 302; *State ex rel. Rodwell, Prosecutor, v. Newark*, 34 N. J. L. 264; *Ritter v. Kunkle*, 39 N. J. L. 259; *Traphagen v. West Hoboken Twp.* 39 N. J. L. 232; *Tucker v. Burlington County Freeholders*, 1 N. J. Eq. 282; *Harris v. Vanderveer*, 21 N. J. Eq. 424; *People v. Chenango County Justices*, 1 Johns. Cas. 179; *Lawton v. Cambridge Highway Comrs.* 2 Cal. 179; *Lynde v. Noble*, 20 Johns. 80; *Le Roy v.*

New York, 20 Johns. 434, 11 Am. Dec. 289; *Bradhurst v. First Great Southwestern Turnp. Road Co.* 16 Johns. 13; *People ex rel. New York Consol. Stage Co. v. New York City & County Common Pleas Ct.* 43 Barb. 278; *Appo v. People*, 20 N. Y. 531; *Jones v. People*, 79 N. Y. 45; *People ex rel. Ryan v. Green*, 58 N. Y. 295; *People ex rel. New York v. Nichols*, 79 N. Y. 582; *People ex rel. Van Rensselaer v. Van Alstyne*, 32 Barb. 131; *People v. Donnelly*, 21 How. Pr. 406; *People ex rel. Adams v. Westbrook*, 89 N. Y. 152; *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 31 N. E. 1009; *Raleigh Comrs. v. Kane*, 47 N. C. (2 Jones L.) 288; *Brooks v. Morgan*, 27 N. C. (5 Ired. L.) 481; *Re Turner*, 5 Ohio, 542; *Hummel's Case*, 9 Watts. 416; *Com. ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393; *Com. ex rel. Johnson v. Betts*, 76 Pa. 465; *Com. v. Balph*, 111 Pa. 365, 3 Atl. 220; *State v. Nathan*, 4 Rich. L. 518; *Kendrick v. State, Cooke (Tenn.)* 474; *Rogers v. Ferrell*, 10 Yerg. 254; *Nashville v. Pearl*, 11 Humph. 249; *State v. Green*, 2 Head, 356; *Friedman Bros. v. Mathes*, 8 Helsk. 488; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182; *Ex parte Knight*, 3 Lea, 401; *Durham v. United States*, 4 Hayw. (Tenn.) 54; *Bob v. State*, 2 Yerg. 173; *Bullard v. Thorpe*, 66 Vt. 599, 25 L. R. A. 605, 30 Atl. 36.

2. In courts of appellate jurisdiction.

It does, however, exist in the highest court of the state, although that court may be restricted by organic or statute law to appellate jurisdiction only, where it is clothed by the same law with the power to issue the writs by means of which the power of "superintendency" is exercised. *Hyatt v. Allen*, 54 Cal. 353; *Avery v. Contra Costa County Super. Ct.* 57 Cal. 247; *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121; *Mastick v. San Francisco City & County Super. Ct.* 94 Cal. 347, 29 Pac. 869; *Philbrook v. San Francisco City & County Super. Ct.* 111 Cal. 31, 43 Pac. 402; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615; *Hensley v. Sacramento County Super. Ct.* 111 Cal. 541, 44 Pac. 232; *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5; *Whelan v. San Francisco City & County Super. Ct.* 114 Cal. 548, 46 Pac. 468; *Foster v. San Francisco City & County Super. Ct.* 115 Cal. 279, 47 Pac. 58; *McClatchy v. Sacramento County Super. Ct.* 119 Cal. 413, 39 L. R. A. 691, 51 Pac. 696; *Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626; *White v. San Francisco City & County Super.*

to show that the motion to make the account more definite and certain was based upon all the records and files in the assignment proceedings, as well as upon affidavits. In this condition of the record an order to show cause was issued by the chief justice of this court, at chambers, based upon a verified petition of the creditors who had appeared in the circuit court, setting forth the foregoing facts, which order was directed to the circuit judge, and required him to show cause before this court on the 22d of June following why the petitioners should not be allowed to examine the assignee and officers of the bank, and file objections to the assignee's account, and why the orders denying such examination, as well as the orders of May 9th and 10th and of June 7th and 14th, should not be vacated. This motion was argued on the return day, and taken under ad-

visement until July 3d following, at which time the motion was denied. In the meantime, however, a petition had been filed by the appealing creditors, setting forth the facts above stated, and praying for the issuance by this court of a writ of mandamus requiring the circuit court to vacate the aforesaid orders, and grant the relief prayed for by the previous petition; and this court on the 28th of June issued an alternative writ of mandamus as prayed, directed to the circuit judge, returnable on the 3d of July following, and at the same time, of its own motion, issued its writ of certiorari as auxiliary to the writ of mandamus to the clerk of said circuit court commanding him to certify and return the account of the assignee, and the various orders in question, and all records and files upon which they were based, in order that the same might be present in

Ct. 126 Cal. 245, 58 Pac. 450; State *ex rel.* Reynolds v. White, 40 Fla. 297, 20 So. 160; People *ex rel.* Bristol v. Pearson, 4 Ill. 270; People *ex rel.* Coberly v. Scates, 4 Ill. 351; Doolittle v. Galena & C. Union R. Co. 14 Ill. 381; People *ex rel.* Bell v. Zane, 105 Ill. 682; State *ex rel.* Fuller v. Beall, 48 Neb. 817, 67 N. W. 868; Wiggins v. Henderson, 22 Nev. 103, 36 Pac. 459; Cavanaugh v. Wright, 2 Nev. 106; Richardson v. Farrar, 88 Va. 780, 15 S. E. 117; Swinburn v. Smith, 15 W. Va. 483.

But when not clothed by constitution or statute either with the power of superintending control or with authority to issue the several writs by means of which that power is usually exerted, the supreme appellate court will not assume to exercise it. People *ex rel.* Earle v. Cook County Circuit Ct. 169 Ill. 201, 48 N. E. 717; People *ex rel.* Graver v. Cook County Circuit Ct. 173 Ill. 272, 50 N. E. 928; *Ex parte* Bollman, 4 Cranch, 75, 2 L. ed. 554; *Re* Garvey, 7 Colo. 507, 4 Pac. 758; State *ex rel.* Powell v. Biddle, 36 Ind. 188; State *ex rel.* Seres v. First Jud. Dist. Ct. 19 Mont. 501, 48 Pac. 1104; Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137; State *ex rel.* King v. Hall, 47 Neb. 579, 66 N. W. 642.

Yet a court of purely appellate jurisdiction will issue to the court over which that jurisdiction extends any of the writs, and exercise all the control essential to compel the subordinate court to act; or otherwise to aid appellate jurisdiction. See authorities under IX. a, b.

3. In courts of local jurisdiction.

It is also possessed by courts created by the constitution or legislature having a jurisdiction confined to a particular locality or municipality, but which, within its local jurisdiction, is clothed by the grant or law creating it with all the powers of the highest court of original jurisdiction. State *ex rel.* Pinney v. Williams, 69 Ala. 311; Knight v. Farrell, 113 Ala. 258, 21 So. 974; Wilson v. Duncan, 114 Ala. 659, 21 So. 1017; People *ex rel.* Allen v. Murray, 2 Misc. 152, 23 N. Y. Supp. 160; People *ex rel.* Ryan v. Green, 58 N. Y. 295; People *ex rel.* Van Rensselaer v. Van Alstyne, 32 Barb. 181; Swinburn v. Smith, 15 W. Va. 483.

III. Constitutional and statutory grants of superintending control, general supervision, etc.

Alabama.

"Except in cases otherwise directed in this Constitution the supreme court shall have ap-
§1 L. R. A.

pellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may be from time to time prescribed by law. Provided, that said court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions." Ala. Const. art. 6, § 2.

"The circuit court shall have original jurisdiction in all matters, civil and criminal, within the state, not otherwise excepted in this Constitution." Id. art. 6, § 5.

"1. The supreme court has authority to exercise appellate jurisdiction coextensive with the state, under such restrictions and regulations as are prescribed by law.

"2. To exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction.

"3. To issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of inferior jurisdictions." Ala. Civ. Code, § 675.

The circuit court has authority:

"1. To exercise original jurisdiction of all felonies and misdemeanors; of all actions for libel, slander, assault and battery and of ejectment without regard to the amount involved; and of all other suits and actions at law when the matter or sum in controversy exceeds \$50.

"2. To exercise appellate jurisdiction of all civil actions cognizable before a justice of the peace and in such other cases as may be provided by law.

"3. To exercise a general superintendence over all inferior jurisdictions." Ala. Civ. Code, § 756.

The circuit judges have authority:

"1. To grant writs of certiorari, supersedeas, quo warranto, mandamus, and all other remedial and original writs which are grantable by judges at common law.

"2. To grant writs of injunction and ne exeat returnable into the courts of chancery.

"3. To exercise such other powers as are or may be granted them by law." Id. § 758.

The judge of probate, in making an order under the statute of 1884 to regulate the sale, etc., of spirituous, etc., liquors, acts in a summary manner, and in a course different from the common law. No method is provided by which his action may be reviewed. In such case certiorari is the proper remedy, and the circuit court,

court upon the hearing of the alternative writ of mandamus. Upon the return day of the two writs the clerk first made a special return to the writ of certiorari, seeking to excuse himself from returning the original record on the ground that the trial court had made no order authorizing the transmission of the original papers to this court; but the objection was summarily overruled, and the original papers were at once returned in obedience to the writ. Thereupon the circuit judge made his return to the alternative writ as follows:

"It is true that in a certain proceeding of the voluntary assignment of the Plankinton bank, pending in the circuit court of Milwaukee county, the respondent, as judge of said court, on the 9th day of May, A. D. 1899, made and entered an order confirming an account of William Plankinton, the as-

signee of said bank, filed in said court on the 1st day of July, 1898. It is also true that in and by said order time for the settlement of said assigned estate was extended to the 1st day of January, 1900. It is also true that on the 10th day of May, 1899, the respondent, as judge of said court, did enter a further order in said assignment proceedings, accepting the resignation of William Plankinton as assignee. It is not true that said order relieved said assignee from the statutory duty of filing an account, but it was the true intent and meaning of said order to refer the taking of said account in the first instance to Hugh Ryan, Esq., the commissioner therein named; that said assignee was to file his account with said commissioner, and said commissioner to act thereon as directed in said order, and report the same for final action to the court. It is true that

by virtue of its statutory authority to exercise a general superintendence over all inferior jurisdictions, is the proper court to supervise the proceedings. *Miller v. Jones*, 80 Ala. 89.

The city court of Mobile has the same power within its territorial jurisdiction as the circuit court. *State ex rel. Pinney v. Williams*, 69 Ala. 311.

The city court of Talladega has the same jurisdiction within its territory. *Wilson v. Duncan*, 114 Ala. 659, 21 So. 1017.

The provisions of art. 5, § 2, of the original Constitution (1836), as regards the power to issue the original and other remedial writs, were the same substantially as art. 6, § 2, of the present Constitution, except that mandamus was among the enumerated writs. Under this section it was held that the exception contained in the first words could not enlarge the meaning of the proviso following (*Ex parte Simonton*, 9 Port. (Ala.) 383); that the jurisdiction conferred upon the supreme court to issue writs of injunction, mandamus, etc., was revisory, and could only be exercised when justice required it in order to control an inferior jurisdiction. *Ex parte Mansony*, 1 Ala. 98; *State ex rel. Atty. Gen. v. Williams*, 1 Ala. 342.

But that in a case in which no subordinate court would act the supreme court would have jurisdiction to award either of the enumerated writs or the appropriate remedial or original writ that might be "necessary to give it the general superintendence and control of inferior jurisdictions." *State ex rel. Atty. Gen. v. Porter*, 1 Ala. 698; *Ex parte Chaney*, 8 Ala. 424; *Ex parte Croom*, 19 Ala. 561; *Ex parte Burnett*, 30 Ala. 461; *Ex parte Hardy*, 68 Ala. 308.

The foregoing are clearly all cases of habeas corpus, and while it is difficult to see how the writ of habeas corpus, which is always addressed to an individual and never to an inferior tribunal or its incumbent, can be used to superintend or control the latter, they are valuable as showing the rule in Alabama, that not only the writs mentioned as remedial and original, but also those expressly enumerated, cannot be awarded by the supreme court in the exercise of original jurisdiction, but only in aid of its appellate jurisdiction, and in exerting a superintending control over inferior jurisdictions. In this position Alabama would seem to stand alone, with the exception of Arkansas, from 1851 to 1868, and, since the Constitution of 1874, Florida until its present Constitution, and a single decision made by the supreme court of Wisconsin in the early days of statehood, when the court was composed of

the six circuit judges. *State ex rel. Besley v. Farwell*, 4 Chand. (Wis.) 106, 3 Pinney, 393. The latter was promptly overruled by the new supreme court in an unanimous decision.—*Atty. Gen. v. Blossom*, 1 Wis. 317, cited in the principal case,—and the rule there laid down has been the doctrine in that state since.

The power as an original jurisdiction is exercised in Alabama by the circuit court under the provisions of the Code authorizing it "to exercise a general superintendence over all inferior jurisdictions." Code, § 756, subd. 3.

Under this provision the supreme court will decline to exercise the "general superintendence and control" conferred upon it by the Constitution, unless the power is to be exerted on the circuit court itself. *Etheridge v. Hall*, 7 Port. (Ala.) 47; *Ex parte Simonton*, 9 Port. (Ala.) 383; *Ex parte Mansony*, 1 Ala. 98; *State ex rel. Pinney v. Williams*, 69 Ala. 311; *Ex parte Tarlton*, 2 Ala. 35; *Marlon v. Chandler*, 6 Ala. 899; *Talladega County Road & Revenue Comrs. v. Thompson*, 15 Ala. 134; *Ex parte Russell*, 29 Ala. 717; *Barnett v. State ex rel. Glimmer*, 15 Ala. 829; *Jack v. Moore*, 66 Ala. 184; *Ex parte Henderson*, 43 Ala. 392; *Ex parte Pearson*, 76 Ala. 521.

When the circuit court has refused to exercise the power thus conferred upon it the supreme court will correct the error, either on appeal (*Ex parte Elston*, 25 Ala. 72; *Ex parte Pearson*, 76 Ala. 521; *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, 17 So. 112), or by issuing the writ which the former court has denied in case the remedy by appeal is inadequate. *Ex parte Croom*, 19 Ala. 561; *Talladega County Road & Revenue Comrs. v. Thompson*, 15 Ala. 134; *Ex parte Candee*, 48 Ala. 386.

Where, however, a subordinate court, over which the circuit court has ordinarily a "general superintendence," is possessed of a particular jurisdiction concurrent with the circuit court, or one in which an appeal lies concurrently to either the supreme or circuit court, the supreme court will exercise the power of "general superintendence and control" directly, and without an application having been first made to the circuit court. *Ex parte Burnett*, 30 Ala. 461; *Ray v. Porter*, 42 Ala. 827; *Ex parte Boynton*, 44 Ala. 261.

The foregoing decisions would seem to indicate that the supreme court has the authority under the constitutional grant to exercise the power, even where there has been no previous application to the circuit court, with the exception of *Ex parte Russell*, 29 Ala. 717, in which it was held that the supreme court had no constitutional power to issue the writ nec-

said order provided that said William Plankinton continue to act as assignee until his account was stated and settled, and that the appointment of his successor be reserved until said time. It is true that, after being moved so to do, the respondent, as such judge, refused to vacate and set aside the said order. It is not true that the order confirming said report was made without notice to the creditors of said assigned estate. Upon that subject, and in reference to the motion to make said account more definite and certain, mentioned in said writ, respondent states the following facts:

"The Plankinton Bank made an assignment June 1, 1893. In due time an inventory of assets and a list of creditors were filed, as required by § 1897 of the Revised Statutes, then in force. Thenceforth, from time to time, many and repeated applications

for direction in the administration of the affairs of the bank were addressed to said court or the undersigned by the assignee, and orders made thereon, all of which remain of record in said proceeding. It was impracticable to close the affairs of said bank within six months. The progress of settlement was inevitably slow. Dividends were paid from time to time as money was realized. No requirement was made for the filing of an account by the assignee until the 28th day of May, 1898, when, upon application of a creditor, the assignee was ordered to make and file a report and itemized account on the 1st day of July, 1898. On July 1, 1898, a report and itemized statement of account were filed by the assignee. A notice signed by said assignee, to the effect that he had filed his report containing a statement of his transactions, receipts and disburse-

ment, was filed with the court, and the court was necessary to exercise "general superintendence and control" in such cases.

Under the proviso of the section of the Constitution granting to the supreme court jurisdiction to issue "such other remedial and original writs as may be necessary to give it a general superintendence and control," that court has power to prohibit the chancery court, where a proper case for the exercise of this power is presented. *Es parte* Smith, 23 Ala. 94; *Es parte* Walker, 25 Ala. 81; *Es parte* Greene, 29 Ala. 52; *Es parte* Hardy, 68 Ala. 303; *Es parte* Sayre, 95 Ala. 288, 11 So. 378. Arkansas.

"The supreme court . . . shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error, and superseas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same. Ark. Const. art. 7, § 4.

The circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution. Ark. Const. art. 7, § 11.

"Circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas and corporation courts, and justices of the peace, and shall have power to issue, hear, and determine all the necessary writs to carry into effect their general and specific powers." Const. art. 7, § 14.

These constitutional provisions are repeated verbatim in the statutes. Sandels & Hill's Dig. (Ark.) §§ 1014, 1113, 1114, 1120; Manaf. Dig. (Ark.) §§ 1263, 1356, 1357, 1363.

"Circuit courts shall have original jurisdiction of all actions and proceedings for the enforcement of civil rights or redress of civil wrongs, except when exclusive jurisdiction is given to other courts; and where such actions and proceedings are not expressly provided for by statute, the same may be had and conducted by the circuit courts and judges in accordance with the course, rules, and jurisdiction of the common law." Sandels & Hill's Dig. (Ark.) § 1114; Manaf. Dig. (Ark.) § 1357.

The exercise of "general superintending control" in Arkansas has been a varied one. This was owing, not only to the many changes in the judiciary article of the Constitution, but also to the different manner in which the same provisions of the Constitution of 1836 in regard to the jurisdiction of the supreme and circuit

courts have been construed by the supreme court, due, possibly, to changes in the *personnel* of its judges, or an insufficient regard for *stare decisis*, or both.

In the first case in the state in which the subject under consideration was involved in reference to § 2 of the judiciary article of the first Constitution the supreme court held that the object and intention of the convention that framed the Constitution was to confer upon both the supreme and circuit courts superintending control over the county court and over justices of the peace. The court said: "In general we would deem it more appropriate and regular for the application to be first made to the circuit court; but should the party aggrieved prefer this tribunal, and present his case before us, it becomes our duty to award him the writ if he is legally entitled to it." Webb v. Hanger, 1 Ark. 121.

Shortly after the supreme court decided that it was the intention of the framers of the Constitution to limit and restrict the supreme court in the exercise of original jurisdiction to such cases as to which the writs therein specially enumerated would apply, and that the power to issue other remedial writs was intended to embrace only such other writs as might be properly used in the exercise of appellate powers or power of control over inferior or other courts expressly granted by the Constitution. State v. Ashley, 1 Ark. 279.

Thereafter the supreme court held that the "superintending control" which it possessed acted directly upon the inferior tribunal. *Es parte* Woods, 3 Ark. 532.

This was soon after followed by a case in which it was held that the circuit courts, in the exercise of their "superintending control," were bound to confine their action to such process and proceedings as might be regularly taken against the tribunals themselves; and that the supreme court acted, not in the exercise of appellate, but original, jurisdiction; and that, notwithstanding the rights of others might be thereby affected, the tribunals against which the proceeding was taken, or the individual or persons composing it, must always in such cases be the party defendant; and further, that the "superintending control" given by the Constitution to the supreme court was in no respect different from that possessed by the circuit courts, except that the latter was limited to county courts and justices of the peace, and the former extended to all courts in the state. *Es parte* Anthony, 5 Ark. 358.

In Levy v. Lychinski, 8 Ark. 113, the language of the case last cited was repeated, viz:

ments down to 1st of July, 1898, and should ask for an order of the court confirming said report, and directing his compensation as assignee thus far on the 16th day of July, 1898, at ten o'clock A. M., was mailed to each and every creditor of said bank, as appears by affidavit on file. Said notice not having been given for a sufficient length of time, the hearing was postponed to August 10, 1898, and a further notice directed to be given. A further notice was then given by the assignee by postal card to the effect that said assignee had filed his account as such in the office of the clerk of this court on the 1st day of July, 1898, and should apply to the court on August 10th, at ten o'clock A. M., for an order confirming the same. Proof of the due and proper mailing of such postal cards to all the creditors of said bank was presented to respondent at the hearing. Objections to

said account were filed on and before the 10th day of August, 1898, by several creditors, all of which were general, and referred to no particular part, subject-matter, or item thereof. No objections or exceptions to said report and account were filed by either the Fourth National Bank of Philadelphia, Pennsylvania, the Yankton National Bank of Yankton, South Dakota, the First National Bank of Marquette, Michigan, the State Bank of Grant County, Wisconsin, or Blanchard Bank of Blanchardville, Wisconsin. An affidavit of Herman A. Wittig, an officer of the Wittig Plumbing Company, a creditor of said bank, dated August 10, 1898, was filed, objecting to the allowance of compensation to the assignee, containing also objections to said account, all of a very general nature, not referring to any particular part, subject, or item thereof. Said Wittig Plumb-

"That the circuit courts are bound in the exercise of their superintending control to confine their action to such process and proceedings as may be legally taken against the tribunals themselves, and in such case the court acts, not in the exercise of appellate, but of original, jurisdiction."

Directly after this it was decided that the supreme court, through its "general superintending control" over inferior courts, would be authorized, in a case where the county court had exceeded its jurisdiction, to remove and quash the proceedings by certiorari. *Ex parte* Buckner, 9 Ark. 73.

The case of *Ex parte* Hunt, 10 Ark. 284, was a habeas corpus proceeding, and has no present significance except that it was here that Justice Scott inserted his entering wedge of mild dissent, which he afterwards drove with such vigor and earnestness as to completely overturn that judicial construction of the provisions of § 2 of the judiciary article of the Constitution, which had existed without interruption from the origin of the state to 1861.

Carnall v. Crawford County, 11 Ark. 604, is the beginning of the overturning just alluded to. Justice Scott, who delivered the opinion, in the beginning of that opinion, in distinguishing *Levy v. Lynchinski*, 8 Ark. 113, more than intimated that there would be no hesitancy in promptly overruling that case should occasion require it, because it was "founded upon a radical misconception of the true character of the powers of superintending control over county courts and justices of the peace which by the Constitution is vested in the circuit courts." The court then proceeded to demolish the doctrine suggested in *State v. Ashley*, 1 Ark. 279, laid down in *Webb v. Hanger*, 1 Ark. 121, and *Ex parte* Anthony, 5 Ark. 358, and adopted in *Levy v. Lynchinski*, 8 Ark. 113, by in terms overruling the last two cases, and asserting as the true doctrine under the provisions of the Constitution that the "powers of superintending control, so far from being all powers of primary and original jurisdiction," were for the most part in their essence and nature revisory powers as well over cases as over tribunals, "and are to be exerted as well upon the one as the other, according to the exigency of the matter to be controlled;" the judge writing the opinion citing his own dissent in *Ex parte* Hunt, 10 Ark. 284, as an authority.

At the same term the supreme court in the case of *Ex parte* Marr, 12 Ark. 84, overruled the doctrine of *Webb v. Hanger*, 1 Ark. 121, and proceeded to lay down the contrary doctrine, that the power of superintending control would

not be exercised by it over the courts inferior to the circuit courts until the applicant had first sought it at the hands of the latter, or could show that that court was incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of some incompetency of its incumbent. At the next term the supreme court again enunciated the new doctrine. *Ex parte* McMeechen, 12 Ark. 70; *Ex parte* Marr, 12 Ark. 87.

The complete overthrow of the former doctrine culminated in the decision of the supreme court in *Ex parte* Allis, 12 Ark. 101, in which it not only reaffirmed the doctrines of *Carnall v. Crawford County*, and the other cases of like import, that the powers of "general superintendency and control" embraced the powers both of original and revisory jurisdiction, and are to be exerted by means of process affecting and running to cases and parties litigant as well as to courts and officers, and that there is an implied and constitutional inhibition upon their exercise by the supreme court until relief first sought in the circuit court, etc., and that the powers should not, except in extreme cases, be exerted so as to conflict with and in effect supersede the appellate jurisdiction of the supreme court; and stated that those doctrines were well-settled in the supreme court of Alabama, and had just been recognized and adopted by the supreme court of Florida,—citing *Ex parte* White, 4 Fla. 165; but concluded a somewhat lengthy opinion by deciding that the supreme court had no original jurisdiction other than such as might be necessary to exercise the general superintendency and control over all the courts, and as part and parcel of those powers of control.

The opinion of the court in the *Carnall* Case, the two *Marr* Cases, and in the *Allis* Case, were each and all written by Mr. Justice Scott, who dissented in *Ex parte* Hunt.

Whatever may be thought as to the correctness of the doctrines promulgated in these decisions, it is suggested that there can be no doubt of that of the definition of Justice Scott in the *Allis* Case, of the power, and of the writs, and their relation, *i. e.*, that, in brief, the power is the thing to be exerted, the writs the means by which it is exercised.

In *Ex parte* Good, 19 Ark. 410, the circuit court had denied an application to admit the prisoners charged with murder to bail. This was an application to the supreme court to grant either a habeas corpus or mandamus to the circuit court to admit them to bail or to sign a bill of exceptions which the circuit court had refused. The supreme court held that it

ing Company had also obtained an order to show cause, returnable at the same time with the hearing upon said account pursuant to the notices given as aforesaid, upon an affidavit of Samuel T. Mock, one of the attorneys for said Wittig Plumbing Company, why said account should not be itemized and particularized as in the affidavit of said Mock set forth, and why the petitioning creditors should not have further time to file objections, and for such other and further relief in the premises as might be just and equitable. Objections were also filed by Dodge County Land Company, Mrs. L. J. Fisher, Louis Fisher, and Nickolaus Knoeschel, creditors of said bank, all of a very general character. None of the objections filed raised any question of fact upon said report and account. The application for the confirmation of the same, the hearing upon

the objections thereto, and said order to show cause came on for hearing, and were heard and fully argued before said court, the respondent presiding, on August 10, 1893. During the discussion reference was made to the matter of compensation to be allowed to the assignee. The respondent then stated that he should not pass upon that question upon the present application, but reserve the same until the rendition of the final account by said assignee at the winding up of the assignment proceedings. The whole contention was thereupon taken under advisement, and entry thereof was made in the minutes of the court as follows: 'Assignee's motion to have his report confirmed, and motion to make said assignee's report more definite and certain, came on to be heard. After hearing respondent's counsel, court takes same under advisement.' After fully investi-

would be the exercise of original jurisdiction for it to issue the habeas corpus, and would be inconsistent with the Hunt, Carnall, Marr, Allis, and Crise Cases. Held that both writs should be refused, but that a certiorari would issue to the circuit court in a proper case made.

An application for mandamus was originally to the supreme court in *Ex parte Crise*, 16 Ark. 193, because there was then no judge of the circuit court. It was denied for not stating certain facts after the circuit judge had been commissioned and qualified. The petitioner sought to renew his application, and to amend his petition wherein it had been held to be defective. The supreme court said: It was "the duty of this court so to exert its revisory power of superintending control as to conflict with its ordinary appellate power as regulated by law as little as may be practically consistent with the stern demands of justice in prevention of irreparable mischief." The court cites the Carnall and Allis Cases.

In 1868 a new constitution was adopted. Up to that time the rule had continued as stated in the cases last referred to. Thereafter in the case of *Price v. Page*, 25 Ark. 527, the judge delivering the opinion of the majority of the court, after taking a good-sized whack at Justice Scott, said: "Under the Constitution of 1836 the circuit court was a creature of the Constitution, . . . and that under the Constitution of 1868 it is a mere creature of the law. Its jurisdiction is now regulated by the will of the legislature." The court said further: "Notwithstanding all this, if there had not been a radical change in the judiciary clause of the Constitution of 1868 we would have deemed it to have been our duty to have sustained the decision in *Ex parte Allis*, even against the judgment of a portion of the bench." Distinguishing *Jones v. Little Rock*, 25 Ark. 284,—then recently decided,—the court stated that the application in that case was for an injunction, and that the authorities there cited and approved (Carnall v. Crawford County, 11 Ark. 604, and kindred cases) were only approved so far as they referred to, and were applicable to, the question then before the court, and called attention to the fact that at the same term, in the case of *Jones v. Little Rock*, which was an application for a mandamus, the court assumed jurisdiction, and disposed of the case on its merits. (If this is a reference to *Jones v. Little Rock*, 25 Ark. 301, where the court exercised its appellate jurisdiction purely, its application is too refined to be clear to ordinary mental vision.) The court also decided that, inasmuch as the words of the Constitution of 1836, which limited the supreme court to appellate jurisdiction only, were left out of, and the power to grant the enumerated writs retained in, the Constitution of 1868, there was an object in doing so, and that that object was that the supreme court should exercise original jurisdiction as to those writs.

This decision was made by a bare majority, Judge Harrison, writing a strong dissent, citing and claiming that the court should follow *Carnall v. Crawford County*, 11 Ark. 604, and *Ex parte Allis*, 12 Ark. 101, and stating that the court since the adoption of the Constitution of 1868 had approved those decisions in *Jones v. Little Rock*, 25 Ark. 284, then recently decided.

Hudson v. Jefferson County Ct. 28 Ark. 359, cites with approval *Price v. Page*, 25 Ark. 527. In 1874 a new constitution was adopted which substantially abrogated the provisions of that of 1868, and restored those of that of 1836.

In *Baxter v. Brooks*, 29 Ark. 173, a case which arose under the Constitution of 1868, but decided after that of 1874 was in force, the three Constitutions and the various decisions under them were discussed and considered. It was a certiorari to the circuit court to review its proceedings in overruling a demurrer to the complaint on the ground that the circuit court had no jurisdiction of the subject-matter in an action brought by Brooks against Baxter to oust the latter from the office of governor and in rendering a judgment of ouster and for a sum of money. The court, in awarding the writ and in doing so asserting that it exercised the power of superintending control, after considering the Woods, Anthony, Carnall, Marr, and Allis Cases, and *Price v. Page*, and *Jones v. Little Rock*, referred to, and *Ex parte Crise*, 16 Ark. 193, and *Ex parte Good*, 10 Ark. 411, most of which arose under the Constitution of 1836, said: "The decision under the Constitution of 1868 first followed these (see *Jones v. Little Rock*, 25 Ark. 284), and afterwards, in the case of *Price v. Page*, 25 Ark. 527, it was held that the Constitution of 1836 and that of 1868 were different in this,—that that of 1836 prohibited all original jurisdiction in this court, while that of 1868 did not, and therefore this court could take original jurisdiction whenever the writs named were the appropriate legal remedy. But upon this question of superintending control there has never been any difference in the construction of the two Constitutions."

To ascertain the correctness of the foregoing statement the profession is referred to *Webb v. Hanger*, 1 Ark. 121, and cases before mentioned, which followed it for thirteen years, and in

gating said account in connection with the orders made and directions given from time to time by respondent as judge of said court in reference to the administration of the said estate, respondent concluded that the same was a full and sufficient account, and that the objections thereto should be overruled, and on the forenoon of May 9, 1899, he so informed Mr. E. H. Bottum, one of the attorneys for the said assignee, and directed him to prepare an order to that effect. On the afternoon of the same day, Mr. E. H. Bottum presented to respondent an order allowing and confirming said account as a full accounting on the part of the assignee for all his actions prior to the 1st day of July, 1898, reserving the question of allowance of compensation to the assignee until the final settlement of the trust. Said order being in accordance with the judgment of the respondent,

he signed the same considering that the same fully disposed of all the matters submitted on August 10, 1898, including the motion of said Wittig Plumbing Company to make said report more definite and certain.

"It is true that the undersigned, on June 9, 1899, as judge of said court, made and entered an order setting aside a certain order made by Frederick Scheiber, court commissioner, for a certain examination at the expense of the estate; and also that he denied application for an order for a general examination of a like character, at the expense of the estate, upon the petition of a number of creditors by M. M. Riley and Mock & Wittig, their attorneys, verified May 18, 1899. It is not true that the respondent has refused to allow the creditors of said bank an opportunity to examine under oath the assignee of said bank concerning his adminis-

which it was decided, among other things, that the supreme court had the same power of superintending control over the county court and justices of the peace as the circuit court, and that, should the party aggrieved prefer the supreme court and present his case before it, it would become its duty to award him the writ if he was legally entitled to it, and to *Es parte Marr*, 12 Ark. 84, and the cases also mentioned which followed it, in which a diametrically opposite doctrine is asserted.

In *Es parte Snoddy*, 44 Ark. 221, the court in denying an application for a mandamus to compel the clerk of the circuit court to effect a change of venue ordered by the latter court after refusal on the part of the clerk to do so on the ground that it could not, in the exercise of superintending control, direct the action of an officer of another court, said: "All courts, and especially the superior courts of original jurisdiction, have within their proper spheres the original control of the operation of their proceedings and the discipline of their recalcitrant officers, subject to correction for error or abuse of discretion, and subject to be set in motion when, having no discretion as to acting, they refuse to act. This is said in reference to superintending control. In aid of appellate proceedings we may send writs of certiorari and habeas corpus to officers and individuals, but our superintending control must be directed to the courts themselves." This case, decided after the Constitution of 1874, which restored the provisions of that of 1836, would seem to be contrary to the provisions of the latter as interpreted in *Carnall v. Crawford County*, 11 Ark. 604, and *Es parte Allis*, 12 Ark. 101, to the effect that the powers of the supreme court are to be exerted by means of process affecting and running to cases and parties as well as to courts and officers.

To sum up what may seem too long a dissertation on the rule in Arkansas:—It would seem that if, as stated in *Price v. Page*, 25 Ark. 527, that but for the interposition of the Constitution of 1868 the doctrine laid down in *Carnall v. Crawford County*, 11 Ark. 604; *Es parte Marr*, 12 Ark. 84; and *Es parte Allis*, 12 Ark. 101, would prevail; and if as stated in *Baxter v. Brooks*, 29 Ark. 178, the Constitution of 1874 has virtually restored the Constitution of 1836,—that those doctrines again prevail, and are the rule in Arkansas, and are substantially:

1. That superintending control may be exerted by writs and process affecting and running to cases and parties litigant, as well as to courts and their incumbents.

2. That the supreme court has no authority

to issue the enumerated and other writs in the exercise of original jurisdiction, but only in aid of its appellate jurisdiction, and in the exercise of superintending control.

3. That the supreme court not only will not exercise superintending control over a tribunal inferior to the circuit court until the application therefor has shown that the latter court is incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of some incompetency of its incumbent, but that it is under an implied and constitutional inhibition not to do so.

It is believed that the first of the foregoing propositions is not acquiesced in by the ultimate courts of all of the states; that the second is denied in all except Alabama and Arkansas; and that the third is generally accepted as correct.

The circuit court, or a judge thereof who obstinately refuses to perform any of the duties required of him by law, may be compelled thereto by mandamus from the supreme court in the exercise of its constitutional control over inferior tribunals. *Es parte Trapnall*, 6 Ark. 9, 42 Am. Dec. 676; *Es parte Allston*, 17 Ark. 580.

Where no appeal lies from the county court to the circuit court an order of the latter dismissing the cause will be affirmed. Certiorari is the proper remedy. *Es parte Couch*, 14 Ark. 387.

The supreme court granted a habeas corpus because there was no subordinate tribunal competent to give the relief sought, and without the interposition of the court in the exercise of its constitutional powers of superintending control there would be a failure of justice. *Es parte Robins*, 15 Ark. 402.

Where proceedings in the county court to establish a ferry are erroneous, the proper method of procedure is to put on record by bill of exceptions sufficient of the evidence to show the errors complained of, and then invoke the appellate jurisdiction of the circuit court by writ of certiorari according to the doctrine laid down in the *Couch* and *Carnall* Cases. *Lindsay v. Lindley*, 20 Ark. 578.

An application made to the supreme court for a certiorari to a justice of the peace because the circuit judge was abin to the petitioner was denied because: (1) The degree of relation was not shown; and, (2) it appeared that the justice had jurisdiction. *Es parte Allston*, 17 Ark. 580.

Until the legislature restricts it, the circuit court is clothed with all powers which were con-

tration as such assignee, and to allow opportunity for filing objections by creditors to the assignee's account filed on the 1st day of July, 1898, and a hearing on such objections. All creditors were duly notified of the filing of said account, and of the application for the confirmation thereof, to be heard on the 10th day of August, 1898, and then had full opportunity of filing objections thereto, and being heard upon the same. All the objections filed related wholly to the sufficiency in form of said account, and no questions of fact were raised thereon. No application of any kind was made for the examination of the assignee, or taking of testimony upon said account, until after the same had been confirmed, as hereinbefore stated. The orders then asked for were not based upon any objections to any particular portions of said account, or any particular

acts of the assignee, but asked the court to authorize a general examination of the assignee and other parties, at the expense of the estate, as to all transactions during the whole period of the six-years administration, very many of which transactions had been had and had taken place under the orders and express directions of the court, and which remained of record. A general examination, so conducted before a court commissioner, would necessarily consume a great deal of time, be cumbersome, and involve very great expense.

"It has been represented to the respondent, and it has not been denied, that all the creditors and their attorneys have had free access at all times to all the books of the bank and the books kept by the assignee; that it is, in the judgment of this respondent, impracticable in a business of so large an ex-

ferred upon it by the Constitution of 1836. *Floyd v. Glibreath*, 27 Ark. 675.

(Does not this militate against the statement of McClure, J., in *Price v. Page*, 25 Ark. 527?)

A certiorari was issued to test the legality of a tax levy. An objection was made: (1) That the court had no jurisdiction to issue, hear, and determine the writ; (2) that the plaintiffs have a remedy by appeal; (3) the circuit court has sole and exclusive jurisdiction to supervise and control the judgment of the county court, and the supreme courts have none until there has been an application to, and refusal to act by, said court. The first and third objections were overruled on the authority of *Price v. Page*, 25 Ark. 527. *Hudson v. Jefferson County Ct.* 28 Ark. 359.

The circuit court had issued a certiorari to the county court to review the action of the latter in issuing county bonds. The supreme court held that the circuit court had jurisdiction to issue its certiorari by virtue of its superintending control granted it by the Constitution. This decision would seem to have been made under the Constitution of 1874. *McKay v. Jones*, 30 Ark. 148.

A petition had been made to the county court for the removal of the county seat. The circuit court had issued a certiorari to bring before it the order of the county court and the returns of the election held by virtue of the order. The relators herein opposed the application for want of jurisdiction of the circuit judge over the subject-matter. The circuit court stayed the proceedings of the county court with a supersedeas, and this was an application for a prohibition restraining the circuit court from proceeding on the certiorari. Prohibition was made peremptory, and the supersedeas vacated on the ground that the county court had exclusive original jurisdiction of the subject-matter, and in such case the superintending control of the circuit court over the county court did not obtain. *Russell v. Jacoway*, 33 Ark. 191.

The circuit court issued a mandamus commanding a sheriff to accept in payment of an execution upon a judgment in favor of the county certain county script. The sheriff appealed, and the supreme court reversed the judgment and remanded the cause, and instructed the circuit court to dismiss the petition for want of jurisdiction. *Hinkle v. Bail*, 34 Ark. 177.

The petitioner was defendant in an action in the circuit court in which judgment had been rendered against her. She had prayed an appeal in the circuit court, which the latter had refused. The court, in awarding a peremptory

writ of mandamus, said: "This court has the general superintending control over all inferior courts of law or equity in aid of which it can issue, hear, and determine writs of mandamus." *McCreary v. Rogers*, 35 Ark. 298.

In an application for a mandamus to compel the chancery court to award an interlocutory injunction under the special act of March 23, 1881, providing that when an application for an injunction is refused the chancellor or court shall certify such refusal to the supreme court, and if, upon examination, the supreme court should be satisfied that the injunction should issue, it should award a mandamus to the judge, chancellor, or inferior court to grant it, the writ was denied. *Ex parte Batesville & B. R. Co.* 39 Ark. 82.

The petitioner had been indicted for the crime of murder in the circuit court. He applied to the circuit judge for bail, which was refused. He then applied to the supreme court for a certiorari to bring up the transcript to the circuit court that the order of the circuit judge refusing bail might be reviewed. The court held that, in the exercise of its constitutional power of superintending control over an inferior tribunal it could review on certiorari the decision of the circuit court refusing bail. Certiorari was issued. *Ex parte Harbour*, 39 Ark. 126.

The record of allowance in the probate court against the estate of which Wylds was administrator in favor of Baskins was removed by certiorari into the circuit court, and the judgment of allowance quashed, and the claimant appealed to this court. The court held that certiorari could not be used by the circuit court under their appellate power and superintending control for the mere correction of errors therein as a substitute for appeal; but when it appears from the face of the record of the inferior court that it has no jurisdiction of the subject-matter or the person, its judgment may be quashed on certiorari by the circuit court. The judgment of the circuit court quashing the judgment of allowance of the probate court was affirmed. *Baskins v. Wylds*, 39 Ark. 347.

An application was made for a certiorari to the chancery court to quash an order reviving an injunction pending an appeal from an order of the chancery court dissolving the injunction and dismissing the complaint for want of equity. Certiorari was dismissed. *Payne v. McCabe*, 37 Ark. 318.

A writ of mandamus was refused to compel the chancery court to cause its clerk to do a certain ministerial act on the ground that in such case it was unnecessary, and the writ only

tent as that of the Plankinton Bank and its assigneeship, to render an account so complete and in detail that it will not require reference, more or less, to the books of the bank for explanation; that it would be a very great abuse to allow all the transactions of the assignee, from the beginning of his trust, to be gone into and investigated in the form of testimony, involving, at the expense of the estate, a very great outlay without compensatory benefit. Creditors should avail themselves of their opportunity to examine the books of the assignee, and thereupon present to the court specific objections or points upon which investigation is desired or sought, giving the court an opportunity to determine if any, and what form of, examination is required.

"The applications have been made under § 1693b of the Revised Statutes, providing for

lies in a case of necessity. *Basham v. Carroll*, 44 Ark. 284.

Upon a certiorari to the circuit court to review its action in habeas corpus proceedings, it was held that to review the action of the circuit court it would be necessary to consider the admissibility and competency of evidence to be introduced on the trial of the relator for an offense; that this could not be done on a review of the habeas corpus; and petition was denied. There is no mention of superintending control. *Ex parte Perdue*, 58 Ark. 285, 24 S. W. 423.

Colorado.

"The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." Colo. Const. art. 6, § 2.

"It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same." Id. § 3.

"The district courts shall have original jurisdiction of all causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law. They shall have original jurisdiction to determine all controversies upon relation of any person on behalf of the people, concerning the rights, duties, and liabilities of railroad, telegraph, or toll-road companies or corporations." Id. § 11.

The statutes seem to confer no other or different jurisdiction on either court.

An application was made for a mandamus to compel the respondent, judge of the judicial district, to recognize one Green as prosecuting attorney of that district. Green had been elected in September, 1870, prosecuting attorney of the third district at the December term. The respondent then presiding as judge refused to recognize Green because he was not an attorney of the court. It was admitted that at the date of the election Green was not a licensed attorney. The proceeding was against the chief justice of the supreme court, and the other two judges were not agreed upon the principal point, and therefore the writ was denied. Both the latter judges delivered opinions. Belford opposed to the granting of the writ and Wells in favor of it. Wells at the opening of his opinion says: "Although I at first doubted, I am now satisfied that the court has jurisdiction to entertain this application; the court to which the writ was prayed is within the supervisory

the inspection of the books of the assignor, and for his examination. No proper case for such an examination has, in the judgment of the respondent, been shown, nor do the circumstances of the Plankinton Bank, as they are known to respondent from the course of the administration of the assigneeship under his supervision, call for such an examination. Said bank has practically ceased to exist from the making of said assignment. There is no claim or pretense that it has withheld from the assignee any of its assets, or any of its books or papers, or has had any dealings with the same subsequent to that time.

"The indebtedness of said assignor, as to which examination is asked for, has long since become *res judicata* under the operation of Rev. Stat. §§ 1699, 1700. No subject-matter as to the property of the assignor for which inquiry of the assignor is

jurisdiction of this court; the duty sought to be enforced is of public concern, and is not judicial in its nature, nor one about which that court is called upon to exercise a discretion." His opinion concludes as follows: "I am of opinion that Mr. Green was unlawfully excluded from the office of district attorney, and that a peremptory mandamus ought to issue according to the prayer of the relator." *People ex rel. Baxter v. Hallett*, 1 Colo. 352.

The petitioners were members of the city council of Leadville. They had preferred charges as such against the city solicitor, and were proceeding to consider the same. They were acting in the manner provided by ordinance, and the ordinance was passed in accordance with law. The district judge upon petition granted an order commanding the members of the city council to show cause why a writ of prohibition should not issue, and directing that further proceedings by them be stayed until the hearing thereof. The examination of charges preferred against the solicitor, finding him guilty of malfeasance in office and removing him therefrom, by the city council, was not the exercise of judicial power. The court below had taken jurisdiction of the contempt case, tried the petitioners and adjudged them guilty of contempt, had deferred sentence, but threatened to pronounce it. The supreme court held that the district court had no jurisdiction, either to issue the original order, or to punish the petitioners for contempt, and granted a writ of prohibition. *People ex rel. Dougan v. Lake County Dist. Ct.* 6 Colo. 534.

The court after adopting what it claims was decided in *Vall v. Dinning*, 44 Mo. 214, and *Ex parte Allis*, 12 Ark. 116, that the expression "and other original and remedial writs" should be construed to mean writs of like nature, and holding that the power to issue the writs mentioned in § 3 was not conferred solely to promote the efficient exercise of the authority given in the preceding section; that these writs were only to be used in aid of the appellate jurisdiction or in effectuating the general superintending control over inferior courts,—held further that the declaration in § 2, "except as otherwise provided in this Constitution," implies the conferring of some independent original jurisdiction; that at least two of the writs designated in § 3 cannot be used in aid of appellate jurisdiction, nor are they appropriate to the exercise of a superintending control over inferior courts; that the appellate jurisdiction and superintending control, each without any express provision on the subject, carries with it authority to issue all writs appropriately con-

desired is mentioned, nor is the officer of the assignor named who has, or is supposed to have, information concerning the same. Application for such examination being first made six years after the date of the assignment, it is due that a reasonable necessity therefor should be shown, and reasonable limits prescribed.

"In answer to the specific commands contained in said alternative writ, this respondent respectfully informs this court that he has not complied with the same, and, showing cause for such noncompliance, answers the several commands as follows: First. The command 'to allow the creditors of the Plankinton Bank, through or by their duly-authorized attorneys, to fully examine, under oath, before such court, William Plankinton, as assignee of such bank, concerning his administration as such assignee.' Respondent

has omitted to comply with such command for the reason that no proper foundations for such an examination have been laid, as hereinbefore stated, and that said account stands confirmed by the order of this court. Second. The command 'to take and consider all proper evidence offered regarding such objections.' Respondent has omitted to comply with this command for the reason that no objections were filed which required the taking of testimony, and no proper foundation is laid therefor, and that said account stands confirmed by the order of this court. Third. The command 'to allow such creditors, by their duly-authorized attorneys, to inspect the books of the assignor.' Respondent has omitted to make any order in this respect for the reason that none is required. All the books and papers of the assignor were delivered to the assignee at the time of

nected with the proper performance of the duties imposed; and finally held that the writs mentioned in the constitutional provision, § 3, were intended to furnish the supreme court with an equipment powerful for the protection of the sovereign rights and interests of the state at large, and hence possess a leading prerogative feature. The court said further: "We are clearly of the opinion that original jurisdiction should be here entertained only in cases involving questions *publici juris*, and that the writs from this court should in general be put only to prerogative uses." *Wheeler v. Northern Colorado Irrig. Co.* 9 Colo. 248, 11 Pac. 108.

"The 'superintending control' given by the constitutional provision . . . refers primarily to courts, not to parties or cases. Its purpose is to keep the courts themselves within bounds, and to insure the harmonious working of our judicial system. It was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction; and, in so far as the rights of suitors in particular causes may be affected, the effect is incidental purely. To say that the 'superintending control' was intended to include ordinary appellate power is to render the preceding clauses superfluous in so far as they constitute a grant of such power." *People v. Richmond*, 16 Colo. 274, 26 Pac. 929.

One Kaufman, a defendant in an execution, had been arrested and confined in the jail, and thereafter had filed his petition in the district court for a writ of habeas corpus alleging that he was unlawfully detained by the sheriff. The sheriff made return in the district court, by which it appeared that the execution was duly issued by the county court upon a judgment in an action therein, of which that court had jurisdiction, and authority to issue such an execution. The district court discharged the petitioner, and entered judgment against the respondent for costs. The petitioner in this proceeding thereupon sued out a certiorari from this court to the district court, and upon the hearing the court annulled the judgment of the district court, and in doing so said: "From the application for the writ of habeas corpus and the return thereto it appeared that petitioner was restrained of his liberty under a process in proper form issued in a case where the law allows process for imprisonment to issue by a court legally constituted, and upon a judgment valid upon its face, and attempted to be impeached only by the averment of facts *dehors* the record, and not cognizable by the court on habeas corpus. Upon this showing the court below was not authorized to interfere
31 L. R. A.

with the custody of petitioner, and in discharging him it exceeded its jurisdiction." *People ex rel. Burchinell v. Arapahoe County Dist. Ct.* 22 Colo. 422, 45 Pac. 402.

Original application was made to the supreme court for a writ of prohibition. An indictment for murder was pending in the district court. The cause had been set for trial against the objection of the state; the district attorney moved for a continuance upon the ground of public excitement at the place of trial. The application for a continuance having been overruled the state filed an application for a change of judges, basing this application upon the alleged prejudice of the presiding judge of the district of which the county formed a part. This application having been overruled the district attorney thereupon filed a *nolle prosequi*, and requested the court to dismiss the cause. Thereupon the court refused to dismiss the proceedings, and, being about to impanel a jury for the trial of the defendants upon the charge of murder, the attorney general applied to the supreme court for a writ of prohibition to prevent the district court from proceeding. The supreme court held that the district attorney had power to discontinue any criminal cause without the consent of the court, and that prohibition would lie to restrain a district court from trying a criminal cause after the district attorney had entered a *nolle prosequi* therein, and a temporary writ of prohibition was ordered to issue. *People ex rel. Atty. Gen. v. Lake County Dist. Ct.* 23 Colo. 466, 48 Pac. 500.

After a verdict on issues for the plaintiff in a divorce action a motion was made to set aside the verdict, and for a new trial. The motion was overruled, and, the case coming on further to be heard, the judge rendered a decision to the effect that the plaintiff in the suit was entitled to a decree, and that the defendant should be awarded the sum of \$5,000 as permanent alimony. Plaintiff had previously been required to pay for the use of the defendant the sum of \$500 counsel fees, and also alimony *pendente lite*, first at \$75, and then at \$100, per month. It affirmatively appeared that all these sums had been paid prior to the time that the case was reached for judgment. Respondent, after outlining his decree, refused to enter the same unless \$1,000 of the \$5,000 awarded the defendant should be first paid, and afterwards prepared a written decree inserting said condition therein, but refusing to sign the same until the condition should be complied with. This was an original application for a writ of mandamus commanding the respondent as one of the

the assignment, and have been open to the inspection of all creditors and their duly-authorized attorneys at all reasonable times since said assignment. Fourth. The command 'to fully examine, under oath, before the respondent as such judge, or before said court, or some judicial officer authorized to act in such matters, under § 1693b of the Revised Statutes, the officers and directors of the assignor as to the business affairs and condition of the assignor before and after the making of the assignment, as to all matters appertaining to the assigned property and the assignor's indebtedness.' Respondent has omitted to make any order for such an examination under the statute referred to for the reason that no proper application therefor has been made, and no occasion therefor has been shown to exist, as hereinbefore stated, and for the further reason

that there was not sufficient time to comply with any of said orders before the return day of said writs, said time being limited to two days, not counting Sunday."

To this return the petitioning creditors made answer as follows: "(1) Relators allege that the order of May 10, 1899, made by the respondent, referring the account of the assignee of the Plankinton Bank since July 1, 1898, was made without authority of law, and deny that any order was made and filed directing the assignee to file an account with the referee. (2) Relators deny that any such account as is required by the statutes has ever been filed by said assignee, and allege that the account filed was and is insufficient, indefinite, and uncertain, and wholly fails to comply with the requirements of Rev. Stat. § 1701. (3) Relators allege that the objections made and filed by the creditors to the

judges of the second judicial district to enter a decree in a case pending in the court. The court said: "At an earlier period in the case the court refused to proceed until its order in reference to alimony *pendente lite* had been fully complied with. Its right to impose such condition is undisputed, the plaintiff being able to comply. But, as we have seen, at that time the case was ripe for a final decree; all former orders of the court had been fully complied with. It will be time enough to enforce the provisions of the proposed final decree when in fact it becomes the decree of the court. The district court by its conduct is placed in the attitude of refusing to proceed to judgment in the cause. While the writ of mandamus cannot be issued to control judicial discretion, it may properly be invoked to command a subordinate court to proceed to judgment, as is prayed in this case." Peremptory writ issued. *People ex rel. Rosenfeld v. Graham*, 16 Colo. 347, 26 Pac. 936.

Application was made for a writ of certiorari. The court said: "The court of appeals had exclusive jurisdiction of the appeal, and the power to review and revise the judgment of the court below, and if satisfied, from an examination of the record, that an error in weighing the facts or applying the law had been committed, to reverse and remand the cause for a new trial. We cannot for a moment admit that if, in the performance of its duty, it should commit an error in respect to the matter now complained of, that this court would have any right to interfere under the guise of its supervisory power over subordinate judicial tribunals." *People ex rel. Baxter v. Court of Appeals*, 24 Colo. 186, 49 Pac. 36.

The complaint in an equity action stated that the plaintiff was president of a Christian temperance union interested in the moral, material, and financial welfare of the city where she resided, and in that of her children; that it was her interest that the city be made, as far as possible, a peaceable, law-loving and order-abiding community, to the end that the husbands and fathers might not be led astray by the unlawful devices and practices carried on by the defendants; that she was a property owner in the city, and it was her interest that the moral and financial interests might be protected; that the defendants were the owners and engaged in the operation of gambling rooms used for the purposes of gambling openly in direct violation of the statutes of the state, to the detriment of the well-being and good order, the deterioration of the moral tone, of the community, and the detriment and destruction of § 1 L. R. A.

plaintiff's financial and moral interests; and that the officers whose duty it was to enforce the said statutes refused to interfere with the illegal conduct of the defendants; and prayed an injunction. Upon the filing of the complaint a temporary injunction was issued *ex parte*, a demurrer to the complaint was interposed and overruled, and a motion to dissolve the injunction denied. Whereupon the relators, the defendants in the action, applied to the supreme court for a writ of prohibition to restrain the district court from further proceeding in the case. It was claimed on the part of the respondent that the question as to whether or not the court below erred in granting or refusing to dissolve the writ could only be determined on writ of error after final judgment was rendered in the cause. The court held that a court of equity had no jurisdiction to prevent a criminal act merely because it is criminal, that the court below had assumed unwarranted jurisdiction, or exceeded its legitimate powers, in issuing the injunction complained of, and that the defendants were without any other speedy and adequate remedy through the ordinary modes prescribed by law; and granted the writ of prohibition restraining the district court from further proceeding in the case. *People ex rel. L'Abbe v. Lake County Dist. Ct.* 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604.

The foregoing is another notable instance of the exercise of superintending control without mentioning it as such; and also as to when and under what circumstances the superior tribunal will exercise the power of superintending control over the inferior court by prohibiting its further action, even where there is a remedy by appeal, for the reason that such remedy is not plain, speedy, and adequate; and in this respect is very much like *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494.

A petition to the supreme court for a certiorari to be directed to the court of appeals averred that the latter court disregarded its own rules, and refused to follow the practice therein prescribed. Upon demurrer to the petition the supreme court held that such a case did not come within either of the instances in which its power of superintending control should be exercised. *Ingersoll v. Colorado Ct. of Appeals (Colo.)* 61 Pac. 594.

The power of superintending control granted to the supreme court over inferior courts by the Constitution will be exercised by it: (1) When

assignee's report are sufficient, and not too general, in view of the nature and character of said report, and that the motion to make said report more definite and certain was expressly made, as appears on the face of the petition, for the purpose of enabling the creditors to make further and more specific objections to said report and account, and that said creditors were entitled to have said motion determined and passed upon by respondent before the motion to confirm said account was determined; and relators allege that the objections to such report and account filed by the creditors raised issues of fact as to said report and account. (4) Relators deny that said objections so made and filed by creditors were ever passed upon by respondent, and allege that the only matters taken under advisement on the 10th day of August, 1898, as shown by the record, were

the motion to confirm the report, and the motion to make the same more definite and certain, and to allow the creditors more time in which to file additional objections. (5) Relators deny that the order made by Frederick Scheiber, as court commissioner, directed an examination of the assignor or assignee at the expense of the estate, and allege that the application upon which said order was made is based upon the provisions of Rev. Stat. § 1693b. (6) Relators allege that the respondent did, by an order dated June 14, 1899, deny the applications of certain creditors for leave to examine the assignor and assignee. (7) Relators deny that creditors have, since the denial by respondent of the motion to make such report more definite and certain, had any opportunity to file objections to said report, or to be heard in regard to the same. (8) Relators deny that

the court of appeals is without jurisdiction to review the judgment in question; (2) when, in a clear case, it refuses to be guided or controlled by the law as laid down in the prior decisions of the supreme court.

But it will not be exercised to correct errors in law. *People ex rel. Green v. Colorado Ct. of Appeals* (Colo.) 61 Pac. 592.

Under its general superintending control over inferior courts, conferred by Colo. Const. art. 6, § 2, the supreme court has no power to review on certiorari a judgment of the court of appeals in a habeas corpus proceeding to determine the right to the custody of a child, as between the father and relatives of the deceased mother, upon the theory that the court applied a rule of law at variance with the settled doctrine upon the subject, where the court had jurisdiction to determine the question, and its judgment was not in conflict with any prior decision of the supreme court. *Ibid.*

Iowa.
"The supreme court . . . shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state." Iowa Const. art. 5, § 4.

"The district court shall . . . have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law." *Id.* § 6.

No additional statutory jurisdiction to supreme court.

"The district court shall have general, original, and exclusive jurisdiction of all actions, proceedings, and remedies, both civil and criminal . . . [except when conferred by constitution on other courts], and shall have and exercise all the powers usually possessed and exercised by courts of record. It shall also possess and exercise jurisdiction in all appeals and writs of error taken in civil and criminal actions and special proceedings authorized to be taken from all inferior courts, tribunals, boards or officers under any provisions of the laws of this state, and shall have a general supervision thereof in all matters, to prevent and correct abuses, where no other remedy is provided." Iowa Code 1897, chap. 5, § 225.

The district courts have, in the absence of any statute, power to award writs of certiorari to bring before it causes pending before a justice of the peace. The district court had granted a motion to dismiss the proceedings for the reason that a case had not been presented to authorize the granting of the writ in pursuance of the statute. (The statutes practically make certiorari an appeal.) *The su- 51 L. R. A.*

preme court held that this was a common-law certiorari, and that the district court erred in dismissing the writ. *Helmich v. Johnson, Morris* (Iowa) 89.

"The supreme court of Iowa has no jurisdiction to issue a mandamus. It is a court of appellate jurisdiction. Iowa Rev. Stat. § 2631; Const. art. 5, § 4.

"A writ of mandamus . . . issues from the district court." Iowa Rev. Stat. § 8761.

"It may also be issued by the supreme court to any district court if necessary: and also in any other case where it is found necessary to enable it to exercise its legitimate power." *Id.* § 8764.

The express grant of the power in enumerated cases implies a negation of it in those not mentioned. *Westbrook v. Wicks*, 36 Iowa, 382.

The circuit, and not the district, court has power to issue and determine certiorari in civil matters. *Keniston v. Hewitt*, 48 Iowa, 679.

Kentucky.

"The court of appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions." Ky. Const. 1892, § 110.

"The jurisdiction of the circuit court shall be and remain as now established." The General Assembly has power to change it. *Id.* § 126.

There is no additional jurisdiction by statute.

Actions had been commenced by one appellant before the other, a justice of the peace, for enforcing in each case a penalty denounced by a statute claimed by the appellees to be unconstitutional, and therefore void. They instituted proceedings in the circuit court for prohibition. That court rendered judgment for prohibition, and the appellants appealed to the supreme court. The latter court, in describing the authority of the circuit court in prohibition said: "Prohibition, being a useful and usual common-law remedy, should be deemed applicable and proper here, unless abolished by statute or desuetude, or deemed inconsistent with our peculiar institutions. It has not been abolished by any positive enactments; nor can we perceive any reason for considering it either obsolete or incongruous. Wherefore we do not feel authorized to decide otherwise than that it is still here an existing legal remedy in an appropriate case."

According to the common law, superior courts are entitled to a general superintendence over all subordinate courts for the purpose of keeping them in their prescribed sphere, and of preventing usurpation. In this commonwealth the circuit courts bear towards the county courts and justices of the peace a relation of superior-

all objections filed to said report relate wholly to the insufficiency in form of said report or account, and allege that issues of fact were specifically raised by said objections. (9) Relators allege that the orders asked for, permitting the examination of the assignor and assignee, were based upon the objections filed to said account, and to specific items thereof. (10) Relators allege that attorneys for the creditors have requested, and been refused by said assignee, information relative to the contents of said report and account. (11) Relators, further answering, show to the court that as to all matters hereinbefore referred to, and for the evidence as to proof of each and every allegation, denial, and statement of fact herein, relators hereby refer to the record in the above-entitled matter, and in the matter of the assignment of the Plankinton Bank, now on file in

this court; and said records, and each and every part thereof, are hereby for all proper purposes made a part of this answer."

Upon the filing of the answer motion was made by counsel for the circuit judge to send the issues of fact raised by the answer to the circuit court of Milwaukee county for trial under the provisions of § 3452, Rev. Stat. 1898, but the motion was denied, and the hearing proceeded upon the record, and the matter was taken under advisement until the 5th of July following, when judgment was entered adjudging that the alternative writ of mandamus be made peremptory, and that the record sent up in response to the writ of certiorari be returned to the clerk. At the same time the following statement of the conclusion reached by the court was filed:

"In this case it is decided:

"(1) That the account filed by the as-

ity resembling in all its essential particulars that of the King's bench over the inferior tribunals of England, and are the only courts of original jurisdiction in which the common-law suit in prohibition could be maintained. Consequently, it seems to us that in such a case as this the circuit court had jurisdiction if any court had. *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669.

The mere fact that an inferior court is attempting to exercise control over a cause of which it has no jurisdiction is a sufficient ground for a writ of prohibition. *Newport News & M. Valley Co. v. McBrayer*, 15 Ky. L. Rep. 399.

Although the writ of mandamus as defined and treated in the Civil Code cannot in any case be issued by the court of appeals, which is of appellate and not of original jurisdiction, its power to issue writs, when there is a right and no other specific remedy directed even to an inferior court of judicature within its jurisdiction, still exists as it did before the adoption of the Civil Code. *Vance v. Field*, 89 Ky. 178, 12 S. W. 190.

From the foregoing it would seem that in Kentucky the court of appeals since the adoption of the Constitution of 1892 has power to issue such writs as may be necessary to give it a general control of inferior jurisdictions; and that the circuit court, by virtue of its authority as a court of original jurisdiction, is entitled to a general superintendence over all subordinate courts for the purpose of keeping them in their prescribed spheres, and of preventing usurpation.

An action was brought against the appellant in the county court when he moved to quash the summons, but his motion was overruled. He then demurred to the information, and, the demurrer having been overruled, he applied to the common-pleas court for a writ of prohibition against the county attorney and the court, forbidding them to take any further action in the proceeding against him. The common-pleas court sustained a demurrer to the writ of prohibition, and dismissed it, and this was an appeal from that judgment. The court of appeals held that the writ should have been issued; and reversed the judgment, and remanded the cause with directions to overrule the demurrer. *Pennington v. Woolfolk*, 79 Ky. 13.

It was held, prior to the adoption of the present Constitution, that there could be a proceeding in this court (court of appeals) for prohibition only in a case in which, in the exercise of appellate jurisdiction, it has the power of controlling the inferior court by a direct revision 51 L. R. A.

of its judicial acts. But it seems to have been intended by the clause of the Constitution which provides that the court of appeals "shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions," which was not in the old Constitution, to give to the court of appeals plenary power to issue writs in every case necessary to give it control of inferior jurisdictions. *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006. Louisiana.

"The supreme court shall have control and general supervision over all inferior courts. They shall have power to issue writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs." La. Const. 1879, art. 90.

From its organization to the adoption of art. 90 of the Constitution of 1879, the supreme court repeatedly and uniformly disclaimed and refused to exercise any general superintending control over the proceedings of inferior tribunals, and held that it could interpose its authority only when such interposition was necessary for the maintenance of appellate jurisdiction. *Lavery v. Duplessis*, 3 Mart. (La.) 42; *State v. Esmault*, 12 Mart. (La.) 488; *Winn v. Scott*, 2 La. 88; *Macarty's Succession*, 2 La. Ann. 979; *State v. First Dist. Judge*, 19 La. 183; *Whipple's Succession*, 2 La. Ann. 236; *State v. Watts*, 8 La. 80; *State v. New Orleans Dist. Judge*, 8 La. Ann. 92; *State ex rel. Henly v. Reynolds*, 8 La. Ann. 288; *State v. East Baton Rouge Dist. Judges*, 9 La. Ann. 522; *State v. Sixth Dist. Judge*, 12 La. Ann. 405; *State ex rel. Foulhouse v. New Orleans Dist. Judge*, 12 La. Ann. 513; *State v. Bermudez*, 14 La. 478; *State ex rel. De Meza v. Orleans Dist. Judge*, 21 La. Ann. 123.

Previous to the adoption of the Constitution of 1879, art. 90, which gives to the supreme court "control and general supervision" over all inferior courts, the legislature had adopted a Code of Practice, and in a case arising just before the Constitution of 1879 the supreme court decided that arts. 820, 821, of that Code were sufficiently broad, and would authorize the writ of mandamus if the court were not restrained by the constitutional provision which declared that its jurisdiction is appellate only. *State ex rel. Padron v. St. Bernard Judge*, 31 La. Ann. 794.

In the first case after the Constitution of 1879 took effect the supreme court held that, from the context of art. 90, it was clear that its power thereunder could only be expressed through the medium of the stated writs, that that article vitalized the provisions of the Code

signee July 1, 1898, is not the final report and account contemplated and required by Rev. Stat. 1898, § 1701.

"(2) A final order settling an assignee's account, under Rev. Stat. § 1701, cannot properly be made until the duties of the trust have been fully performed. *Magnus v. Sleeper*, 60 Wis. 219, 34 N. W. 149.

"(3) Not only was the account which was filed July 1, 1898, not in fact a final account, under Rev. Stat. 1898, § 1701, but it was not so treated upon the hearing by the circuit court, for it appears by the return that upon said hearing, August 10, 1898, the judge of that court expressly recognized the same as merely an interlocutory account by stating that he reserved certain matters until the rendition of a 'future final account by the assignee and the winding up of the assignment proceedings;' and the creditors acted

thereafter under the belief that a final account was thereafter to be filed under the entry of the order of May 9, 1899, without notice, which purports to approve said account as a final account.

"(4) No final report and account, within the meaning of the statute, having been filed, the rights of the creditors to have an inspection of the books or the assignor, and an examination of the assignor and other witnesses under § 1693b, were absolute, and not discretionary.

"(5) Aside from the statute, the right of a creditor to have an examination of the assignee under oath as to his dealings with the estate, under reasonable restrictions, is absolute, and a refusal to allow such examination prior to the approval of the final account can only be regarded as an abuse of discretion.

of Practice mentioned in the case last cited; and that the court had jurisdiction to issue a mandamus to allow an injunction *in limine* whenever a proper state of facts was presented. *State ex rel. New Orleans v. Sixth Dist. Judge*, 32 La. Ann. 549.

Since then the supreme court has uniformly exercised the power conferred by art. 90 of the Constitution of 1879, or asserted its authority to do so under the varying circumstances shown in the following cases: *State ex rel. Cobb v. Circuit Court of Appeals Judges*, 32 La. Ann. 774; *State ex rel. Marks v. Third Dist. Judge*, 32 La. Ann. 296; *State ex rel. New Orleans v. Sixth Dist. Judge*, 32 La. Ann. 549; *State ex rel. De Buys v. Orleans Dist. Judges*, 32 La. Ann. 1256; *State ex rel. Sinnott v. Falls*, 32 La. Ann. 553; *State ex rel. Berthoud v. Jefferson Dist. Judge*, 34 La. Ann. 782; *State ex rel. Morgan & L. & T. R. & S. S. Co. v. Twenty-first Dist. Judge*, 36 La. Ann. 392; *State ex rel. Murray v. Lazarus*, 36 La. Ann. 578; *State ex rel. New Orleans Gaslight Co. v. New Orleans City Judge*, 37 La. Ann. 285; *State ex rel. Wood v. New Orleans City Judge*, 38 La. Ann. 377; *State ex rel. Hirsch v. St. Mary Dist. Judge*, 39 La. Ann. 97, 1 So. 281; *State ex rel. Henderson v. McCrea*, 40 La. Ann. 20, 3 So. 380; *State ex rel. Cohen v. Ellis*, 41 La. Ann. 41, 6 So. 55; *State v. Carreau*, 45 La. Ann. 1416, 14 So. 292; *State ex rel. Rochel v. Orleans Dist. Judge*, 45 La. Ann. 532, 12 So. 941; *State ex rel. Waller v. Fowler*, 47 La. Ann. 27, 16 So. 565; *State ex rel. Lyons v. Circuit Court of Appeals*, 49 La. Ann. 1221, 22 So. 368; *State ex rel. Crozier v. Rost*, 49 La. Ann. 1451, 22 So. 421; *State ex rel. Babin v. Voorhies*, 49 La. Ann. 1717, 23 So. 107; *State ex rel. Moore v. Hingle*, 50 La. Ann. 683, 23 So. 616; *State ex rel. New Iberia Teleph. Exch. Co. v. Voorhies*, 50 La. Ann. 671, 23 So. 871; *State ex rel. Bivoire v. St. Paul (La.)* 28 So. 973.

In *State ex rel. Wints v. Orleans Dist. Judge*, 32 La. Ann. 1222, the court said: "We are thoroughly satisfied the Constitution intended that our supervisory jurisdiction should be distinct in nature as well as in name from our appellate jurisdiction. The former was intended simply to enable us to compel inferior courts to perform their functions, to prevent them from exceeding the bounds of their jurisdiction, and to enforce the observance of that regularity in their proceedings which is essential to fairness in the conduct of contradictory litigation." It is hardly necessary to state that the first of these is accomplished by mandamus, the second by prohibition, and the third by certiorari.

The supreme court alone is vested with "con-

trol and general supervision" over inferior courts; but every appellate court has power to issue writs of mandamus, prohibition, and certiorari in aid of its appellate jurisdiction.

The court was unanimous on the above proposition, but divided on the question whether this was a case for the exercise, the majority holding that it was not. *State ex rel. Rocchi v. Orleans Dist. Judge*, 45 La. Ann. 532, 12 So. 941. To the same effect, are *State ex rel. Hirsch v. St. Mary Dist. Judge*, 39 La. Ann. 97, 1 So. 281; *State ex rel. Babin v. Voorhies*, 49 La. Ann. 1717, 23 So. 107.

But when the circuit courts are vested with authority to issue writs of mandamus, prohibition, and certiorari in aid of their appellate jurisdiction, the supreme court has no authority to issue and determine such writs under its supervisory jurisdiction. *Troegel v. King*, 46 La. Ann. 421, 15 So. 410.

The supreme court is without power, in the exercise of its supervisory jurisdiction, to coerce the circuit court of appeals to reinstate a case it has dismissed for want of appellate jurisdiction, and to try and decide the same on its merits. *State ex rel. Liggins v. First Circuit Ct. of Appeals Judges*, 47 La. Ann. 1516, 18 So. 510; *State ex rel. Mutual Nat. Bank v. Court of Appeals Judges*, 49 La. Ann. 1084, 22 So. 198.

Before the exercise of supervisory jurisdiction can be successfully invoked one of three things must be established: First, that the proceedings are infected with some fatal irregularity rendering them absolutely void; second, that the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or, third, that the cause is of a nature jurisdiction of which is denied to any court because not within the limits of judicial power. *State ex rel. Patton v. Houston*, 40 La. Ann. 893, 4 So. 50.

Upon an application for the exertion of the supervisory jurisdiction of the supreme court the investigation must be strictly confined to the question of jurisdiction *vel non* of the lower court. *State ex rel. Berthoud v. Jefferson Dist. Judge*, 34 La. Ann. 782; *State ex rel. Wood v. New Orleans City Judge*, 38 La. Ann. 377.

Maine.

"The judicial power of this state shall be vested in a supreme judicial court and such other courts as the legislature shall from time to time establish." Me. Const. art. 6, § 1.

"The [supreme judicial] court has cognizance of all offenses and misdemeanors, and of

"(6) Under the superintending power given this court by the Constitution this court may, by mandamus, compel an inferior court to perform a duty imposed by the statute which is not discretionary in its nature, and may also compel action even in cases where discretion is to be exercised when it clearly appears that such discretion has not in fact been exercised, or that action has been taken in manifest disregard of duty, or without semblance of legal power, and where it further appears that there is no remedy by appeal, or that such remedy, if existing, is entirely inadequate, and the exigency is of such an extreme nature as to justify the interposition of the extraordinary superintending powers of this court.

"(7) The refusal to allow the examination of the assignee and other witnesses being a violation of a clear duty, and the same being

within the power of this court to summarily correct by mandamus, the order of the court below purporting to confirm the said account, and the orders thereafter made in any way interfering with the making of a proper final report by the assignee and the filing objections thereto by the creditors, and the examination of the assignor, assignee, and other witnesses (which orders, being unappealed from, are now claimed to be *res judicata*, and to constitute insuperable objections to the effective exercise of the power of this court by mandamus), cannot impair or defeat the remedy by mandamus, and the court below will be directed by the peremptory writ to vacate all such orders.

"(8) The alternative writ heretofore issued will be made peremptory, with specific directions to vacate the orders referred to in the last paragraph, it being considered that

civil actions between party and party and between the state and individuals legally brought before it; may render judgment and award execution thereon; may exercise its jurisdiction according to the common law not inconsistent with the Constitution or any statute." Me. Rev. Stat. 1883, chap. 77, § 2, p. 626.

"It [the supreme judicial court] has general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy." Id. § 3, p. 626.

"It may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all writs and processes necessary for the furtherance of justice, or the execution of the laws." Id. § 5, p. 627.

In an application by a petitioner for certiorari to bring up the records and proceedings of the respondent in relation to the disclosure of a poor debtor who had been arrested on mesne process by virtue of a writ in favor of the petitioners, and had been brought before the respondents, two justices of the peace, a quorum for the county in which the arrest had been made, the court said: "The justices had jurisdiction of the subject-matter in regard to which the plaintiffs seek relief. It was in its nature of a judicial character. No appeal lies from their decision. This court has a superintending power over inferior tribunals. As the proceedings of the justices were not according to the course of the common law a writ of certiorari is the regular process from this court under which their errors are to be examined and corrected." The court quashed the proceedings because the debtor had declined to make the full disclosure required of him by the statute. While what is done in this case is exactly what is done in a number of others,—that is, certiorari allowed where there is jurisdiction but no appeal,—in this case alone it is stated to be in the exercise of superintending power. *Dow v. True*, 19 Me. 46.

Little v. Cochran, 24 Me. 509, was the same kind of review as *Dow v. True*, 19 Me. 46, but no superintending power is mentioned. Both cases were a certiorari to review the action of the two justices in making discharges of poor debtors, under the Maine statutes. In *Smyth v. Titcomb*, 31 Me. 272, on a petition for mandamus, the court said: "This court has power to issue writs of mandamus to courts of inferior jurisdiction, to corporations and individuals, when it 'may be necessary for the furtherance of justice and the due execution of the laws.' Rev. Stat. chap. 96, § 5. As a court of the highest common-law jurisdiction 51 L. R. A.

it would have this judicial sovereignty and general superintendence throughout the state upon the principles of the common law if there were no statute upon the subject. It is the only power through which magistrates of inferior jurisdiction and officers of the law can be compelled to perform their official duties. The writ is to issue 'in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance.' 3 Bl. Com. 110."

Ross v. Ellsworth, 49 Me. 417, is the same kind of review as in *Dow v. True*, 19 Me. 46, the poor-debtor case. In this case the court doubted if certiorari would lie. It is only mentioned here to show that these cases arise and the power is exercised without mentioning it. To the same effect, are *Lewis v. Brewer*, 51 Me. 108; *Marr v. Clark*, 56 Me. 542.

"The law not having expressly provided any remedy for correcting the errors of the board of county commissioners in their adjudication relating to the abatement of taxes, parties aggrieved by their decisions in matters of law may, under the general authority contained in the above provisions [of Me. Rev. Stat. chap. 77, §§ 3, 4] seek redress in this court. A writ of certiorari is in some respects similar to a writ of error, and in others dissimilar. The former, unlike the latter, is not a writ of right, and it lies where the proceedings sought to be revised, like those now under consideration, are not according to the course of the common law." There are a large number of cases in the Maine reports where certiorari is issued to correct county commissioners in their decision in the matter of opening, laying out, changing, and controlling roads and highways, and in the abatement of taxes, etc., but this is the only case in which it is stated that it is done by the exercise of the power of general superintendence. *Levant v. Penobscot County Comrs.* 67 Me. 429.

In a case which was commenced in the supreme court by a petition for a certiorari to quash the proceedings of the mayor and aldermen of Portland in removing the petitioner from the office of city marshal on the 1st day of May, 1884, it appeared as a matter of fact that the mayor was not present when the action was taken, and the supreme court held that the court constituted by the statute did not sit, that the mayor, an essential factor, abdicated his judicial functions. The board of aldermen assumed to themselves the power that was only to be exercised by the mayor and board of aldermen. The second-named irregularity was an error in the procedure. They are both within the superintending power of the

the same are in fact void and ineffective, and that they constitute apparent obstacles only to the full effect of the writ.

"An opinion will be prepared and filed in the near future more fully expressing the views of the court."

Mr. Joseph B. Doe, for relator:

This tribunal is invested with the highest judicial authority and jurisdiction, but in no way are the means, machinery, or instrumentalities by which its jurisdiction shall be exercised specified, prescribed, or limited. The clause as to superintending control over inferior courts is a clear granting of power, unlimited in extent, indefinite in character, unsupplied with means or instrumentalities.

The exercise of such power is not limited to the use of the writs enumerated.

supreme court, which has general superintending power of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy. Me. Rev. Stat. chap. 77, § 3. This jurisdiction is broad enough to include the superintendence of the mayor and aldermen where they are sitting in any judicial capacity. Such power has been repeatedly exercised in England and in this country, and in cases of removal of officers of private corporations as well as of public officers. It does not extend to a re-trial of the facts, nor to a review of the evidence, nor to a revision of any matters of discretion. It does extend to an examination of the grounds of the proceedings, and of the course of the procedure to determine whether the inferior court kept within its jurisdiction and proceeded according to law. Whether the inferior court is legally constituted; whether the allegations made to it are sufficient in form and substance to authorize it to proceed; whether its procedure is correct; and whether its sentence is lawful,—are questions for the supreme court to determine. If abuses or error be found in any of these matters the supreme court can, by proper process, annul the whole proceeding where no other mode of correction is provided. The foregoing proposition as to the extent of the supervisory power of the supreme court and that it comprehends cases of attempted removal of officers for cause, is well established by authority. *Andrews v. King*, 77 Me. 224; *Citing People ex rel. Munday v. New York Fire Comrs.* 72 N. Y. 445; *People ex rel. New York v. Nichols*, 79 N. Y. 582; *People ex rel. Campbell v. Campbell*, 82 N. Y. 247; *State ex rel. Norton v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253; *Rex v. Richardson*, 1 Burr. 517; *Dill. Mun. Corp.* 8d ed. 250, 251, note.

An application was made by the selectmen of a town for a writ of prohibition. The county commissioners (respondents) had laid out, but had not built, a highway in the town. The petitioners and other inhabitants of the town had petitioned the county commissioners to make an alteration in the highway. The commissioners adjudged and determined against the alteration, which judgment was reversed by a committee appointed according to statute. The reversal was accepted by the supreme judicial court, and the judgment duly certified to the commissioners, who, in disregard of the same, took measures to open the highway as originally located. The court at nisi prius awarded prohibition, and the supreme judicial court in affirming the decision said: "This court 'has

Atty. Gen. v. Blossom, 1 Wis. 317; *Re Booth*, 3 Wis. 1; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *State ex rel. Lamb v. Cunningham*, 83 Wis. 124, 17 L. R. A. 145, 53 N. W. 35; *Atty. Gen. v. Eau Claire*, 37 Wis. 400; *State v. St. Croix Boon Corp.* 60 Wis. 565, 19 N. W. 396; *State ex rel. Wood v. Baker*, 38 Wis. 71.

Messrs. M. M. Riley, Moritz Wittig, J. V. Quarles, and C. E. Estabrook also for relator.

Messrs. Winkler, Flanders, Smith, Bottum, & Vilas for respondents.

Winalow, J., delivered the opinion of the court:

The Constitution of this state (§ 3, art. 7) provides: "The supreme court, except in cases otherwise provided in this Constitution, shall have appellate jurisdiction only,

the general superintendence of all courts of inferior jurisdiction for the prevention and correction of errors and abuses where the laws do not expressly provide a remedy. It may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all writs and processes necessary for the furtherance of justice or the execution of the laws." Rev. Stat. chap. 77, §§ 5, 6. We have jurisdiction, then, unless the laws expressly provide a remedy. They do not, for no legislature ever contemplated such a state of facts. The writ of mandamus might have prevented the evil, but now, before such writ could be issued the old highway may have been made. The only remedy for the time being is the writ of prohibition." *Harriman v. Waldo County Comrs.* 58 Me. 83.

It may be well to say here that the nisi prius court is held by any of the members of the supreme court,—that is to say, the aggregation of the judges of the nisi prius court form the appellate court.

Massachusetts.

"The [supreme judicial] court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes to courts of inferior jurisdiction, corporations, and individuals necessary to the furtherance of justice and the regular execution of the laws." Mass. Pub. Stat. chap. 150, § 8.

The superior court is a court of limited jurisdiction, and while it has original jurisdiction in regard to some matters, it is not considered that it has such original jurisdiction as gives it a superintending control over inferior courts, either by express provision of statutes, or as having the inherent powers of the King's bench. Mass. Pub. Stat. chap. 152, §§ 1-7.

There is no provision in the Constitution of Massachusetts whereby the power and authority of the courts of that commonwealth are either conferred or limited, and no fetter is placed by that instrument upon the legislature in the matter of clothing those tribunals with such jurisdiction as it sees fit. The act of Parliament of 1699 and 1700 (11 Wm. III.), chap. 3, conferred a very extensive jurisdiction of pleas of the criminal and civil actions upon the superior court of judicature of the province of Massachusetts, and generally of all other matters as fully and amply to all intents and purposes whatsoever as the courts of King's bench, common pleas, and exchequer have. Of course the supreme court of the commonwealth suc-

which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same." Very early in the history of this court and of the state the question of the construction and meaning of the section was presented to this court, and learnedly discussed by Justice Smith in the opinion in the case of *Atty. Gen. v. Blossom*, 1 Wis. 317. That case was an information filed in this court by the attorney general in the nature of a quo warranto against Blossom and others, and motion was made to dismiss the cause for lack of jurisdiction, on the ground that

the granting of the writs in the third clause of the constitutional provision above quoted gave no additional jurisdiction, but that those writs were simply named as instrumentalities by which the appellate power and the superintending control were to be exercised. This contention was repudiated by the court, and the conclusion distinctly reached and clearly stated that the constitutional provision contained three separate grants of jurisdiction to this court, namely, (1) the appellate jurisdiction; (2) the superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of the writs named in the third clause to protect the sovereignty of the state, preserve the liberty of the people, and secure the rights of its citizens. In discussing the second clause of the section, namely, "the supreme court shall have a general superin-

ceeded to those powers, and, in addition thereto, the earlier statutes provided that that court should have power to issue all writs of prohibition and mandamus according to the law of the land, and should have cognizance of all such matters as by the laws of the province were made cognizable by the superior court of judicature. Stat. 1780, chap. 17; 1782, chap. 9.

Soon thereafter the legislature enacted the statute before quoted (Gen. Stat. chap. 112, § 3). It thus appears that both by legislative grant and as the successor of the King's bench the power of the supreme judicial court as to the possession of general superintendence became and remains unlimited, and also exclusive, for, as will be noticed, while the one provision of the before-mentioned statutes confers the unrestricted power on the supreme judicial court, the other specially excludes "superintending control" from the jurisdiction of the superior court. *Atty. Gen. v. Boston*, 127 Mass. 471.

The following are the instances of the exercise of the power by the supreme judicial court:

The power to lay out, etc., streets, conferred by statute on the mayor and aldermen of the city, is judicial in its character, and their action in such matters is subject to review by certiorari. *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322.

The reason for the existence of the power, the mode of action of the superintending court in exerting the control, and the circumstances under which it will be exercised, are thus stated in the case of *Strong, Petitioners*, 20 Pick. 484: "In every well-constituted government the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors it will correct them. If they refuse to perform their duty it will compel them. In the former case by writ of error, in the latter by mandamus. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion upon a particular subject."

As will be seen later, the above statement has been approved and adopted in other states.

While the power to issue the specified original writs is conferred by statute, the cases and modes in which it is to be exercised are not; and for that dependence must be had upon 51 L. R. A.

on what the court in the following case partly styles "that great repository of rules and precedents,—the common law."

Prohibition to restrain a court martial having jurisdiction under the statutes was refused in *Washburn v. Phillips*, 2 Met. 296.

The supreme court, as such, could not exercise appellate jurisdiction over the probate courts, but for the statute of 1783, chap. 46, by which the former court is constituted the supreme court of probate. As the latter it has such appellate jurisdiction, and will decline to issue certiorari to the probate courts. *Peters v. Peters*, 8 Cush. 529.

While the remedy of certiorari has usually been confined to cases where some error or defect in proceedings in their nature judicial, which are not according to the course of the common law, appears on the record, that remedy is not restricted to that class of cases. If it were so it would be a serious defect in the administration of justice. *Mendon v. Worcester County Comrs.* 2 Allen, 463. In this case the court said, after quoting Gen. Stat. chap. 112, § 3: "This broad and general authority was doubtless conferred for the purpose of enabling this court to bring before them any proceedings of judicial tribunals when there was no special mode prescribed for revising and correcting them." A certiorari will not, however, be made a substitute for appeal or exceptions. The granting of it is always addressed to the discretion of the court.

To same effect is *Farmington River Water Power Co. v. Berkshire County Comrs.* 112 Mass. 212.

The case of *Atty. Gen. v. Boston*, 123 Mass. 460, contains a statement by Lord Hardwicke, of the reason why the King's bench grants the original prerogative writs, which "is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's charter." And Lord Mansfield said that "the original nature of the writ [of mandamus], and the end for which it was framed, direct upon what occasions it should be used," viz.: "Where the law has established no specific remedy, and where in justice and good government there ought to be one." The court then held that, as the highest court of law of the commonwealth, it had as extensive powers and duties in this respect as the court of King's bench in England, and that the granting of the writ of mandamus rested in the sound discretion of the court; and quoted the statute in reference to "general superintendence" and the permission to issue the several writs.

tending control over all inferior courts," it was said: "This sentence contains a clear grant of power. We will not undertake to say that without this grant the power would not be in the court. It is not necessary to discuss that question. We are endeavoring to arrive at the proper construction of the written law. It is a grant of power. It is unlimited in extent. It is undefined in character. It is unsupplied with means and instrumentalities. The Constitution leaves us wholly in the dark as to the means of exercising this clear, unequivocal grant of power. It gives, indeed, the jurisdiction, but does not pretend to intimate its instruments or agencies." Again, in discussing the third clause of the section, it was said: "Here is also a distinct grant of power. The first of the section is restrictive,—one of limitation merely. The two last are clear grants of

power, the one of which gives the power of a superintending control over inferior courts; the other giving the power to issue certain writs in the appropriate cases, and to hear and determine the same." The section came before this court again in the great case of *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425, and the exhaustive discussion by Chief Justice Ryan in that case of the original jurisdiction of this court under the third clause of the section will ever stand as a monument to the legal learning and ability of that distinguished justice. In that discussion the conclusion reached in the *Blossom Case* to the effect that there were three separate and independent grants of jurisdiction in the section quoted was fully approved, and the court said pp. 515 *et seq.*: "The framers of the Constitution appear to have well understood that with appellate

The court awarded a mandamus to the city of Boston to compel it to maintain a toll ferry.

The legislature had enacted a statute providing for the condemnation of lands of the Connecticut River Railroad Company under the right of eminent domain for the construction of a union passenger station to be used by the Connecticut River Railroad and other railroad companies, including a railroad owned and controlled by the commonwealth. The only provision in the statute for compensation was that it should be made from the earnings of the last-mentioned railroad. Thereupon the manager of that railroad, by direction of the governor and council, entered and took possession of the lands of the Connecticut River Railroad Company, and presented a petition to the county commissioners praying them to determine and award such damages to the said company as might seem just. The latter company appeared before the commissioners, and objected to their assuming any jurisdiction in the premises. The objection was overruled, and the company thereupon applied to a justice of the supreme judicial court for a writ of prohibition to the defendants, the county commissioners, upon the ground that the statute was unconstitutional because no provision was made therein, or otherwise, for the reasonable compensation of the Connecticut River Railroad Company for the land so taken. The supreme judicial court decided that the provision of the statute for compensation was not such as the Constitution required; that the statute was as a consequence unconstitutional, and the county commissioners without jurisdiction, and issued a writ of prohibition to restrain their further proceedings. The opinion of Chief Justice Gray is of value as a history of the exercise of the power by the King's bench, and contains citations of the various acts of Parliament and provincial statutes whereby the jurisdiction of the King's bench, common pleas, and exchequer passed to the province of Massachusetts. *Connecticut River R. Co. v. Franklin County Comrs.* 127 Mass. 50, 34 Am. Rep. 338.

The supreme court will issue a writ of prohibition to restrain a magistrate from entertaining an application of a debtor to take the oath that he does not intend to leave the state after a similar application has once been heard and refused. *Henshaw v. Cotton*, 127 Mass. 60.

Michigan.

"The supreme court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, pro-

cedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only." Mich. Const. art. 6, § 3.

Circuit courts have superintending control of inferior courts and tribunals.

"They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect their orders, judgments, and decrees, and give them a general control over inferior courts and tribunals within their respective jurisdictions." Mich. Const. art. 6, § 8.

"The supreme court shall have a general superintending control over all inferior courts to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law, . . . and shall have power to issue writs of error, certiorari, habeas corpus, mandamus, quo warranto, procedendo, prohibition, supersedeas, and all other original and remedial writs." 2 How. Anno. Stat. (Mich.) title 29, chap. 243, § 6404, p. 1660.

Where there is no other mode of reviewing a judgment the party aggrieved has the right to avail himself of the superintending power which this court possesses over all inferior jurisdictions, and to have the proceedings of the court below reviewed by the supreme court in a mode authorized by the common law. *Perkins v. Lapeer County Superintendents of Poor*, 1 Mich. 504.

Where the right of appeal from the action of the board of supervisors is entirely abrogated by the Constitution it is not to be presumed that the framers of that Constitution intended to confer upon the board absolute despotic power to place them entirely above and beyond the reach of all legal control or restraint touching their official acts and the discharge of their official duty imposed upon them by existing laws, and to leave all those who have just and honest claims against counties without legal remedy. At any rate the mere abrogation of the right of appeal by the Constitution raised no such legal presumption, nor does it authorize the construction which the board of supervisors assumes to claim,—that the supreme court has no supervisory power over their official acts. *People ex rel. Bristow v. Macomb County Supers.* 3 Mich. 475.

In *People ex rel. Russell v. State Prison Inspectors*, 4 Mich. 187, the supreme court quoted with approval what has been given in the *Strong Case*, 20 Pick. 484.

Where a mandamus issued to direct the action of a legal tribunal or proceeding in the

jurisdiction the court took all common-law writs applicable to it, and with superintending control all common-law writs applicable to that; and that failing adequate common-law writs, the court might well devise new ones, as Lord Coke tells us, as 'a secret in law.' Hence the Constitution names no writ for the exercise of the appellate or superintending jurisdiction of the court." And again: "The grant of original jurisdiction is one entire thing, given in one general policy, for one general purpose, though it may have many objects, and many modes of execution. So it is of the appellate power. So it is of the superintending control. There are three independent and distinct grants of jurisdiction, each compact and congruous in itself; each a uniform group of analogous remedies, though to be exercised in several ways, by several writs, in legal and equitable

proceedings on many objects, in great variety of detail. The Constitution wisely, almost necessarily, stopped with the general grants of jurisdiction carefully distinguished, and left details to practice and experience. . . . The three grants of jurisdiction proceed on one policy: Appellate jurisdiction to decide finally all ordinary litigation; superintending jurisdiction over all other courts to control the course of ordinary litigation in them; and, outside of these, original jurisdiction of certain proceedings at law and in equity, to protect the general interests and welfare of the state and its people, which it would not do (to quote Smith, J.) to dissipate and scatter among many inferior courts." These propositions, so clearly laid down, have never been questioned, nor does it seem that they are open to question even in the absence of

course of justice it is an exercise of supervisory control, and is in the nature of an appellate action. In other cases it is generally, if not always, an exercise of original jurisdiction.

It would seem to follow that the writ should be regarded as directed to the judge officially, and as binding the incumbent whoever he may be. In all cases the jurisdiction to issue mandamus depends on the official character, and binds the officer, and the reason is, if anything, stronger where the writ issues to a court of justice. *People ex rel. Barrett v. Bacon*, 18 Mich. 247.

The circuit court had issued a certiorari to the recorder of a city, and upon review decided that he had no jurisdiction over the person or the subject-matter in dispute, and that the judgment was wholly void and of no effect, but by an order dismissed the certiorari. The relator thereupon brought error to the supreme court insisting that the order was inconsistent, to which it was replied that the circuit courts have not, like the supreme court, any general superintending or supervisory control over inferior courts or tribunals so as to enable them to issue a common-law writ of certiorari. The supreme court held that while the statutes did not confer the power upon the circuit, the Constitution, by § 8 of art. 6 did as clearly as § 3 gives it to the supreme court; and that, while a statutory certiorari may have been intended to have been issued, yet the proceedings were sufficient to justify the granting of a common-law writ; and the judgment of the circuit court in dismissing the certiorari and the judgment of the recorder was reversed. *Thompson v. School Dist. No. 6*, 25 Mich. 483.

The circuit court had made an order appointing a receiver over a railroad company, and granted an injunction restraining the majority of the directors of the company from the management and control of the corporate business. The supreme court held that the appointment *ex parte* of a receiver to manage the corporate business, and the granting of an injunction in a like manner on an interlocutory *ex parte* application, whereby the control of the business is taken from the directors, are more than irregular, and are absolutely void as entirely beyond the power of the court, and are such an abuse as may be required to be corrected by mandamus; and awarded a writ of mandamus to compel the circuit court to vacate the order appointing a receiver, and to dissolve the injunction. *People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge*, 31 Mich. 456.

This case is very nearly identical with *Have-*
51 L. R. A.

meyer v. San Francisco City & County Super. Ct. 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 164.

In another case the supreme court held that its jurisdiction is not statutory, but plenary, and supervision is given over all inferior tribunals by the Constitution. The court in this case granted a mandamus to compel the circuit judge to set aside an injunction which it held to be more than erroneous, absolutely void; that an appeal, although admissible, was not necessary to rescind it; that the existence of a remedy of another nature, which is not adequate, furnishes no reason for refusing a remedy by mandamus if the necessity of justice requires it. *Tawas & B. County R. Co. v. Iosco County Circuit Judge*, 44 Mich. 479, 7 N. W. 67.

As to compelling the circuit court to dissolve the injunction, the same thing was accomplished in the last two cases, in the same manner and by the same mode of reasoning; but in the first no mention is made of the supervision given over all inferior tribunals by the court, and in the last it is expressly stated to be done in virtue of it.

Where the circuit court grants an injunction, and the bill of complaint in the equity action is devoid of substance, a mandamus will be awarded by the supreme court to compel the circuit court to dissolve the injunction. *Van Norman v. Jackson County Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

Where a preliminary injunction operated in such a way as to do violence to vested rights and interests it was such an invasion of rights as entitled the aggrieved parties to a prompt redress. Mandamus was awarded to compel the circuit judge to dissolve the injunction. *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622.

Certain persons claiming to be trustees of a church commenced an equity action against the relator, the pastor of the church, to establish the validity of an action taken at a church meeting at which it was alleged that the pastoral relation was dissolved; and, anticipating an attempt to rescind that action, procured an injunction to enjoin the relator from admitting any person to membership without the consent of a majority of the church council. A motion to dissolve the injunction was made and denied. The supreme court granted a mandamus to compel such dissolution on the ground that the questions involved related to the method of admission to membership in a denominational body and the qualification of voters at a meeting, not of the corporation, but of the church; and that both parties must first exhaust the remedies afforded by the ecclesiastical

decisions upon the subject, and looking at the language of the section alone. It must be regarded as settled, therefore, that by the constitutional grant of "a general superintending control over all inferior courts" this court was endowed with a separate and independent jurisdiction, which enables and requires it in a proper case to control the course of ordinary litigation in such inferior courts, and was also endowed with all the common-law writs applicable to that jurisdiction. What those writs are, and the manner of their use, are questions which have not as yet been directly presented or decided, but they are necessarily involved in the present case, and hence must now be considered. That the makers of the Constitution used the words in question understandingly, and with a specific meaning, and not as a mere rhetorical flourish or high-sound-

ing form of words, can admit of no doubt. Only a superficial knowledge of the growth and development of the English judicial system is necessary to determine what that meaning was and is. The English court of King's bench had a superintending jurisdiction over all the inferior courts of the realm, which it freely exercised by the use of well-defined writs from very early times. The Norman idea was that the King was the foundation of all justice, and hence, when an inferior court executed its jurisdiction, or refused to act within the jurisdiction to the prejudice of a suitor, and no other remedy was provided, application could be made by the aggrieved party to the King's court to restrain or compel action. The King's bench was peculiarly the King's court, in which he sometimes sat himself, and was always supposed to sit when not personally

bodies before the court will consider the questions involved. *Buettner v. Fraser*, 100 Mich. 179, 58 N. W. 834.

In an action in the circuit court against the relator for an injunction restraining the levy of an assessment by the relator upon the plaintiff in that action as a member of and insured in the relator company, an injunction *pendente lite* was issued and served, a motion to dissolve which was denied, and this action was instituted to compel such dissolution. The supreme court held that the bill itself showed that the complainant was liable to pay the assessment, and had nothing to complain of on account of it, and that, as a matter of law, it appeared from the bill alone that he was not entitled to an injunction; and granted a mandamus to compel the court in which the action was brought to dissolve the injunction. *Ionia, E. & B. Farmers' Mut. F. Ins. Co. v. Davis*, 100 Mich. 606, 32 L. R. A. 481, 59 N. W. 250.

The circuit court had granted an injunction against the relators in an equity action enjoining the board from issuing bonds for the purchase of the site for, and erecting, a county building. The supreme court held that, admitting all the allegations of the bill, there were no grounds for an injunction; and awarded a writ of mandamus to compel its dissolution. *Wayne County Supers. v. Wayne Circuit Judges*, 106 Mich. 166, 64 N. W. 42.

What was done, and the manner of, and reasons for doing it, in the last five cases, was the same as in *Tawas & B. County R. Co. v. Iosco County Circuit Judge*, 44 Mich. 479, 7 N. W. 67. But no mention is made in either of the constitutional power, the exercise of which was asserted in that case.

In *Detroit v. Wabash, St. L. & P. R. Co.* 63 Mich. 712, 30 N. W. 321, the court said it has been always held that our jurisdiction by certiorari is constitutional, and not subject to revocation.

The judge of the recorder's court had quashed certain indictments for want of jurisdiction, and the prosecuting attorney applied to the supreme court for a mandamus to compel him to proceed to the trial of the indictments. The supreme court held that the recorder's court had jurisdiction. And that "under the constitution . . . this court is given general superintending control over all inferior courts with power to issue all the various classes of original and remedial writs including writs of error, mandamus, procedendo, etc. The writ of procedendo has been practically superseded . . . by the writ of mandamus." *People ex*
31 L. R. A.

rel. Robison v. Swift, 59 Mich. 529, 26 N. W. 694.

In *Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 360, 42 N. W. 908, which was an application in mandamus to compel the circuit judge to grant a new trial, the court said: "It is true that the Constitution has given this court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this court can substitute its discretion for that of the inferior tribunal, and compel it to exercise and enforce our discretion and not theirs. This court has uniformly held that it has no authority to review the discretion of trial courts in granting or refusing new trials."

Relator had executed a bond on appeal from a justice's court. A judgment was rendered against him and the appellant at circuit. Before an execution was legally issuable, the attorney for the appellee signed a stipulation which was filed in the case, agreeing not to take out an execution for sixty days; after the expiration of which he issued an execution, which was returned unsatisfied and an alias execution issued. The relator moved to quash the alias execution on the ground that it was not issued until after the expiration of thirty days limited by the statute, and that the stipulation was made without relator's consent. The respondent denied the motion, and relator applied for a mandamus to compel him to quash the alias execution. The supreme court held that the circuit judge had no power to extend the liability of a surety in a bond executed on an appeal, and granted the writ. *Gildersleeve v. Adsit*, 97 Mich. 606, 57 N. W. 187.

Where the circuit court in a divorce action held that it had no jurisdiction because of a defect in publishing under an order of publication the supreme judge on application for a mandamus to compel the circuit court to proceed, held that the publication was sufficient, and the circuit court had jurisdiction and awarded the writ. *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051.

Attorneys procured an attachment and under it procured the sheriff to levy on certain books of account, trial balances, and private papers of a firm, and while in his possession the sheriff permitted the attorneys to examine and take copies of such books, etc. The property was then returned and the attachment proceedings discontinued. Upon the facts thus obtained a second attachment was sued out. The circuit court denied a motion for an order restraining the use of the facts so obtained for the purposes of the second attachment. The supreme court

present. It succeeded in this respect the very ancient *aula regis* when (near the close of the Norman period) that court was divided into the courts of the King's bench, common pleas, and exchequer. Being the King's court, it was natural, if not inevitable, that the King's sovereign power of causing justice to be dealt to his subjects in the course of litigation in inferior courts should be administered by and through that court. Blackstone says of this court (Com. bk. 3, chap. 4, p. 42): "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here or prohibit their progress below. It superintends all civil corporations in the Kingdom. It commands magistrates and others to do what their duty requires in every case

where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes, the former in what is called the Crown side or Crown office, the latter in the plea side of the court."

It is very apparent that when the makers of the Constitution used the words "superintending control over all inferior courts" they definitely referred to that well-known superintending jurisdiction of the court of King's bench. In England it was a branch of the King's power lodged with the King's court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely used for the benefit of any

awarded a writ of mandamus to compel the circuit-court judge to enter the order. *Rosenthal v. Dickerman*, 98 Mich. 208, 22 L. R. A. 693, 57 N. W. 112.

In *Combs v. Wilber*, 99 Mich. 234, 58 N. W. 71, the supreme court issued a mandamus to compel the circuit court to vacate an order allowing an appeal from a justice's court, where it was not a proper case for such allowance.

Relator recovered a judgment in the superior court of the city possessed of a co-ordinate jurisdiction with the circuit court. A motion for a new trial in the superior court was denied, and on writ of error to the supreme court the judgment was affirmed. Thereupon the defendant in the judgment commenced an equity action against relator in the circuit court alleging the misconduct of the jury in the principal suit, and asked to have the judgment canceled because of it. The supreme court held that the equity action was practically an application for a new trial in another action in a court having co-ordinate jurisdiction, which the circuit judge had no jurisdiction to entertain; and granted a mandamus to compel him to vacate a restraining order made in the equity action, and a writ of prohibition to stay further proceedings therein. *Maclean v. Speed*, 52 Mich. 257, 18 N. W. 396.

Circuit courts have, under the Constitution, art. 6, § 8, a general supervisory control over inferior courts and tribunals subject to appellate jurisdiction of the supreme court. *People ex rel. Taylor v. St. Clair Circuit Judge*, 32 Mich. 95.

And by virtue of that section the circuit court of the county of Wayne correctly issued a writ of certiorari to review a conviction in the recorder's court of Detroit for an alleged violation of the city ordinance. *Swift v. Wayne County Circuit Ct. Judges*, 64 Mich. 484, 31 N. W. 434.

In *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272, 26 N. W. 802, a mandamus was awarded by the supreme court to compel the circuit court to vacate an order restraining relator from proceeding in an attachment suit.

Mandamus will issue under the power of superintending control conferred upon the supreme court by Mich. Comp. Laws, § 191, to vacate a void order by the state court of mediation and arbitration granting a rehearing in a cause decided by it. And prohibition to stay further proceedings under such order will be granted under the like power of control. *Renaud v. State Court of Mediation & Arbitration* (Mich.) 83 N. W. 620.
51 L. R. A.

Missouri.

"The supreme court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same." Mo. Const. art. 6, § 3.

"The supreme court shall have superintending control over the courts of appeal by mandamus, prohibition, and certiorari." Mo. Const. Amend. 1884, § 8.

Kansas City and St. Louis courts of appeals have power to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other original remedial writs, and to hear and determine the same, and shall have a superintending control over all inferior courts of record in the counties of their respective districts. *Id.* §§ 2, 4.

"The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits." Mo. Const. art. 6, § 23.

Where the chancellor refuses to certify a cause in which he had been counsel before his accession, to the supreme court on the ground that there had been no final determination of the action, and that the supreme court, having appellate jurisdiction only, could not assume jurisdiction until such a determination, the supreme court in the exercise of superintending control can award a certiorari to remove the cause into that court. *Rector v. Price*, 1 Mo. 198.

The supreme court will not exercise its power of superintending control to command the judge of the circuit court to alter his record so as to conform to what it may be told is the truth. *Dixon v. Second Jud. Circuit Judge*, 4 Mo. 286.

Speaking of the power of superintending control, the supreme court, in *Lane v. Charles*, 5 Mo. 285, said: "It is most apparent, then, that, but for the exceptions, this court would have no original jurisdiction at all. Now what are the exceptions? They are all found in the 3d section, and they are: 1. That the supreme court shall have a general superintending control over all inferior courts of law. This power may, I have no doubt, sometimes require the exercise of original jurisdiction, and sometimes the power may be used in the exercise of appellate power, as in cases of appeals and writs of error. But my opinion rather is, that the first of the section is a general grant of power, and that the balance is a specification

citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen. 2 Spelling, Extraordinary Relief, § 1388. The two great writs by which this superintending jurisdiction was principally exercised by the court of King's bench were the writs of mandamus and prohibition; the one directing action by the inferior court, and the other forbidding action. Of these writs and their peculiar office, when directed to an inferior court, Blackstone says (Com. bk. 3, chap. 7, p. 110): "For it is the peculiar business of the court of King's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or legislature have invested them, and this, not only by restraining their excesses, but also by quickening

their negligence, and obviating their denial of justice." In addition to these two prerogative writs, the superintending control over inferior courts was at common law sometimes exercised by means of the writs of certiorari and procedendo, the first of which issued either from the King's bench or from chancery, and the second from the court of chancery alone, which court was also invested with a part of the superintending power. Harris, Certiorari, § 3, p. 4; Bl. Com. bk. 3, chap. 7, p. 109. As to the writ of certiorari, it is used so frequently, and its ordinary functions are so well known, that discussion of it is unnecessary; and as to the writ of procedendo it may be said that it has practically fallen into disuse, its functions being fully performed by the writ of mandamus. High, Extr. Legal Rem. 3d ed. §§ 147, 148. It would hardly be helpful

of the instances and the mode." Referring to the conclusion of the section, the court said further: "What can those other writs be? To bring them under the clause they must be both original and remedial. I consider a writ of prohibition as known at common law one instance under the general words, for as I understand the objects and nature of that writ the court can, from its organization, both hear and determine the writ." The court then held that the writ of injunction could not be another instance, on the ground that, although it was remedial, it was not an original writ, and the court had no power to grant it.

In *Harper v. Baker*, 9 Mo. 115, the supreme court said that what is the regular law day of the justice's court is a question of fact which could be proved on the trial; or perhaps advantage of the irregularity might have been had by an exercise of the superintending control of the circuit court.

A party filed a petition before the law commissioner praying the latter to make an order on a justice of the peace to retax costs, and to refrain from issuing execution, and other relief. The justice demurred to the petition, and the commissioner sustained the demurrer, which the court considered as equivalent to the refusal of the order asked for by the petition. The court said: "This proceeding was designed to call into exercise the superintending control which the statute confers upon the law commissioners over justices of the peace. *Ladue v. Spalding*, 17 Mo. 159.

The clerk of the supreme court, after failing to appear at a term thereof, and refusing obedience to the orders of the court, filed a petition in a circuit court making the judges of the supreme court and others defendants, and praying an injunction to restrain the defendants from taking the records, seal, etc., of the supreme court from his possession. Upon an affidavit that the injunction had been served on the defendants and others, among them the governor of the state, and that they had violated it, the circuit court made an order for them to show cause why an attachment should not issue against them for contempt. This was an application to the supreme court for a prohibition to the plaintiff and the judge of the circuit court, to prohibit them from proceeding further in the matter. A peremptory writ was issued. The case presents the novel spectacle of an application being made to a court for a writ to another court to prohibit the latter from proceeding in a matter before it in which two of the three judges composing the former were parties defendant, and the awarding of the peremptory

writ of prohibition by the necessary vote of one of those two. It was no doubt the exercise of superintending control. *Thomas v. Mead*, 36 Mo. 232.

Where the law devolves upon an officer the exercise of discretion, it is the sound legal discretion, not a capricious arbitrary or oppressive one. In a case like this, if the supreme court had no jurisdiction the petitioner would stand in the anomalous attitude of a person having a specific right, and might be entirely remediless by law. *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 221.

And the supreme court will exercise a superintending control over that discretion so far as to compel the court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner; but will not undertake to judge of that matter in the first instance, but will only command the court to proceed in the performance of their official duty. *State ex rel. Jackson v. Howard County Ct.* 41 Mo. 247.

Where the circuit court was attempting to supervise the action of the county court in a matter in which it had no jurisdiction to do so, the supreme court awarded a prohibition to the circuit court to prevent it from further proceeding in the matter. *Vitt v. Owens*, 42 Mo. 512.

The county court is an inferior tribunal over which, by the Constitution and laws of the state, the supreme court has supervising control, and can compel it to act when it refuses to perform or proceed in the execution of a plain duty enjoined on it by law. *State ex rel. Ensworth v. Albin*, 44 Mo. 346.

In an application for a mandamus to the judge of the circuit court to compel him to receive a verdict rendered by the jury, where the jury had found as a verdict, "We, the jury, find a verdict for defendants, they to pay the costs of this suit," and the respondent had refused to receive the verdict and discharged the jury, a peremptory writ was awarded to compel him to receive and enter the verdict of record. *State ex rel. Webster v. Knight*, 46 Mo. 83.

The writ of mandamus is one mode of exercising the superintending control over inferior courts conferred upon the supreme court by the Constitution, and can be resorted to in criminal, as well as civil, cases. In neither, however, can it be made to perform the functions of a writ of error or appeal when addressed to subordinate judicial tribunals. *State ex rel. Harris v. Laughlin*, 75 Mo. 358.

The St. Louis court of appeals has no power, under § 12 of art. 6 of the Constitution, to

to enter into any extended investigation as to whether there were other writs at common law by which the superintending power was exercised. The writs already named form a veritable arsenal of legal weapons by means of which all ordinary excesses or defaults on the part of inferior courts which call for the exercise of such power can be corrected and controlled. Nor, for the same reason, is it necessary to consider the suggestion of Chief Justice Ryan in the *Railroad Cases* to the effect that the court may devise new writs in case of the inadequacy of the common-law writs to meet the case in hand. The conclusion is inevitable that with the constitutional grant of superintending control this court took at the same time all the ancient writs necessary to enable it to exercise that high power, including certainly the writs of mandamus, prohibition, certiorari, and procedendo. The statute which purports to grant to the supreme court the power to issue writs of "prohibition, supersedeas, procedendo, and

all other writs and process not specially provided by statute, which may be necessary to enforce the due administration of right and justice throughout the state" (Stat. 1898, § 2406), can hardly be said to have given the court any additional instrumentalities for the exercise of the superintending jurisdiction, because this court possessed those writs as a necessary adjunct of the constitutional grant of a superintending control. Nevertheless, the section is helpful as indicating the legislative intention that no doubt should be left as to the power of the court to issue any writs necessary to make effective the three separate grants of jurisdiction made to it by the Constitution. Nor does the fact that in the third clause of the Constitution certain writs are named, including mandamus and certiorari, as the means by which original jurisdiction is to be exercised, militate against the position that the grant of superintending control carried with it all necessary writs applicable to its efficient exercise, for the plain reason

grant an allowance to a wife for attorneys' fees and expenses of proceedings on appeal from the judgment of the circuit court in favor of the husband for a divorce. *State ex rel. Clarkson v. St. Louis Court of Appeals*, 88 Mo. 135.

The Kansas city court of appeals had dismissed an appeal from the circuit court. The supreme court held that it had the power, under Const. Amend. 1884, § 8, to issue a mandamus to compel the judges of the Kansas city court of appeals to reinstate the cause, which it had refused to hear and determine and had stricken from its docket. The opinion is of some length, and contains authorities pro and con on the question whether the junior appellate court can be compelled by mandamus from the ultimate appellate court to reinstate and hear and determine an appeal which it has dismissed. The court said, *inter alia*: "There is perhaps no subject in the whole range of jurisprudence where the decisions of different courts, and frequently of the same court, are so conflicting as upon the subject of the writ of mandamus,—as to when the writ shall issue. As Chancellor Kent would say, the law on the subject is in a state of 'painful vibration.'" *State ex rel. Bayha v. Phillips*, 97 Mo. 331, 8 L. R. A. 476, 10 S. W. 855.

A jury had convicted a person of felony, and fixed his punishment at six months' imprisonment. The judge, of his own motion, set aside the verdict, and entered an order forever disqualifying the jurors. Afterwards the defendant was placed on trial, and pleaded his former conviction. The plea was disregarded by the court, and the defendant was convicted and his punishment fixed at five years. This was a writ of error to the trial court. The supreme court reversed the judgment, and added: "And an order herein will be entered in this court expressly commanding the judge of the criminal court . . . that on receipt of a copy of said order he, said judge, do forthwith reinstate the original verdict in this cause as of the date the same was returned and set aside. . . . and that, this being done, he, the said judge, do forthwith enter judgment and sentence thereon as of said date." *State v. Snyder*, 98 Mo. 555, 12 S. W. 369. All that could properly be done under the writ of error was accomplished when the judgment was reversed and the defendant ordered discharged; but it is suggested that the making of the order is purely the exercise of superintending control. 51 L. R. A.

State ex rel. Blakemore v. Rombauer, 101 Mo. 499, 14 S. W. 726, was an action involving the title to the office of clerk of the circuit court, which the supreme court held was an office under the state, and that, therefore, under the Constitution, an appeal lay directly to the supreme court; and that in such case the court of appeals had no jurisdiction to entertain a proceeding in quo warranto; and that, if the court of appeals attempted to assume jurisdiction, the supreme court had the power to, and would, arrest its action by prohibition. The result of this decision is that the supreme court has exclusive appellate and original jurisdiction of all the cases mentioned in Mo. Const. 1875, art. 6, § 12, and also Amend. 1884, § 5, and that the original and appellate jurisdiction of the courts of appeals is confined to those cases, the subject-matter of which is not within the original and appellate jurisdiction of the supreme court.

The doctrine of this case was afterwards approved and reasserted in *State ex rel. Rogers v. Rombauer*, 105 Mo. 103, 16 S. W. 695, in which case it was also held that the office of the writ of prohibition was not alone merely to arrest illegal action, but was broad enough to, in a case calling for it, compel restitution. This view, as will be seen, was that of the supreme court of California in *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 827, 10 L. R. A. 627, 24 Pac. 121.

Where a cause had been transferred to the circuit court of the nearest adjoining county, which court held that the case had been improperly sent there, and ordered it stricken from its docket and returned to the county where it originated, on an application for a mandamus to compel said circuit court to reinstate the case on the ground that it had jurisdiction, the supreme court so held, saying: "The premises considered, we do not doubt that this was an appropriate occasion for the exercise of our supervisory control and mandatory authority, and consequently we issue our peremptory writ." *State ex rel. Schonhoff v. O'Bryan*, 102 Mo. 254, 14 S. W. 933.

Where the court of appeals had omitted to certify a cause to the supreme court under the provision of Amend. 1884, § 6, and it appeared that one of the judges of the court of appeals had dissented, but did not state in terms that he deemed the decision contrary to a former decision of the supreme court or of either of

that mandamus and certiorari, though entirely suitable and efficient as superintending writs, are equally well adapted for use in the exercise of the original jurisdiction, and in fact necessary to make that jurisdiction complete and effective. Further, it may be said that said last-named writs are frequently used in the exercise of the appellate jurisdiction of this and other supreme courts, but they are not thereby confined to such use.

It was suggested at the bar upon the argument of this case that this "superintending control" was a branch of the jurisdiction of this court which had practically remained dormant during the existence of this court, but a very slight examination of the decisions will demonstrate that this is an erroneous idea. The examples may not be numerous, and it is to the credit of the trial courts that such is the fact, but they are entirely sufficient. It is true, the subject has never been fully discussed, and the jurisdiction has been exercised without being class-

ified or named, but the fact remains that it has certainly been exercised by the use of the writs of mandamus and prohibition. Thus, in *State ex rel. Brownell v. McArthur*, 13 Wis. 407, the writ of mandamus was granted compelling a circuit judge to make an order changing the venue of an action, and in *State ex rel. Spence v. Dick*, 103 Wis. 407, 79 N. W. 421, the same judgment was rendered. In *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 193, a writ of prohibition was granted preventing the further prosecution of certain contempt proceedings in the circuit court because such court was acting in excess of its jurisdiction. Doubtless other cases could be cited in this court where the superintending control has been exercised by this court, but these will suffice to show that such power has not lain dormant. Instances of the exercise of this power by the circuit court under its constitutional grant of "superintending control" over inferior courts (Wis. Const. art. 7, § 8)

the courts of appeals, it was held that the supreme court has superintending control over the courts of appeals, but no appellate jurisdiction from that court; that to give the supreme court authority to compel the court of appeals to certify the case there must have been a refusal to do so after the dissenting judge had stated in terms that he deemed the decision contrary," etc. *State ex rel. Third Nat. Bank v. Smith*, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; *Missouri, K. & T. R. Co. v. Smith*, 154 Mo. 300, 55 S. W. 470.

The writ of prohibition is a familiar mode of the exercise of the power of superintending control over all inferior courts with which the supreme court is invested by the Constitution. *State ex rel. Merriam v. Ross*, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947.

Where an inferior tribunal or official body charged with the performance of a duty involving a discretion in the exercise thereof is guilty of a gross and palpable violation of the discretion confided to it, the supreme court, in the exercise of the superintending control conferred by the Constitution, will control the inferior tribunal by its writ of mandamus, especially if the right violated pertains to the public. *State ex rel. Kelleher v. St. Louis Public Schools*, 134 Mo. 298, 35 S. W. 617.

This case quotes with approval the statement in *Strong, Petitioner*, 20 Pick. 495, also quoted in *People ex rel. Russell v. State Prison Inspectors*, 4 Mich. 187.

A writ of habeas corpus had been issued by defendant Dobson, circuit judge, for the production of certain parties who had been convicted of, and sentenced to be executed for, murder. The attorney general removed the proceeding into the supreme court by a certiorari. The court, in quashing the habeas corpus proceedings, after quoting the provision of the Constitution giving it a general superintending control over all inferior courts, further stated that, as a means of maintaining that superintending control, the supreme court had power to issue writs of habeas corpus, quo warranto, certiorari, and other original and remedial writs, and hear and determine the same; and that the power of the court is as comprehensive in this respect over inferior courts in the state as was the court of King's bench in England; and that the power of superintending control has been exercised by the supreme court from the earliest days of its history down 51 L. R. A.

to the present time in keeping the circuit and other courts within the compass of their legitimate jurisdiction, and in preventing them from transcending the confines of their lawful authority. *State ex rel. Walker v. Dobson*, 135 Mo. 1, 36 S. W. 238.

State ex rel. Mollineux v. Madison County Ct. 136 Mo. 823, 37 S. W. 1126, reasserts the power of superintending control of the supreme court over all inferior courts.

An appeal had been taken from an order overruling a motion to vacate an order appointing a receiver of the property of the relators, and an appeal bond had been duly approved. The receiver retained the possession of the property after the perfected appeal, and did not turn it back to the possession of the relators notwithstanding the approval of their appeal bond. The supreme court held that the bond operated to stay all proceedings to enforce the receivership order; and, as incident to that stay, it had likewise the effect to release the property to the party from whom it had been taken by reason of the order of appointment of the receiver; and further, that it was not necessary for the relators to make any further formal application to the circuit judge by the way of suggesting his want of jurisdiction over the property after the appeal became perfect by the approval of the bond; as it was obvious from the whole proceedings that such an application would be futile.—citing *London v. Cox*, L. R. 2 H. L. 282, 16 Week. Rep. 44, 36 L. J. Exch. N. S. 225. The alternative writ of prohibition was made absolute; and it was further ordered that the receiver forthwith deliver all property in his custody to the parties from whom he received the same. *State ex rel. St. Louis & K. R. Co. v. Hirtzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

The court of appeals had reversed the judgment of the criminal court which discharged the relator convicted by a police justice, and restored the conviction, and refused an application to certify the case to the supreme court on the ground that a constitutional question was involved, and that the court of appeals had no jurisdiction. Relator then applied to the supreme court for a mandamus to compel the court of appeals to make the certificate. The supreme court decided that a constitutional question was involved, and awarded a peremptory mandamus. *State ex rel. Mulholland v.*

may also be cited. Thus, in *State ex rel. Marsh v. Whittet*, 61 Wis. 351, 21 N. W. 245, the circuit court, by mandamus, compelled a justice of the peace to correct the entries in his docket to accord with the facts, and it was held that the circuit court had the power under its grant of supervisory control. There seems to have been no extended discussion of the general character and limits of the superintending jurisdiction of supreme courts in the decisions of other states, although the Constitutions of Missouri, Michigan, and Colorado contain provisions very similar to our provision granting to the supreme court superintending control over all inferior courts; while in Alabama, Arkansas, Iowa, and North and South Carolina the superintending control is given in somewhat different phraseology. However, we have found no decisions nor intimations contradictory to the views hereinbefore expressed, while we find the writs of mandamus and prohibition to have been frequently used in the exercise of this jurisdiction.

Thus, in *State ex rel. Bayha v. Phillips*, 97 Mo. 331, 3 L. R. A. 476, note, 10 S. W. 855, mandamus was issued under the superintending power to compel an inferior court to reinstate a cause, and it was said of the superintending control: "The control granted to this court in the particulars mentioned is fettered by no restriction or limitation; it is as broad as the exigency of the case demands." And in *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 357, 658, a writ of prohibition was granted to prevent an inferior court from proceeding to exercise unauthorized power. See a discussion of superintending control in 2 Leg. Adv. April, 1899, p. 333. See also 2 Spelling, Extraordinary Relief, § 1394, and cases cited in note 2, and cases cited in note to *State ex rel. Bayha v. Phillips*, 3 L. R. A. 476.

Having thus demonstrated that the constitutional grant of superintending control over all inferior courts vested in this court an independent and separate jurisdiction en-

Smith, 141 Mo. 1, 41 S. W. 906; *State ex rel. Smith v. Smith*, 152 Mo. 444, 54 S. W. 218.

The circuit court has control of assignments for the benefit of creditors. Where the surviving partner of a firm, who had been administrator of the partnership estate, was removed therefrom for failure to give the security required by the probate court; and thereafter assumed to assign the partnership estate for the benefit of creditors,—the circuit court was restrained from exercising jurisdiction over the partnership estate under the assignment. *State ex rel. Richardson v. Withrow*, 141 Mo. 69, 41 S. W. 980.

The circuit court issued a temporary injunction restraining the relators from acting as election commissioners on the ground that the act under which they were appointed and about to be commissioned was unconstitutional. The injunction was issued five days before the act complained of became a law. The supreme court held that the circuit court had no jurisdiction to issue the injunction, and awarded a prohibition to the circuit court forbidding its entertaining jurisdiction of the suit. *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 302, 54 S. W. 494; *State ex rel. McCaffery v. Eggers*, 152 Mo. 485, 54 S. W. 498.

An application was made to the supreme court for a prohibition to the court of appeals on the ground that a case in the last-named court had been decided in disregard of the last ruling of the supreme court on the question involved. The writ was refused for the reason that the court of appeals has the right to determine all cases before it. *Missouri, K. & T. R. Co. v. Smith*, 154 Mo. 300, 55 S. W. 470.

The circuit court has, under the Constitution, art. 6, § 23, superintending jurisdiction over inferior courts. *Bennett v. McCaffery*, 28 Mo. App. 220.

The circuit court had refused a mandamus to compel a justice of the peace to allow a change of venue in a case, and under circumstances where the statute was imperative that he should do so. The court of appeals reversed this, and directed the circuit court to award the writ. *State ex rel. Lloyd v. Clayton*, 34 Mo. App. 563.

In *State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551, the Kansas city court of appeals held that while Mo. Const. art. 6, § 12, in connection with § 4 of the Amendment of 1884, gave that court "superintending 51 L. R. A.

control over all inferior courts of record," yet, as the first clause of the section gave it power to issue writs of habeas corpus, quo warrant, mandamus, certiorari, and other original remedial writs, and to hear and determine the same, it might issue a writ of prohibition to a justice of the peace,—citing and following *Lane v. Charles*, 5 Mo. 285. The court said: "The original remedial writs included in the first clause are frequently the mode best adapted to superintend and control inferior courts, but they are not always so. . . . We supervise, superintend, and control inferior courts by appeal and writs of error. . . . Any other view would drive us to the position that we can only exercise superintending control by an original remedial writ, which was certainly not contemplated by the makers of the Constitution, else they would have stopped short and not have added the second clause, 'and shall have superintending control,' etc. The particular words of the first clause exhaust all original remedial writs; therefore, 'if the particular words exhaust a whole genus, the general words must refer to some larger genus.' Sutherland, Stat. Constr. § 278. The general words of the last clause are of broader signification, as it relates to superintending control, than the particular words of the first."

State ex rel. Houston v. Ganzhorn, 52 Mo. App. 220, cites and follows *State ex rel. Blakemore v. Rombauer*, 101 Mo. 499, 14 S. W. 726. To the same effect, *Joplin & W. R. Co. v. McGregor*, 53 Mo. App. 366.

Where a change of venue has been duly taken and a transcript of the record filed in the office of the clerk of the circuit court of the county to which the case has been transferred, so that the court has complete jurisdiction thereof, but the court dismisses the cause on its own motion for alleged want of jurisdiction, the supreme court will, by mandamus, require the circuit court to reinstate the case, and to proceed with the trial thereof; but it has not the power to control the judgment and discretion of the circuit court in any particular direction, under Const. art. 6, § 3, giving the supreme court "a general superintending control" over the circuit courts of the state. *State ex rel. Monett Mill Co. v. Neville* (Mo.) 57 S. W. 1012. **Montana.**

"The supreme court . . . shall have a general supervisory control over all inferior courts, under such regulations and limitations

abling and requiring it, upon sufficient occasion, by the use of all proper and necessary writs to promptly restrain the excesses and quicken the neglects of inferior courts in the absence of other adequate remedy, the question arises whether the case presented is one within that jurisdiction, and, if so, whether mandamus is an appropriate and efficient remedy. The present controversy arises out of the administration of the affairs of an insolvent bank with nominal assets of over a million and a half, and debts nearly as large. By the deed of assignment these assets became substantially the property of the creditors to the amount of their just claims held in trust for their benefit by the assignee, to be converted into money, under the direction of the court, and applied in liquidation of their claims. The creditors were the real owners, the assignee their trustee, and, in a sense, their mere agent. While they were not entitled to officiously intermeddle with the business, nor dictate to the assignee, they were entitled at

all reasonable times and in all reasonable ways to be informed of the progress of affairs and the state of the business. These propositions seem self-evident from the very nature of the relations of the parties to the subject-matter, and from the care which is taken by the statute to arm the creditors with all necessary power to intervene in the proceedings, to examine the assignor and his books; to investigate, by the examination of the assignor and other witnesses, the business affairs of the assignor, both before and after the assignment; to compel the rendering of an account by the assignee; to be heard up on the settlement of the account, and to require the removal of the assignee by the court. Rev. Stat. 1898, §§ 1693b, 1701, 1702.

We are compelled to say in the present case that the fundamental rights of the creditors seem to have been entirely ignored or denied by the assignee and by the court, and the position seems to have been taken that the business was the business of the

as may be prescribed by law." Mont. Const. art. 8, § 2.

"Said court shall have power, in its discretion, to issue and to hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction." Mont. Const. art. 8, § 3.

"The district court shall have original jurisdiction in all cases at law and in equity . . . and in all criminal cases amounting to felony. . . . Said courts and the judges thereof shall have power also to issue, hear, and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction, and other original and remedial writs, and also all writs of habeas corpus on petition by or on behalf of any person held in actual custody in their respective districts." Mont. Const. art. 8, § 11.

"In the exercise of its original jurisdiction the supreme court has power to issue writs of mandamus, certiorari, prohibition, injunction, and habeas corpus; also has power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction." Mont. Code Civ. Proc. 1893, § 19.

The Code provision as to district courts is the same as the Constitution.

The circuit court had denied a writ of mandamus to compel a justice of the peace to issue an order on a personal judgment in attachment proceedings against a nonresident, to a garnishee, to appear and testify under oath where the justice had refused to make the order on request. On appeal to the supreme court the judgment of the circuit court was reversed, and a mandamus to the justice ordered. *State ex rel. Mathews v. Eddy*, 10 Mont. 811 25 Pac. 1032.

In *Re MacKnight*, 11 Mont. 126, 27 Pac. 338, the court, after quoting the provision of the Constitution, art. 8, § 3, held that only the use of the "other original and remedial writs" mentioned in the last clause is restricted or limited to the exercise of appellate jurisdiction. The writs named are defined in law, and their use in the administration of justice is fixed by long usage and well-settled principles. Their office being known, the framers of the Constitution understood exactly what jurisdiction was being granted by placing them within the power of the court to issue, hear, and determine.

This is opposed to the construction of a like 51 L. R. A.

provision in the Constitutions of Alabama and Arkansas by the supreme courts of those states.

Relator, having been arrested before a justice of the peace upon a warrant in two cases, deposited \$50 cash bail, and presented a sufficient affidavit for a change of venue, which was overruled by the justice. She was convicted in the first case, and fined \$25 and costs. She afterwards deposited \$500 cash bail in the second case. She did not appear, and the deposits were forfeited. The supreme court, on certiorari, held that the justice had no jurisdiction after the presentation of the affidavit to change the venue, and annulled all his proceedings. *State ex rel. Gleim v. Evans*, 13 Mont. 239, 33 Pac. 1010.

A justice of the peace had entered judgment on the verdict of a jury, and the jury were discharged. Several days afterwards the justice, on motion of the plaintiff, entered another judgment, which included \$50 attorney's fees. On an application to the district court for a certiorari to review the action of the justice as in excess of jurisdiction the latter court dismissed the writ and affirmed the judgment. On appeal from the dismissal the supreme court held the action of the justice was beyond his jurisdiction and the judgment void, and reversed the judgment of the district court, and remanded the case with instructions to the latter court to sustain the writ and annul the judgment of the justices. *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95.

A suit was commenced in respondent's court against the husband of relatrix. The constable served the summons by delivering a copy and reading it to relatrix as wife of defendant. A judgment was rendered against the husband, and an execution issued. Months afterwards the respondent issued an alias execution against the husband and the relatrix, by virtue of which a constable levied on her property. The district court, on certiorari, annulled the proceedings as in excess of jurisdiction, and on appeal this was affirmed by the supreme court. *State ex rel. Simpson v. Votaw*, 18 Mont. 279, 44 Pac. 982.

The district court had by an order directed a special administrator to pay a claim against an estate. The supreme court on certiorari held that, as the relator had no authority to pay claims, the district court acted without, and exceeded its jurisdiction in directing him to pay it,—that the only adequate remedy was

assignee, in which the creditors were only remotely interested, if interested at all. Five years and more passed without the rendering of any account by the assignee, and these years were full of many business transactions, some of them of considerable magnitude, including the compromise of large claims, the purchase and closing out of a large stock of furniture upon execution, and the payment of senior execution creditors from the proceeds. When at last, in compliance with an order of court, the assignee rendered a supposed account of his long stewardship, he failed utterly to comply with the requirement of the statute. By § 1701, Rev. Stat. 1898, his account and report must consist of (1) an itemized and verified statement of the property by him received, (2) the manner of his dealing therewith, (3) the amount of money realized by him, (4) the condition of the property and funds in his possession, (5) the names and residences of the assignor's creditors, (6) the dividends paid them, (7) his

receipts and disbursements, and (8) his claim for compensation. The account filed by the assignee consisted principally of a transcript of his cash account, which is nowhere footed, and which utterly fails to state the property received by him, the manner of his dealing therewith, and from which the amount realized and the condition of the funds and property in his possession can only be determined, if at all, by long and patient examination by expert accountants. It is an account better calculated to obscure and confuse the situation than to render it plain. It was an account that did not comply with the statute, and which any creditor was entitled to have made definite and certain before being required to file specific objections to it. Upon the hearing of the so-called "account" certain creditors moved that the same be made more definite and certain, so as to comply with the requirements of the statute. There can be no question of the absolute right of any creditor to demand that the assignee make and file an

certiorari; and denied the motion to quash the certiorari, and annulled the order of the district court. *State ex rel. Bartlett v. Second Jud. Dist. Ct.* 18 Mont. 481, 46 Pac. 259.

The relator having been denied a certificate entitling him to practise medicine, etc., in the state, by the board of medical examiners, appealed from that decision to the district court. That court dismissed the appeal on the ground that it had no jurisdiction to try and determine the same. The supreme court held that the district court should have entertained the appeal, and, having dismissed it, would be compelled to assume the jurisdiction it thus refused to entertain, and ordered a peremptory mandate for that purpose. *State ex rel. Seres v. First Jud. Dist. Ct.* 19 Mont. 501, 48 Pac. 1104.

Montana Code Civ. Proc. § 1980, is in the following words: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board, or person."

In a recent case it was held that this section did not enlarge the office of the writ so as to permit its use to arrest proceedings not of a judicial but merely of a ministerial character. *State ex rel. Scharnikow v. Hogan* (Mont.) 62 Pac. 493.

New Hampshire.

No constitutional grants.

"The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, and shall have exclusive authority to issue writs of error, certiorari, and prohibition, and may issue writs of habeas corpus and all other writs and processes to other courts, to corporations and to individuals." N. H. Pub. Stat. 1891, chap. 204, § 2, p. 572.

"The court at the trial terms shall take cognizance of civil actions and pleas, real, personal, and mixed, according to the course of the common law; of writs of mandamus, and quo warranto, and proceedings in relation thereto." Id. § 4, p. 573.

The power to issue certiorari is given to the supreme court to keep inferior courts within the bounds of their jurisdiction. *State v. Thompson*, 2 N. H. 236.

51 L. R. A.

An ordinary tax assessment of a town is a judicial act of the selectmen. A suit lies for an exercise of superintending power against the selectmen of the town for a writ of mandamus to compel them to assess a tax, and for general relief, and the supreme court of New Hampshire has jurisdiction of such action. *Boody v. Watson*, 64 N. H. 182, 9 Atl. 794. The court then concluded with approval of the statement in *Strong*, Petitioner, 20 Pick. 484, and further said: "The necessity of a superintending power to revise the proceedings and correct the irregularities of such tribunals cannot be questioned. *Lynde v. Noble*, 20 Johns. 80; *Lawton v. Cambridge Highway Comrs.* 2 Cal. 179. From this necessity arises the common-law jurisdiction of general superintendence."

North Carolina.

"The supreme court . . . shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." N. C. Const. art. 4, § 8.

The most frequent use of the writ of certiorari in North Carolina is to supply the place of an appeal where the applicant has been deprived of the right by fraud or accident; and, when allowed by the order of the superior court the case has been transferred to the trial docket, its effect is precisely the same.—the trial is *de novo*. *Gidney v. Hallsey*, 9 N. C. (2 Hawks) 552; *Collins v. Haughton*, 26 N. C. (4 Ired. L.) 420; *Otey v. Rogers*, 26 N. C. (4 Ired. L.) 554.

The superior court had granted a certiorari to review certain proceedings in the county court which were not appealable. The defendant here moved to quash the writ because no appeal was given by law and therefore the superior court could not take jurisdiction in any way. The superior court refused the motion and allowed an appeal to the supreme court. The supreme court held that the ordinary use of the writ (as asserted in the foregoing cases) was not the only application of this remedy in use here,—much less allowed by the common law; that it is often used as a writ of false judgment to correct errors and convictions and judgments of justices of the peace out of court; that although an appeal which is in the nature of a new trial on the facts and merits cannot be sustained unless expressly given by statute, the superior court will always control inferior magistrates and tribunals in matters for which a writ of error lies

account answering the requirements of the statute, before he is required to make special objections to any particular items of such account. But the circuit judge took the motion and the account under advisement, stating that he should reserve the question of the assignee's compensation until the rendering of the final account of the assignee. No further action was taken by the court until the 9th day of May following, when, without notice to any creditor, and without disposing of the motion to make the account definite and certain, an order was made confirming the account as a full accounting of all acts of the assignee up to July 1, 1898, except as to his compensation; thus, in effect, closing every avenue by which creditors could hope to investigate the assignee's conduct of affairs. After this action, taken, as we must conclude, in utter disregard of the rights of the creditors to examine and object to the account required by the statute, orders were made in rapid succession denying the creditors the right to

examine the assignee and the officers of the assignor, accepting the resignation of the assignee, but continuing him in the discharge of his duties, vacating an order for the examination of the officers of the assignor made by a court commissioner, denying the motion to make the account more definite and certain, and denying a motion to vacate the order confirming the account of the assignee. If any additional order could have been devised which would more completely and thoroughly prevent the investigation of the transactions of the assignee prior to July 1, 1898, we do not know what it could be. Notwithstanding the fact that the creditors had an absolute statutory right to an account substantially conforming to the requirements of § 1701, Rev. Stat. 1898, and notwithstanding the fact that some of them had moved the court to require the making of such an account, they now found themselves out of court, and the doors barred to all future entrance except for the purpose of considering the

not, by certiorari to bring up their judicial proceedings to be reviewed in the matter at law; that the superior court is the highest court of original jurisdiction, and has always exercised the superintending control which the King's bench has in England as far as necessary to the preservation of the common right of the citizen: that such a jurisdiction is indispensable in a free country where the principle of arbitrary decision is not acknowledged, but the law is held to be the true and only standard of justice. *Brooks v. Morgan*, 27 N. C. (5 Ired. L.) 481.

The writ of certiorari is ordinarily and commonly used in North Carolina as a substitute for an appeal when the latter has been lost without any fault of the party entitled to it. Its effect in such a case is to give to the party a right to a trial *de novo* or a rehearing in the appellate court. But though this is the ordinary and most common, it is not the only, use of the writ. It may be and often is employed as a writ of false judgment,—to correct errors in law, and then it is the means whereby the superior court, which is the highest court of original jurisdiction in this state, can, and in a proper case always will, control inferior tribunals in matters for which no writ of error lies by bringing up their judicial proceedings to be reviewed in the matter of law. *Raleigh Comrs. v. Kane*, 47 N. C. (2 Jones L.) 288.

In North Carolina the superior court has no power to issue a writ of prohibition. The supreme court alone has that power. If there was any doubt before the adoption of our present Constitution it would seem to be plain now. *Perry v. Shepherd*, 78 N. C. 83. The opinion states that the reports furnish but one instance of the use of the writ of prohibition in the state, saying that it must be owing to the fact that there are other remedies more appropriate and efficacious; that the case alluded to, in which it was resorted to, is *State v. Allen*, 24 N. C. (2 Ired. L.) 183, and that it was held that it would not lie in that case.

When the matter involves the power of the superior court, and error in its exercise, the record may be brought up for review. Under N. C. Const. art. 4, § 10, the supreme court has power to issue any remedial writs necessary to give it a general superintendence and control of the inferior courts. *Ex parte Biggs*, 64 N. C. 202.

The supreme court has the power to supervise 51 L. R. A.

and control the proceedings in the superior courts, and to that end may use any writs necessary and proper, of which the writ of certiorari is the appropriate one, as we have seen. *State v. Swepton*, 83 N. C. 584. This was in a case where the superior court had refused to entertain a motion to amend its record on the ground of want of power; the supreme court deciding that it had the power.

The prerogative writ of mandamus has never obtained in the state of North Carolina. *Scire facias* and *quo warranto*, are abolished and civil actions substituted (N. C. Code, § 623). And mandamus is regulated as an action, by the Code, § 622. *Lyon v. Granville County Comrs.* 120 N. C. 237, 26 S. E. 929.

North Dakota.

"The supreme court . . . shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." N. D. Const. art. 4, § 86.

"It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, *injunction*, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same." Id. § 87.

"The district court shall have original jurisdiction, except as otherwise provided in this Constitution, of all causes, both at law and equity. . . . They and the judges thereof shall also have jurisdiction and power to issue writs of *habeas corpus*, *quo warranto*, *certiorari*, *injunction*, and other original and remedial writs, with authority to hear and determine the same." Id. § 103.

In *State v. Nelson County*, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 83, the court said: "This case furnishes the first instance of an application to this court to put forth its original jurisdiction by issuing a writ except in a single *habeas corpus* case. We deem it expedient, therefore, to now indicate briefly the circumstances under which this court, in the exercise of a discretion vested in it, will deem it its duty to take original cognizance of cases. Section 87 of the Constitution of the state authorizes this court to 'issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and *injunction*.' In the exercise of its appellate and supervisory power over inferior courts the supreme court may have occasion from time to time to issue certain of the writs above

question of the compensation of the assignee. It seems to us manifest that there has been in this court a denial of several absolute and valuable rights which the law guarantees to the creditors of an insolvent estate. They had a statutory right to have an account rendered by the assignee in substantial conformity with the terms of the statute; they had a statutory right to file objections to such an account after examination thereof (Rev. Stat. 1898, § 1701); they had a statutory right to inspect the books of the assignor, and examine the officers of the assignor and other witnesses prior to the final adjustment and approval of such account (Id. § 1693b; *Berles v. Comstock*, 104 Mich. 129, 62 N. W. 148); and they had a common-law right, arising from their relations to the property and to the assignee, to examine the books of the assignee, and the assignee himself, prior to the final approval of such account. All these rights were valuable and absolute rights, to be exercised within reasonable

limits, but which, in the present case, were wholly denied to the creditors; and, unless there be adequate remedy for such denial in the regular exercise of the appellate jurisdiction of this court, it is difficult to see why the superintending jurisdiction should not be exercised to quicken the neglect or refusal of the circuit court, and compel it to act within its jurisdiction. *Merrill, Mandamus*, § 204. But it is argued that, inasmuch as an appeal lies from the order settling the assignee's account (Rev. Stat. 1898, § 1701), as well as from the other orders made in the assignment proceedings (Id. § 1702i; *Re Gilbert*, 94 Wis. 108, 68 N. W. 863), there can be no remedy by mandamus. The general rule of law undoubtedly is that mandamus will not lie where there is a remedy by appeal or writ of error. *Merrill, Mandamus*, § 201; 2 *Spelling, Extraordinary Relief*, § 1390; *State ex rel. Spence v. Dick*, 103 Wis. 407, 79 N. W. 421. But the remedy by appeal must be substantially adequate in order to prevent relief by man-

enumerated, but such writs will not issue out of this court in the exercise of its original jurisdiction, except in a limited class of cases, and such as are not ordinarily of frequent occurrence. All of the original and remedial writs which can be issued out of this court, under the Constitution, may, under § 103 of the state Constitution, be issued, not only by the district courts, but the judges thereof. We think the intention was to devolve upon the district courts, which are readily accessible, and at all times open for public business, the duty of assuming original cognizance of all ordinary cases which are remediable by means of the writs aforesaid; and to confer upon the supreme court, in the exercise of a discretion vested in it, the duty of taking original cognizance only in the limited class of cases where the writs, except the writ of habeas corpus, are sought for on motion of the attorney general as prerogative writs."

An alternative writ of mandamus was issued to compel the judge of the district court to decide a motion for a new trial alleged to be pending before him, and which he refused to decide. The writ was issued under §§ 86, 87, of the state Constitution, vesting in the supreme court superintending control over all inferior courts, and giving it power to issue such original and remedial writs as might be necessary to the proper exercise of its jurisdiction. The court found as a fact that the motion had never been submitted to the judge for decision, and he therefore had no duty to perform with respect to it, and quashed the alternative writ. *State ex rel. Northern P. R. Co. v. Stutsman County Dist. Judge*, 3 N. D. 43, 53 N. W. 433. The converse of the proposition decided by the court is, that had there been a motion properly submitted to the judge which he refused to decide, a peremptory writ would have issued under the power of superintending control.

An assignment for the benefit of creditors had been made of the property of an assignor. Such property having been attached in the hands of the assignee, the district judge of the district in which such assignment was executed made an order directing the sheriff forthwith to surrender possession of the property attached to the assignee on the theory that the property was in the custody of the court. Such order was not made in any action or special proceeding pending in court. It was granted upon the mere affidavit of the assignee, without hearing

the sheriff or the plaintiff in the attachment, and without notice to either of them. The supreme court held that the order was absolutely void, and should be set aside on certiorari; and further, that the proceeding was not before the court on appeal, that the writ had been issued by the supreme court, not in the exercise of its appellate jurisdiction, but under the power of superintending control over inferior tribunals vested in it by the Constitution; and further, that the court in any case has a right to issue a writ of restitution when under certiorari it has annulled an order or judgment of an inferior court under which the successful party has lost property or rights, and it appears that the lower court has no power to order the issuance of such writ. *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 319, 26 L. R. A. 593, 58 N. W. 514.

Oregon.

"The judicial power of the state shall be vested in a supreme court, circuit courts, and county court, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law in accordance with this Constitution." Or. Const. art. 7, § 1.

"The supreme court shall have jurisdiction only to revise the final decisions of the circuit courts." Id. § 6.

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals." Id. § 9.

One of the most common and important offices performed by the common-law writ of certiorari was to enable the superior courts to supervise the proceedings of inferior tribunals, and see that they did not exceed their jurisdiction or proceed wholly without authority. *Thompson v. Multnomah County*, 2 Or. 34. After quoting Const. art. 7, § 9, the court said: "It may be said that this section simply affirms the common law [of this state], but as the fundamental law of this state governing the legislature as well as the court, and looking to the peculiar phraseology of the last clause, it may be matter of grave doubt whether the legislature could so far abridge the power of the circuit courts as to confine them to examination of cases brought upon an appeal only. In

damus. If it appears that an appeal will not be an adequate remedy, mandamus may still issue, in the discretion of the court. Merrill, *Mandamus*, § 201; *Merced Min. Co. v. Fremont*, 7 Cal. 130; Hawes, *Jurisdiction of Courts*, § 141. In the present case it is quite apparent that appeals from the orders complained of would in all reasonable probability constitute no remedy to the creditors. The assignment was made June 1, 1893. A large portion of the assets of the bank consisted of commercial paper executed prior to that date, and necessarily maturing in the summer and early fall of 1893. Such of the paper which is still uncollected, and has not been sued on, will become barred by the statute of limitations within a few months. Furthermore, the long lapse of time which has occurred since the assignment renders it almost certain that rights of action are daily lapsing. Appeals from such orders could not, in the ordinary course of appellate proceedings, be heard and decided before late in the autumn or in the

winter of 1899. It is very plain that, if the creditors are to exercise their rights with any prospect of benefit, they must exercise them promptly. The delay attending upon the presentation and consideration of an appeal would probably be fatal to any effective relief.

Again, it is said that the orders in question are discretionary in their nature, and reliance is placed upon the well-known principle that mandamus will not lie to control the exercise of discretion. It has already been shown that the rights which have been denied to the creditors here were absolute rights, and not dependent upon the discretion of the court. True, the rights must be reasonably exercised, and in this respect there may exist some degree of discretion in the trial court; but the case fails to show that the objecting creditors have chosen an unreasonable time or manner for the exercise of their rights, or that they have been guilty of laches. They set the proceedings in motion to require an accounting by the

support of this view it has been held where, by the act creating an inferior tribunal its adjudications were declared to be final, nevertheless a writ of certiorari would lie. *Es parte Albany*, 23 Wend. 277."

In a case where the circuit court was asked to exercise a supervisory control over the county court by injunction and by a decree in the nature of specific performance, it was held that this could not be done by injunction or by suit in equity. The supervisory control exercised by the circuit court as a general rule is to be exercised by mandamus, the writ of review, or appeal, and this case furnishes no exception to this general rule. *Douglas County Road Co. v. Douglas County*, 5 Or. 373.

In the case of *Simon v. Portland*, 9 Or. 437, the decision does not mention the general subject, but some of the decisions stated do; quoting from *Birdsall v. Phillips*, 17 Wend. 464, which says: "This writ is but an emanation from the general supervisory duty of the supreme court to restrain the action of all inferior magistrates within their legal grasp." This was said in relation to the writ of certiorari.

The opinion in *Es parte Heath*, 3 Hill, 42, was written by Mr. Justice Cowen, who gave the opinion of the court in *Es parte Albany*, 23 Wend. 277, and he there cites the case cited by him in *King v. Fens Comrs.* 2 Keble, 43, and says: "This case declares another principle which has been held by this court, that a writ of certiorari will lie to an inferior tribunal, even though the act by which it is created declares its adjudication to be final."

In *King v. Fens Comrs.* 2 Keble, 43, it was held to lie, although the act declared the proceeding should be without appeal.

The decision does not mention the general subject, but one of the decisions cited does; quoting from *Birdsall v. Phillips*, 17 Wend. 464, which says: "This writ is but an emanation from the general supervisory duty of the supreme court to restrain the action of all inferior magistrates within their legal grasp." This was said in relation to the writ of certiorari.

South Carolina.

"The supreme court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the general assembly may by law prescribe: Provided, the

said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in the state." S. C. Const. art. 4, § 4.

"The courts of common pleas shall have . . . exclusive original jurisdiction in all civil cases and actions *ex delicto* which shall not be cognizable before justices of the peace, and appellate jurisdiction in all such cases as may be provided by law. They shall have power to issue writs of mandamus, prohibition, *scire facias*, and all other writs which may be necessary for carrying their powers fully into effect." Id. § 15.

"Each of the justices [of the supreme court] shall have power to . . . issue writs of injunction, mandamus, habeas corpus, and other remedial writs according to the principles and course of the common law not inconsistent with the Constitution." 1 S. C. Stat. § 2225, p. 775.

"The judges of the courts of common pleas shall have power, at chambers, to grant writs of prohibition, mandamus, and certiorari." Id. § 2247, p. 780.

Where one of the judges of the common pleas, sitting as a court of sessions, made an order for a prohibition to restrain the execution of a judgment of death, which the respondents, who composed a court of magistrates and freeholders, had awarded erroneously against a slave for an offense not capital, thereby transgressing the bounds prescribed to such court by law, a motion to the court of appeals to rescind the order granting the prohibition was dismissed. *State v. Ridgell*, 2 Ball. L. 560. This case is similar in its facts to *Bob v. State*, 2 Yerg. 173.

"By the Constitution and laws of both England and this state the judicial power is committed to a variety of courts, some of limited, and some of general, jurisdiction. And, in order that this may move in harmony each in its proper sphere, it is essential that a power of control should be lodged somewhere. . . . This controlling power is vested in this state, in the court of sessions, which exercises here the jurisdiction of the court of King's bench in England; and the process by which this controlling power is exercised is called a 'writ of prohibition.'" *State v. Nathan*, 4 Rich. L. 513.

assignee more than a year ago, and cannot be held accountable for the long delays which have occurred since that time. A writ of mandamus compelling the trial court to accord to the creditors the exercise of their clear rights in the assignment proceedings cannot, therefore, be held an interference with judicial discretion, when no attempt is made to control the action of the court, or prescribe its judgment, after such rights have been exercised. *Merrill, Mandamus*, § 204. Furthermore, it is not entirely accurate to say that no act involving discretion can be controlled or corrected by mandamus. Where it clearly appears that discretion has been not merely abused, but not exercised at all, or that the action taken by the inferior court is without semblance of legal cause, and no other adequate remedy exists, mandamus will lie to compel the specific action which should have been taken. *Id.* § 40; *State ex rel. Buchanan v. Kellogg*, 95 Wis. 672, 70 N. W. 300. Such cases are, however, more apparent, than real, excep-

tions to the rule, because, when only one course is open to the court upon the facts presented, the pursuance of that course becomes the plain and absolute duty of the court, and the refusal becomes, in effect, a failure to perform a duty within its jurisdiction. It is not meant by this, however, that mandamus will be used to perform the functions of appeal or writ of error, as seems to have been the tendency in the supreme courts of Alabama and Michigan. The duty of the court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by mandamus speedy and prompt, in order to justify the issuance of the writ.

This brings us to the consideration of another objection made by the respondent, namely, that the various orders made by the court below confirming the assignee's account and refusing the applications for examina-

In an application to a judge of the circuit court for a writ of prohibition the supreme court held that there was no doubt as to its power to issue writs of prohibition in proper cases made. That it was granted in unequivocal terms by Const. art. 4, § 4. It is an original and remedial writ, and is covered by the right conferred by terms as full and complete as if directly expressed. *State ex rel. South Carolina R. Co. v. Columbia & A. R. Co.* 1 S. C. N. S. 46.

In *Ex parte Carson*, 5 S. C. N. S. 117, it was decided that the words, "all other courts in the state," in the last clause of S. C. Const. art. 4, § 4, did not include tribunals which, though administrative or executive duties are imposed upon them, may nevertheless be required to incidentally exercise powers of a judicial character, but should be confined to those which by the Constitution were to constitute "the judicial powers of this state." That the case of *State ex rel. South Carolina R. Co. v. Columbia & A. R. Co.* 1 S. C. N. S. 46, did not militate against this proposition as in that case the court issued its prohibition in the exercise of its supervisory control over a court of common-law powers established by the Constitution.

It would seem that this position is in flat contradiction to that taken by courts of other states having constitutional provisions substantially similar, where it is held that the control extends to all tribunals exercising judicial functions.

In an application for a writ of mandamus to compel the secretary of state to deliver the certificate of election of speaker of the house of representatives to the petitioner the respondent made the claim that the enumerated writs could only be issued by the supreme court to control, by its supervision over all other courts in the state. The court held that that interpretation of the Constitution was not well founded. That the writs of injunction and habeas corpus were never used to control courts, being always directed to the party, and not to the court. *State ex rel. Wallace v. Hayne*, 8 S. C. N. S. 367.

The jurisdiction of the supreme court was defined in Const. art. 4, § 4. It embraces four distinct classes of powers: (1) Appellate jurisdiction in cases of chancery; (2) the correction of errors at law under such regulations as the general assembly may prescribe; (3) the power to issue certain specified writs; (4) the

power to issue such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts of the state. Whenever the court is asked to issue one of the writs embraced in the general terms employed in conferring the fourth class of powers, but in the third class of specified writs, it is necessary to show: 1. That the writ is to go to one of the courts of this state, as was decided in the case of *Ex parte Carson*, 5 S. C. N. S. 117. 2. That such writ is demanded for the purpose of giving to the supreme court some supervisory control over the court to which it is directed. *Ex parte Childs*, 12 S. C. 111.

The mayor and aldermen of a city were invested with various powers by the city charter: legislative, executive, judicial, and administrative; but that certainly cannot be regarded as one of the courts of the state, *except when acting in a judicial capacity*. And the supreme court therefore has no power to issue a writ of prohibition for the purposes of supervising or controlling their action, *unless such action be taken in their judicial capacity*. *State ex rel. Richland County v. Columbia*, 16 S. C. 412.

This case cites, and seems to approve, *Ex parte Carson*, 5 S. C. N. S. 117, and *Ex parte Childs*, 12 S. C. 111.

But if such action be taken in their judicial capacity what then? If the italicized words are to be taken for the decision of the court, and not the *obiter* of the judge, is it not an inferential holding that if the city authorities had been acting in "their judicial capacity," but without or in excess of jurisdiction, the writ would have issued?

State ex rel. Sawyer v. Fort, 24 S. C. 510, cites, approves, and follows *State ex rel. Wallace v. Hayne*, 8 S. C. N. S. 367, and *Ex parte Childs*, 12 S. C. 111. See also *Ex parte Bacot*, 36 S. C. 125, 16 L. R. A. 586, 15 S. C. 204.

Mandamus is not a prerogative writ but a writ of right in South Carolina. *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213.

South Dakota.

"The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." S. D. Const. art. 5, § 2.

"The supreme court and the judges thereof shall have power to issue writs of habeas corpus.

tion cannot be reversed upon mandamus, and hence that, being unreversed and unappealed from, they constitute complete bars to any relief by mandamus. This difficulty, also, is more apparent than real. While it is true that the legitimate function of the writ of mandamus is to compel action by the inferior court, rather than to reverse action already taken, it would be gross absurdity to hold that, after refusal to perform a plain duty within its jurisdiction, the inferior court could nullify the constitutional grant of superintending power by the entry of any order or orders. This court holds its power under no such uncertain terms. Those powers are not dependent upon the speed with which the trial court enters orders. If it becomes necessary, in the due discharge of its power of superintending control, that orders of the inferior court be vacated, this court will not hesitate to compel the vacation of such order by the inferior court by so framing its writs of mandamus. With the superintending con-

trol and the attendant writs this court took all the power necessary to make that control and those writs effective, and its arm is not nerveless because no writ may be found in the form books so framed as to meet the emergency. The writ will be framed to meet the exigencies of the case, and the court will discharge the duties of the trust reposed with it by the people, though it becomes necessary to modify and enlarge the terms of the ancient writ.

And so we have reached the conclusions briefly stated in the memorandum decision which was filed at the time of the decision of the case. There are yet remaining, however, two matters which require discussion. When the application for the writ was presented to us, there at once arose an apparent difficulty, resulting from the fact that the record in the court below was not before us, and would not be brought up by the writ. It is true that the petition set forth many of the facts, and contained copies of the orders complained of, and of the affida-

The supreme court shall also have power to issue writs of mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same in such cases and under such regulations as may be prescribed by law." *Id.* § 3.

"The circuit courts have original jurisdiction of all actions and cases both at law and in equity. . . . They and the judges thereof shall also have jurisdiction and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same." *Id.* § 14.

The primary jurisdiction of the supreme court is appellate and the exercise of superintending control. Its original jurisdiction is the power to issue the enumerated and other original and remedial writs with power to hear and determine the same. These writs, being in their nature prerogative or quasi prerogative, should be issued by the supreme court generally only for prerogative purposes in cases where the interests of the state are in some way directly involved. The power to issue these writs is also conferred upon the circuit court, and it is not to be presumed that the framers of the Constitution intended that the supreme court should exercise a concurrent jurisdiction with the circuit court in all cases in which these writs might afford an appropriate remedy. No doubt cases may arise where, in the furtherance of justice, and by reason of the existence of special causes, the subordinate courts are inadequate to furnish the relief sought, or may by reason of interest or other cause be unable to do so; or where the attorney general refuses to assume responsibility of prosecuting the case. *Everitt v. Hughes County Comrs.* 1 S. D. 365, 47 N. W. 296.

Thereafter an application was made by the attorney general for a certiorari to the same board of commissioners upon the same state of facts, which were as follows: The board of county commissioners of an organized county had assumed to establish voting precincts and appoint judges of election in a territory outside the limits of its county, in unorganized counties attached to such organized county "for judicial purposes." This was an application by the attorney general, as stated, for a writ of certiorari to remove and review the proceedings. Among the grounds of the motion to quash the writ 51 L. R. A.

was "that the acts complained of are ministerial in character, and not such as will admit of review under a writ of certiorari." The court said: "But our statute inherited from the territory of Dakota is *sui generis*. It is not only unlike the common law, but equally unlike the law of any other state so far as we have had the means of pursuing the inquiry." After stating the substance of the statute as to certiorari, and quoting a portion of it, the court says, further: "Thus, the legislature, whether wisely or unwisely it is not within the province of this court to inquire, has in plain and unequivocal terms extended the scope of the writ in this state, so that it fairly brings before us the record of these proceedings, whether judicial or otherwise." *State ex rel. Dollard v. Hughes County Comrs.* 1 S. D. 292, 10 L. R. A. 588, 46 N. W. 1127. The court did not intimate whether the board acted in a judicial capacity in doing what they did. If they did, then the supreme court exercised superintending control, notwithstanding that the conferring of power to exercise it is included in the same section with the appellate jurisdiction, and is by the court in the *Everett* case classed with the latter as "primary jurisdiction."

That the clothing of the supreme appellate court of a state by the organic law with the additional power of "superintending control" is a grant of original jurisdiction is too plain a proposition for discussion. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Ex parte White*, 4 Fla. 165; *Mayo v. James*, 12 Gratt. 17; *State ex rel. Meggett v. O'Neill*, 104 Wis. 227, 80 N. W. 447; *State ex rel. Fourth Nat. Bank v. Johnson*, 105 Wis. 164, 83 N. W. 820.

In an application for a mandamus to compel the circuit judge to vacate an injunction the court, after citing authorities from various states that under like provisions of the Constitution the court possessed the power, held that in this case the circuit judge had properly granted the injunction and denied the writ. *Huron v. Campbell*, 3 S. D. 309, 53 N. W. 182.

The county court has charge of probate matters. An application for a mandamus alleged that the son of a judge of the county court had made an agreement with certain of the persons claiming to be the only heirs of a decedent to prosecute a claim for a fee contingent upon his success with their claim in the county court. This was an original proceeding in the supreme court for a mandamus to compel the circuit

vits on which they were based, but the assignee's account was not here, nor the minutes of the clerk, and it seemed quite apparent that the entire record should be before us upon the hearing upon the merits. Upon consideration, the court, of its own motion, issued with the alternate writ of mandamus its writ of certiorari directed to the clerk of the trial court commanding him to return the original records for the sole purpose of placing before us the entire record as it existed in the trial court. The writ of certiorari was thus issued as ancillary only to the writ of mandamus. While the writ of certiorari is generally issued as an independent writ for the purpose of reviewing action below, it is well adapted to, and is frequently used for, ancillary purposes only, as a means of bringing up a record for use upon the hearing of another and different writ. "As a matter of practice in England and in this country, the writ of certiorari is granted as an auxiliary process in the courts where causes have been removed by

other remedy." Harris, *Certiorari*, § 9. In the courts of the United States it is commonly used as auxiliary to the writ of habeas corpus for the sole purpose of bringing up the record. *Ex parte Yerger*, 8 Wall. 85, 19 L. ed. 332; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Royal*, 112 U. S. 181, 28 L. ed. 690, 5 Sup. Ct. Rep. 98. It is also used in aid of a writ of error or appeal where diminution of the record appears. *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. 593; *State v. Randall*, 87 N. C. 571; *Field v. Milton*, 3 Cranch, 514, 2 L. ed. 516; *Fowler v. Lindsey*, 3 Dall. 411, 1 L. ed. 658. But, even in the absence of direct authority, the writ is so well adapted for such use that we should feel no hesitation in using it in a case where the court has obtained jurisdiction by other process, and where the presence of the record is necessary, and it is wholly or partially absent.

The remaining questions referred to arose upon the hearing of the return to the alternative writ. It was claimed by the respondent

court to determine whether it would assume jurisdiction of the matter pending in the county court. The supreme court held that if the son of the judge of the county court was interested in the event of the case the judge was disqualified; that in this case there was no adequate remedy except to exercise the power of superintending control granted by the Constitution, and by virtue of it award a peremptory mandamus to the circuit court commanding it to receive plaintiff's application and proceed to determine whether the judge was disqualified; and it was so ordered. *Vine v. Jones* (S. D.) 82 N. W. 82.

Texas.

The supreme court has a qualified appellate jurisdiction. "The supreme court and the justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and, under such regulations as may be prescribed by law, the said courts and the justices thereof may issue the writs of mandamus, procedendo, certiorari, and such other writs as may be necessary to enforce its jurisdiction. The legislature may confer original jurisdiction on the supreme court to issue writs of quo warranto, and mandamus in such cases as may be specified, except as against the governor of the state." Tex. Const. art. 5, § 3.

"The district court shall have appellate jurisdiction and general control in probate matters over the county court. . . . The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court . . . and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law." Id. § 8.

There is no express grant of the power in either Constitution or statute, except as above to district courts.

From 1845 to 1876 the district court was clothed with power, by the several Constitutions in force during that period, to issue all writs necessary to enforce its own jurisdiction, and to give it a general superintendence and control over inferior tribunals. N. Y. Conv. Man. 1867, part 1, Tex. Const. 1869, art. 4, § 8, Paschal's Dig. p. 1115.

The cases of *Banton v. Wilson*, 4 Tex. 400, and *Titus v. Latimer*, 5 Tex. 433, are decisions recognizing this power in the district court; 51 L. R. A.

and in the latter case it was further held that a district court had no appellate jurisdiction except from the probate court, and that none other could be conferred upon it by the legislature.

After verdict and judgment in favor of the plaintiff in the justice's court the defendant obtained a certiorari from one of the judges of the district court, and the cause after the return of the certiorari was transferred by consent to the district court. The judge of the district court dismissed the case, assigning as a reason for his decision that it was for want of jurisdiction. The supreme court reversed the decision of the district court, holding that what it had decided in *Titus v. Latimer*, 5 Tex. 433, was that while the district court had no jurisdiction by way of appeal from an inferior court (except the probate court), that it could review the proceedings of any and all of such inferior courts by means of any of the writs used in the exercise of superintending control. *O'Brien v. Dunn*, 5 Tex. 570.

All the common-law and chancery jurisdiction known to the courts of common law and chancery in England is conferred on the district courts not incompatible with the Constitution of the United States nor the Constitution of this state and laws under it. Where a person, and not the court, is to be acted upon, this jurisdiction may be exercised by proceedings in the usual form to prevent an injury or enforce a remedy. But whenever it is to control an inferior jurisdiction by acting upon such tribunal to restrain its action or review, revise, or correct its proceedings, it must be by the use of some process issued from the district court or one of its judges. To this there is an exception that an appeal will lie from the probate court to the district court. This right of appeal, however, does not destroy the right of the district court to exercise this control in the manner mentioned above, if for any sufficient cause an appeal has not been taken. *Newson v. Chrisman*, 9 Tex. 113.

The Constitution of 1866 clothed the district courts with the power to issue the writ of certiorari and all other writs necessary to give them general superintendence and control over inferior tribunals. *Wallerath v. Kapp*, 31 Tex. 359.

Kuechler v. Wright, 40 Tex. 600, cites with approval *State ex rel. Hodges v. Powers*, 14 Ga. 888, and quotes from it the statement so

ent that issues of fact were raised by the return to the writ and the answer to said return, and that the said issues must be tried either in the circuit court of Milwaukee county or some other circuit court, as provided by § 3452, Rev. Stat. 1898. That section provides that issues of fact in a mandamus proceeding in this court shall be tried in the circuit court of the county within which the material facts are alleged to have arisen, or in some other circuit court to which this court shall, in its discretion, for cause shown, order such trial. This contention was summarily overruled for two entirely sufficient causes: First. There are no true issues of fact raised by the return and answers thereto. The issues raised, upon analysis, will all be found to be issues of law. There are no material contentions raised as to the rulings of the court, nor as to the papers upon which those rulings were based, but the sole material contentions are as to the legal effect of those rulings, and the legal rights of the parties as shown by

the record. Second. Even admitting that issues of fact were raised by the answer, we cannot admit that the legislature has any power to deprive this court of any part of its constitutional jurisdiction to fully hear and try such questions. By the Constitution this court was given power to exercise fully and completely the jurisdiction of superintending control over all inferior courts. This power carries with it, not only the writs necessary to its exercise, but the right to hear and determine the cause when the writ has brought it before the court. No part of that power can be taken away by a statute. This court will always pay all due deference to the legislative will, and upon mere questions of practice or orderly proceeding will heed and conform to the statute; but when the statute invades or attempts to take away any of the constitutional powers of the court the court would be untrue to itself, and to the people, from which it holds its commission, if it permitted the statute to control. As said in *Klein*

frequently alluded to herein as being taken from Strong, Petitioner, 20 Pick. 484, commencing with the words: "In every well-constituted government the highest judicial authority must necessarily have a supervising power," etc.

Worsham v. Richards, 46 Tex. 441, is only of use as showing to a certain extent what the different Constitutions provided in regard to the subject under consideration. The court said: "It is contended by counsel for appellants that, although this has been repeatedly held to be a question pertaining to the political department of the government, it has become a subject of judicial cognizance by the provision in the Constitution of 1869, which gives to the district courts power to issue writs necessary to give them 'a general superintendence and control over inferior tribunals.' Const. 1869, art. 5, § 7, Paschal's Dig. p. 1115. This clause is not contained in the Constitution of 1875, and therefore the district court could not now issue any writ by virtue of said clause. Wall v. State, 18 Tex. 682, 70 Am. Dec. 302. If, however, the district court could now issue such a writ for the purpose of superintending and controlling the action of the county court it must be in relation to some private right of a person or persons which is recognized by law as being a subject of judicial action."

The Constitution gives the district court no general supervising control by writ or otherwise over the proceedings of the commissioners' court, or any other such courts or inferior tribunals. Const. 1876, art. 5, § 8.

In *Ex parte Towles*, 48 Tex. 418, the court said: "It is important, then, to consider whether or not the district court had the power sought to be conferred by this law, to entertain jurisdiction of the appeal in this case from the commissioner's court." (Laws 1875, 2d Session, 14 Leg. 87.) The court made a statement that all of the proceedings in this case have occurred since the adoption of the Constitution of 1876, and said further: "The Constitution does not confer upon the district court the power to entertain appeals from any other court than the county court in cases of administration and guardianship. (Const. 1876, art. 5, § 8.) Nor does this Constitution, as did that of 1869, give to the district court 'a general superintendence and control over inferior tribunals,' which might have been exercised, by legislative direction, through some writ issued from the district court."

51 L. R. A.

Under the Constitution of 1845, the district courts were given original and appellate jurisdiction and general control over the inferior tribunals to which was confided the transaction of business appertaining to estates. The present Constitution, unlike the former, confers no jurisdiction upon the district courts over county courts sitting as probate courts. Const. art. 5, § 8, evidenced that while an original jurisdiction and control over executors, administrators, guardians, and minors is given to the district courts, the sole jurisdiction given to such courts over the county courts sitting in probate is an appellate jurisdiction, and that must be exercised under such regulations as may be prescribed by the legislature. Under the present Constitution, which contains no grant of original jurisdiction to the district over county courts in probate matters, the rule is as stated by Lipscomb, J., in *Newson v. Chrisman*, 9 Tex. 113. *Franks v. Chapman*, 60 Tex. 46.

This case is of no particular account except for the purpose of showing that in Texas the district court has no original jurisdiction to control the county court in probate matters, but only appellate, and that until it has acquired jurisdiction it has no control over the latter.

Utah.

"The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus." Utah Const. art. 8, § 4.

"The district court shall have original jurisdiction in all matters, civil and criminal, not excepted in this Constitution and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs necessary to carry into effect their orders, . . . and to give them a general control over inferior courts and tribunals within their respective jurisdictions." Id. § 7.

The statutory provisions as to jurisdiction of both courts are identical with the above.

Relator was a member of the fire department, and was removed therefrom by respondents. The district court on certiorari reversed the removal, and this was affirmed by the supreme court, holding that the decision of removal was void as being in excess of jurisdiction; that the

v. *Valerius*, 87 Wis. 54, 22 L. R. A. 609, 57 N. W. 1112: "It must be remembered that this court as well as the legislature gets its judicial power and jurisdiction directly from the Constitution." It may well be that when a bona fide issue of fact is presented in a mandamus proceeding, and one which involves the hearing of oral evidence outside the record, this court will, for convenience, order the preliminary trial of such issue to be held before the circuit court, the findings or verdict being subject to final revision by this court, as has been done in several cases. *State ex rel. Field v. Saxton*, 14 Wis. 123; *State ex rel. Covenant Mut. Ben. Asso. v. Root*, 83 Wis. 667, 19 L. R. A. 271, 54 N. W. 33. But the statute cannot be considered as obligatory upon the court, especially in a case like the present,

where the questions at issue arise upon the record alone, and where the course prescribed by the statute would amount to a denial of relief. Such a holding would amount to a practical abdication of constitutional powers, or rather, perhaps, to a submission to legislative invasion of constitutional powers.

No costs will be awarded against the respondents, but the fees of the clerk of this court will be taxed and paid out of the assigned estate.

Judgment is ordered that a peremptory writ of mandamus issue in accordance with this opinion, and that the record transmitted to this court in response to the writ of certiorari be at once remitted to the trial court.

respondent in making the decision exercised judicial functions; and that certiorari was the appropriate remedy. *Gilbert v. Salt Lake City Police & Fire Comrs.* 11 Utah, 378, 40 Pac. 264. *West Virginia*.

"The supreme court of appeals shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition." W. Va. Const. art. 8, § 3.

"The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari. They shall, except in cases confined exclusively by this Constitution to some other tribunal, have original and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars: of all cases of habeas corpus, mandamus, quo warranto, and prohibition." Id. § 12.

The statutory provisions are substantially repetitions of the constitutional provisions.

A board of supervisors is an inferior tribunal within the meaning of W. Va. Const. art. 8, § 6, giving the circuit court supervision and control over justices and other inferior tribunals. All the reasons which exist for the supervision and control of inferior tribunals by the court of King's bench equally exist in this case, and are equally within the reason and intent of the Constitution, so that the board is no less within the spirit than the letter of the Constitution giving the supervision and control thereof to the circuit court. In this case a prohibition to oust certiorari from the circuit court was refused. *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770.

In *Meeks v. Windon*, 10 W. Va. 180, a judgment was recovered against the appellant in the circuit court, and he appealed to the supreme court. Upon the trial of the appeal the court found for the defendant, and gave a judgment for costs against the plaintiff. The plaintiff obtained a writ of certiorari to remove the proceedings into the circuit court for supervision. The supreme court awarded a prohibition to prevent the circuit court from proceeding further on the ground that it did not appear that it had jurisdiction.

In an election contest the county court in which the primary jurisdiction lay declined it on account of what it held to be a defective proof for service. The circuit court issued a certiorari, and the hearing held the service good, and then proceeded over objection to hear the matter on the merits *de novo*; its judgment being that neither party was entitled to the office. The supreme court reversed the judgment, deciding that the circuit court was right in holding that the service was good, but erred in 51 L. R. A.

trying the matter when it should have remanded it to the county court with directions to proceed to hear it on the merits. *Dryden v. Swinburn*, 15 W. Va. 234.

This is the sequel to the foregoing case. The county court heard the case on the merits and awarded the office of clerk of the circuit court to Swinburn. Thereupon the circuit court allowed a supersedeas and writ of error, and in an equity suit brought by the clerk holding over, an injunction enjoining Swinburn from exercising the duties of the office was granted by the respondent, judge of the circuit court. In both cases prohibition was asked, and the supreme court held that a writ of error does not lie to the judgment of the county court in an election contest, and that certiorari is the remedy. The circuit court had assumed by an injunction granted in the equity suit to decide that the clerk holding over was entitled to fill said office, and perform all its duties, and receive all its emoluments and fees until the contest aforesaid should be fully decided. The supreme court held that the circuit court had obviously no right in this *ex parte* proceeding to decide who was then entitled to said office, and that the order of injunction, etc., could be regarded as only the expression of the opinion of the judge and of his determination to recognize the person holding over as clerk; an opinion which he might, whenever he pleased, change. As the decision of the court the order must be regarded as a nullity. The court ordered a writ of prohibition to be granted to prohibit the proceedings in the court of chancery, as well as in the common-law court. *Swinburn v. Smith*, 15 W. Va. 483.

The circuit court issued a certiorari to the county court to review its action overruling the objections of the board of education to an account of the sheriff. The circuit court had dismissed the certiorari which it had awarded, for want of jurisdiction, and the board of education had caused a writ of error to issue. The supreme court of appeals held that the writ of error was the proper mode of reviewing the action of the circuit court, and that, in the absence of any restriction by the legislature, the circuit courts would properly supervise the county courts in those cases in which, by the common law, it was proper to exercise this supervision. There is nothing in the statute to except this proceeding from supervision, and, as it can only be supervised by certiorari, it was liable to be supervised in that manner. *Sherman Dist. Bd. of Edu. v. Hopkins*, 19 W. Va. 84.

The omission of the word "control" from the Constitution of 1872 wrought no change in the power of the circuit courts, as the power

LOUISIANA SUPREME COURT.

STATE of Louisiana *ex rel.* City of NEW ORLEANS

v.

JUDGE OF CIVIL DISTRICT COURT for Parish of Orleans, Division "B."

(52 La. Ann. 1275.)

*1. The Constitution confers upon the supreme court the control and general supervision of all inferior courts, and, for the purpose of such jurisdiction, authorizes it to make use of the writs of certiorari, mandamus, prohibition, and quo warranto, and other remedial writs; and the functions of the writs mentioned are thereby

*Headnotes by MONROE, J.

of supervision includes control. No statute law was necessary to confer this power on the circuit court, especially when the act of 1872 and 1873, and the Constitution of 1872 conferred on them the power to supervise all proceedings before the county courts by a mandamus. It at once called into existence the power conferred by the common law to enforce the performance of such a duty by mandamus. *Dryden v. Swinburne*, 20 W. Va. 80.

While the court having the power to issue prohibition to inferior tribunals exercising judicial functions as a board of canvassers of election will do so if it is proceeding under such exercise in excess of its judicial powers, or is usurping judicial powers which do not belong to it, mere errors in the irregularities of the commissioners acting as such board of canvassers proceeding within their jurisdiction are not subject to prohibition. *Fleming v. Kanawha County Comrs.* 31 W. Va. 608, 8 S. E. 267.

In West Virginia there is no tribunal which is not subject to be legally controlled by the courts. Not even a board of canvassers of the votes after election can escape legal responsibility; and where such boards act without authority,—usurp judicial functions where none are conferred by statute,—the courts will control them by prohibition. *Brazie v. Fayette County Comrs.* 25 W. Va. 213.

And where they decide improperly, and declare a wrong result, their action will be controlled by certiorari. *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770; *Chenoweth v. Randolph County Comrs.* 26 W. Va. 230; *Poteet v. Cabell County Comrs.* 30 W. Va. 58, 8 S. E. 97; *Alderson v. Kanawha County Comrs.* 31 W. Va. 633, 8 S. E. 274.

Under W. Va. Const. art. 8, § 12, making it the duty of the circuit court, and giving it jurisdiction, to supervise and control all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari, that court will not issue a certiorari to review and revise a justice's judgment for \$14, when the statute provides that no certiorari for review shall issue unless the amount in controversy exceeds \$15. *Wilson v. West Virginia C. & P. R. Co.* 38 W. Va. 213, 18 S. E. 577.

The circuit court had dismissed an appeal for the reason that the statute providing for it was unconstitutional. The supreme court of appeals, taking a different view of that question, awarded a mandamus to compel the circuit court to assume jurisdiction. *Wheeling Bridge & Terminal R. Co. v. Pauli*, 39 W. Va. 142, 19 S. E. 551.

When judgment has been erroneously rendered for costs, but the execution issued has not 51 L. R. A.

broadened by the authority of the fundamental law, in order that they may subserve the uses to which they are thus assigned.

2. Where a defendant in injunction applies for the dissolution of the writ, on furnishing bond, and his application is denied, and it appears to this court, upon an application for a mandamus to compel the court *a quo* to grant the same, that no injury will result to the plaintiff in injunction by the dissolution thereof, and that irreparable injury may result to the defendant from its maintenance, and it further appears that the remedy by appeal will be of no avail, and that the relator will otherwise be without remedy, the mandamus will be issued.

3. Where the government of the city of New Orleans is arrested in the discharge of its functions by an injunction

been satisfied or returned, prohibition is a proper proceeding to arrest the execution of the judgment, where no writ of error or other adequate remedy is available to afford the redress to which the party is entitled for such excess of power. "It is the means by which the superior tribunal exercises its superintendence over the inferior, and keeps it within the limits of its rightful jurisdiction" (*High, Extr. Legal Rem.* § 768); and the Constitution gives the supreme court of appeals original jurisdiction. *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520.

A town council, acting under a statute giving it authority to abate a nuisance, acts judicially, and its proceedings will be reviewed on certiorari. Certiorari always lies unless expressly taken away, and it requires very strong words to do so. The reason of this is that it is an extremely beneficial writ, being the medium through which the court of Queen's bench exercises its power of jurisdiction over the inferior proceedings of inferior courts. And, so far from this common-law writ being taken away in this state, the Constitution in express terms gives the circuit court supervision and control over all proceedings before justices and other inferior tribunals by certiorari. In this case the judgment of the circuit court dismissing the certiorari was affirmed by a divided court, but on the proposition that the proceeding by the council against a party for maintaining a nuisance is judicial in its character, and the decision therefore subject to review, there was no division. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

The petitioner was indicted in the circuit court for murder, and he obtained from the judge of the supreme court of appeals a rule against the judge of the circuit court to show cause why a writ of prohibition should not be awarded to him to prohibit the circuit court from further proceeding upon the indictment. The state moved to discharge that rule as improvidently awarded. *Brannon, J.*, says: "Observe that to warrant prohibition two things must concur: (1) That the court has no jurisdiction or is abusing its lawful jurisdiction; and, (2) that there is no other remedy to correct its error. Code 1891, chap. 110, § 1; *Wood County Ct. v. Boreman*, 34 W. Va. 362, 12 S. E. 400." *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

In *Norfolk & W. R. Co. v. Pinnacle Coal Co.* 44 W. Va. 574, 41 L. R. A. 414, 30 S. E. 196, *Dent, J.*, who disagreed with *Brannon, J.*, in *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259, said: "Our statute greatly amplifies the common-law remedy of prohibi-

issued at the instance of a taxpayer, who alleges no threatened injury personal to himself, and it appears that the particular act enjoined, before becoming binding, must be the subject of subsequent legislative and executive action on the part of the officers of the city, and that no injury will result from the dissolution of the injunction, as on bond, the injunction ought to be dissolved, as on bond, upon the application of the city.

(*Blanchard and Watkins, JJ., dissent.*)

(March 29, 1900.)

APPPLICATION for a writ of mandamus to compel defendant to dissolve as on bond an injunction against relator which restrained it from proceeding to sell certain street-railway franchises. *Granted.*

The facts are stated in the opinions.

tion. It is as follows (Code, chap. 110, § 1): "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power when the inferior court has not jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Two important changes are made in the common law: (1) The writ is no longer a matter of sound discretion, but a matter of right; (2) it lies in all proper cases whether there is other remedy or not."

The three last cases exhibit a difference of opinion as to the construction of W. Va. Stat. chap. 110, § 1; one part of the supreme court of appeals holding that the common-law condition of no other adequate remedy existing must be present before prohibition can be entertained, and the other that the writ will be awarded whether there is or is not another remedy.

Wisconsin.

"The supreme court, except in cases otherwise provided in this Constitution, shall have appellate jurisdiction only which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts, it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same." Wis. Const. art. 7, § 3.

"The circuit courts shall have original jurisdiction in all matters, civil and criminal, within this state not excepted in this Constitution, and not hereafter prohibited by law, and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments, and decrees, and give them a general control over inferior courts and jurisdictions." Id. § 8.

"In addition to the writs mentioned in § 3 of article 7 of the Constitution, the supreme court shall have power to issue writs of prohibition, supersedeas, procedendo, and all other writs and process not specially provided by statute, which may be necessary to enforce the due administration of right and justice, etc." Sanborn & Berryman (Wis.) Anno. Stat. chap. 112, § 2406, p. 1729.

"The supreme court shall be vested with all power and authority necessary for carrying into complete execution all the judgments and determinations in the matters aforesaid, and for 51 L. R. A.

Messrs. Samuel L. Gilmore and Harry H. Hall, for relator:

When an injury is reparable, an injunction restraining it may be dissolved on bond.

Southern Cotton Oil Co. v. Leathers, 50 La. Ann. 134, 23 So. 201; *State ex rel. Lafitte v. Orleans Dist. Judge*, 51 La. Ann. 1771, 26 So. 374.

A taxpayer, however humble or insignificant, may bring a suit to test the validity of an ordinance; but he cannot have a preliminary injunction unless he clearly shows irreparable injury.

State ex rel. Lafitte v. Orleans Dist. Judge, 51 La. Ann. 1771, 26 So. 374; *Citizens' Bank v. Webre*, 44 La. Ann. 1083, 11 So. 706; *State ex rel. Whitesides v. Twenty-first Dist. Judge*, 48 La. Ann. 94, 18 So. 904; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Dodge v. Pennsylvania R. Co.* 43 N. J. Eq.

the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeably to the usages and principles of law." Id. § 2407, p. 1729.

"The circuit courts have the general jurisdiction prescribed by the Constitution, and in the exercise thereof they have power to issue all writs, process, and commissions provided therein or by these statutes, or which may be necessary to the due execution of the powers with which they are vested." Id. chap. 113, § 2420, p. 1742.

In the first case arising under Wis. Const. art. 7, § 3, it was held, adopting the doctrine prevailing in Alabama and Arkansas, that the power to issue both the enumerated writs and the other original and remedial writs, and to hear and determine the same, was not conferred upon the supreme court by way of extending its original jurisdiction, but only to enable it to exercise the jurisdiction already conferred, viz.: that of appellate jurisdiction and of superintending control. *State ex rel. Kesley v. Farwell*, 4 Chand. (Wis.) 106, 3 Pinney, 393.

Before the above case was reported it was reversed by the first case in which the question was involved that came before the reorganized supreme court, that court holding that it has original jurisdiction of the writs of habeas corpus, mandamus, quo warranto, injunction, and other original and remedial writs. *Atty. Gen. v. Blossom*, 1 Wis. 317.

This proposition has been approbated by nearly all the decisions in the state in which the questions of superintending control and the original jurisdiction of the supreme court to issue the writs have arisen. It has also been cited with commendation in other states. The opinion has also been commended and alluded to as though it were a model. And yet while its conclusion is undoubtedly correct, it starts with, and its course of reasoning to a large extent is based upon, a false premise. It is suggested that it is also liable to criticism in two statements made by it, although it may be said that they are practically statements of the same thing. It says that the use of the writs of mandamus and certiorari, two of the enumerated writs, are "no more adapted to the exercise of a 'general superintending control over inferior courts' than would have been the spear of Goliath to the siege of Acre." But the same court in the principal case used both mandamus and certiorari in the exercise of what it denominated "general superintending control" pure and simple. Again, the opinion says: "A mandamus cannot go to an inferior court to control its action. But it may be issued to

351, 11 Atl. 751, 45 N. J. Eq. 366, 19 Atl. 622.

The allegation that the dissolution of the injunction will cause irreparable injury will not take away from the judge all discretion to dissolve it on bond.

Cameron v. Godchaw, 48 La. Ann. 1345, 20 So. 710; *State ex rel. Capitol City Oil Mills Co. v. Monroe*, 50 La. Ann. 266, 23 So. 839.

An injury is not irreparable when it can be made good or repaired by payment of money.

Hale v. Point Pleasant & O. R. R. Co. 23 W. Va. 454; *Crescent City L. S. L. & S. H. Co. v. Police Jury*, 32 La. Ann. 1195; *Southern Cotton Oil Co. v. Leathers*, 50 La. Ann. 134, 23 So. 201; *State ex rel. Capitol City Oil Mills Co. v. Monroe*, 50 La. Ann. 266, 23

So. 839; *Union Oil Co. v. Leathers*, 50 La. Ann. 390, 23 So. 1013.

While this matter is under the consideration of a co-ordinate branch of the government, the courts will not interfere, and parties have no right to enjoin.

High, Inj. ¶ 1240; *Morgan v. Graham*, 1 Woods, 124, Fed. Cas. No. 9,801; *Phelps v. Watertown*, 61 Barb. 121; *Linden v. Case*, 46 Cal. 171; *Roudanez v. New Orleans*, 29 La. Ann. 272; *Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *New Orleans Elev. R. Co. v. New Orleans*, 39 La. Ann. 130, 1 So. 434.

Messrs. *Dinkelspeil & Hart*, for respondent:

A mandamus does not lie in such a case.

State ex rel. Roth v. Iberville Dist. Judge, 38 La. Ann. 49; *State ex rel. Morgan's L. &*

put the court in motion. It may be called the moving, not the controlling, agency." And yet, as before stated, it was this very writ that was used to exert control in the principal case. And subsequently in the same case the supreme court used the same writ to compel the inferior court, not simply to appoint an assignee and to exercise its discretion in doing so, but to appoint a designated individual. *State ex rel. Fourth Nat. Bank v. Johnson*, 105 Wis. 164, 85 N. W. 320.

Re Booth, 3 Wis. 49, which was a certiorari to review a habeas corpus proceeding, approves *Atty. Gen. v. Blossom*, 1 Wis. 317.

A mandamus was awarded by the supreme court directing the judge of the circuit court to make an order changing the venue of the action. *State ex rel. Brownell v. McArthur*, 13 Wis. 407. Nothing is said in the opinion in the case about superintending control, although it is cited in the principal case as an instance where superintending control was exercised.

The supreme court will not award a mandamus to compel the county judge to sign the necessary orders to perfect an appeal from his order, and to approve the appeal bond. The power to do so is in the circuit court. *State ex rel. Tallmadge v. Flint*, 19 Wis. 621.

Under the Constitution the supreme court with appellate jurisdiction took all common-law writs applicable to it, and with superintending control all common-law writs applicable to that. *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425.

If a justice of the peace makes incorrect entries the circuit court, in the exercise of its supervisory control, has the power by mandamus to compel him to make true entries according to the real facts. *State ex rel. Marsh v. Whittet*, 61 Wis. 351, 21 N. W. 245.

The writ of prohibition is the means by which the superior court exercises its supervision over the inferior court and keeps it within the limits of its rightful jurisdiction; but where the inferior tribunal has jurisdiction to do the act sought to be prohibited, but the manner of doing it is improper or even unauthorized, the writ of prohibition is not the remedy. *State ex rel. De Puy v. Evans*, 88 Wis. 255, 60 N. W. 433.

The supreme court will award a writ of prohibition to prohibit the circuit court from punishing a party for contempt because beyond the powers of the latter to do so. *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 193. No mention was made of the power under consideration, yet the effect of the reasoning and the result of the decision would seem to indicate that the court did issue the writ of prohibition. *L. R. A.*

hibition as a means to exercise the power of superintending control. And the case is quoted in the principal case as one in which it was exercised.

Where the county judge should have appointed commissioners to review the action of the supervisors of a town in altering a highway to the detriment of relators, and the circuit court had quashed an alternative writ of mandamus to compel the county judge to appoint the commissioners, the supreme court on appeal reversed the judgment of the circuit court, and remanded the cause with directions to issue the writ, and for further proceedings according to law. *State ex rel. Rogers v. Wheeler*, 97 Wis. 96, 72 N. W. 225.

Relator being defendant in a foreclosure action, an injunction order was made therein restraining him from collecting rents of mortgaged premises. After being served with this order relator collected rents which on demand he refused to pay to the receiver appointed in the same action. For such collection the circuit court adjudged him guilty of contempt, and that he be imprisoned in jail until he obeyed by making the required payment. This was a certiorari to review the action of the circuit judge. The supreme court held that a certiorari would not lie in such a case, as the relator had an adequate remedy by appeal; and that its powers of superintending control, like its other original jurisdiction, were not to be exercised upon light occasion, or when other and ordinary remedies were sufficient. *State ex rel. Meggett v. O'Neill*, 104 Wis. 227, 80 N. W. 447.

Application by the relator on the return of an alternative writ of mandamus for a peremptory writ to compel the circuit judge to issue a writ of assistance. In refusing the writ, the court, per Winslow, J., who wrote the opinion in the principal case, said: "In order to justify mandamus in such a case as the present it must appear that the duty of the court below was plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate. *STATE ex rel. FOURTH NAT. BANK v. JOHNSON*." *State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell*, 104 Wis. 246, 80 N. W. 460.

Wyoming.

"The supreme court shall have general appellate jurisdiction coextensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law." Wyo. Const. 1889, art. 5, § 2.

"The supreme court shall have original ju-

T. R. & S. S. Co. v. Twenty-first Dist. Judge, 36 La. Ann. 394; *State ex rel. New Orleans & H. S. S. & Lottery Co. v. Eighth Dist. Judge*, 23 La. Ann. 766.

Per Curiam:

This court being of opinion that the case presented is one in which the dissolution of the injunction as prayed for by relator will work no irreparable injury to the plaintiffs in injunction; and considering that the discretion vested in the legislative department of the city government should not be interfered with by the courts, save in clear cases, and after hearing, and satisfactory proof of abuse of such discretion, unless it is made to appear that immediate injury will otherwise result to the party complaining; and further considering that the application in this case was made to restrain the sale of

a franchise under the authority of the city government, after the same had been advertised for the greater part of the ninety days required, and at so late a period as to preclude a final hearing upon the merits before the day fixed for said sale, thus giving to the preliminary writ the effect of defeating said sale; and further considering that the rights of all parties are fully preserved with reference to the merits of the case; and for further reasons, which the court reserves the right to file,—it is ordered, adjudged, and decreed that the *preliminary writ of mandamus herein issued be now made peremptory*, and, accordingly, that the respondent judge be commanded to permit the city of New Orleans to dissolve the preliminary injunction herein granted by him, in the manner as prayed for by said city.

jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Id. § 3.

"The district court shall have original jurisdiction of all causes, both at law and in equity, and in all criminal cases, of all matters of probate and insolvency, and of such special cases and proceedings as are not otherwise provided for. The district court shall have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization, and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, injunction, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective districts." Id. § 10.

The jurisdiction of the supreme court by art. 5, § 2, of the Constitution does not appear to be enlarged or changed by statutory provision. The general original jurisdiction of the district courts does not appear to be provided for by statutory enactment.

IV. In states which have no express constitutional or statutory grants of the power.

California.

"The supreme court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." Cal. Const. art. 6, § 4.

"Said courts [superior courts] and their judges shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus on petition by or on behalf of any person in actual custody in their respective counties." Id. § 5.

The statute merely reiterates the language of the Constitution verbatim as to both courts. Cal. Code Civ. Proc. §§ 51, 76.

As has been seen, there is no constitutional or statutory grant of the power under consideration in California.

Under the first Constitution (1849) the supreme court had no original jurisdiction to issue any of the common-law writs except habeas corpus, but did have "power to issue all other

writs and processes necessary to the exercise of their appellate jurisdiction." Thus, the power of "general superintendency" must have been inherent in the highest court of original general jurisdiction. This was then the district court.

In the early days of the state an effort was made to have the supreme court assume the original jurisdiction of the King's bench, and issue a quo warranto. In support of the application it was urged that the omission of the word "only" under the authorities in some of the other states worked an implied grant of powers additional to those of an appellate nature. On this subject the court said: "It is difficult to perceive how the presence of the word could in any manner substantially affect the jurisdiction of this court." The court held further, that the power which created the court had declared what its jurisdiction was, and that there was no reason for defining the jurisdiction if the declaration of it was not to be exclusive of all other. That without the use of the words the court would possess appellate jurisdiction, and that the only original jurisdiction of the supreme court was to award the writ of habeas corpus. *Ex parte People ex rel. Atty. Gen.* 1 Cal. 85.

The district courts, under the Constitution of 1849, had general jurisdiction as superior courts corresponding to the superior courts of Westminster, and as such had a superior power and control over the proceedings of supervisors. *People ex rel. Church v. Hester*, 6 Cal. 679.

In the next case which arose under the first Constitution the plaintiffs obtained an injunction order *pendente lite*, from which order the defendant appealed and gave an undertaking for \$300, and thereafter continued the trespasses, to enjoin which the injunction order was made. Plaintiffs applied to the court making the injunction order for an attachment against the defendant for contempt in disobeying it, which was refused on the ground that the appeal superseded the injunction. The supreme court held that it did not, and awarded a mandamus to the judge of the district court to issue the attachment on the ground that the plaintiff's remedy by appeal was inadequate. *Merced Min. Co. v. Fremont*, 7 Cal. 130.

On an application for a mandamus to compel the judge of the district court to sign a bill of exceptions which he had refused to sign, the answer of the judge was to the effect that he had signed a bill which he believed to be correct. This was traversed by the relator. The

Monroe, J., delivered the following opinion:

This is an application for a writ of mandamus directing the judge *a quo* to permit the city of New Orleans to dissolve, as on bond, a preliminary injunction restraining the sale of a certain street-railroad franchise. The respondent, for answer, says that he refused to dissolve the injunction after hearing the parties, and in the exercise of a discretion vested in him by law, which discretion, as he apprehends, is not subject to review by a writ of mandamus. There is no doubt that the more common and the preferable method of bringing up questions of this kind is by appeal. But it is equally unquestionable that where there is no remedy by appeal, or where an appeal will not afford adequate relief, or meet the ends of justice, the power exists in this court, in the

exercise of the supervisory jurisdiction conferred upon it by the Constitution, to interpose its authority by means of some remedial writ or order. It was with the view that the broadest latitude should be allowed in this respect, and that no case and no litigant should be beyond the reach of its protection, that the Constitution of 1879 conferred upon the supreme court, in addition to its appellate jurisdiction, "control and general supervision over all inferior courts," and, for the purposes of such control and general supervision, authorized it "to issue writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs," and that the present Constitution, adopted after an experience of eighteen years under the Constitution just referred to, confers the same authority in the same language, and makes the grant more effective by authorizing, not

supreme court declined to employ superintending power, and denied the writ on the ground that it could not decide the question of fact first,—that the bill had been made a part of the record, which the district court alone could change. People *ex rel.* Galvin v. Tenth Dist. Judge, 9 Cal. 19.

The next case involving indirectly the subject under consideration arose after the adoption of the first amendment to the section of the Constitution granting power to the supreme court. This amendment was that the supreme court should "have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Art. 6, § 4. And it was decided that the change effected by the amendment was designed to enlarge the powers of the court by conferring upon it original jurisdiction in the particulars above specified. Miller v. Sacramento County Supers. 25 Cal. 93.

And thereby enlarge that jurisdiction to that extent by giving it express power to issue writs of mandamus, certiorari, and prohibition in addition to its former jurisdiction. Tyler v. Houghton, 25 Cal. 26.

That is to say, the effect of the amendment, as will be seen hereafter, was to indirectly confer upon the supreme court the power of general superintendency possessed by the King's bench, which can be exerted by the writs of mandamus, certiorari, and prohibition, by granting it the power without condition or qualification to issue those three extraordinary common-law writs, by means of which the extraordinary power of "general superintendency" has almost, if not quite, always been exercised.

Thereafter the supreme court in another case said: "While the county courts are authorized by statute to grant writs of certiorari, they have not the general power of supervision over inferior tribunals which pertains to the court of King's bench in England. That power pertains to the supreme and district courts alone in this state." Faut v. Mason, 47 Cal. 7.

County courts can issue writs of certiorari only in aid of their appellate jurisdiction. Wilcox v. Oakland, 49 Cal. 29.

The writ of prohibition mentioned in the Constitution is the same as that known to the common law, and § 1102 of the Code of Civil Procedure does not affect an extension of the office of the writ, nor enlarge or add to the class of cases in which it may be resorted to. Maurer v. Mitchell, 53 Cal. 289.

As will be shown hereafter, the common-law 51 L. R. A.

writ of prohibition is only awarded in the exercise of the power of general superintendency and control over inferior tribunals. High, Extr. Legal Rem. § 767.

The case of Hyatt v. Allen, 54 Cal. 353, is very interesting and instructive. It arose shortly after the adoption of the second amendment of the clause of the section of the judicial article of the Constitution under consideration. The opinion gives a history of the clause from the adoption of the original Constitution down to the date of the decision. It is also valuable for its correct and simple statements of the rules of construction of organic and statute law. The conclusion and judgment of the court is that the change of the words of the first amendment, "and also all writs," to those of the second amendment, "and all other writs," before the word "necessary" did not effect any change in the meaning of the clause, and that the original jurisdiction of the supreme court to issue the writs of mandamus, certiorari, and prohibition continued.

In 1881 the legislature amended § 1102 of the Code of Civil Procedure so as to provide that the writ of prohibition should "arrest the proceedings (in excess of jurisdiction) of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial." It was held that the writ of prohibition mentioned in and intended by the Constitution was the common-law writ, and that the legislature had no power to enact the amendatory statute in so far as it attempted to extend the office of the writ. Camron v. Kenfield, 57 Cal. 550.

Havemeyer v. San Francisco City & County Super. Ct. 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121, is an important and interesting case in which the decision of the supreme court of California involved several questions all more or less related to the subject under consideration. It is in its conclusions and effects as high and comprehensive an exhibition of the power of superintending control as any case in the books not excepting the principal case. In considering the case it should be borne in mind that the means used by the supreme court was that writ which, as has been seen, is never awarded but in the exercise of superintending control over an inferior tribunal. It was an original application to the supreme court for a writ of prohibition to the superior court and its judge, and to the receiver appointed by that court, commanding and directing each of them to desist and refrain from proceeding or acting upon or in pursuance of a certain order of the superior court appointing the receiver, and also another order of the same court directing the sheriff to put

only the court, but "any justice thereof," to issue the writs necessary to afford relief (art. 94), and specially authorizes the review of the decisions of the courts of appeal "by certiorari or otherwise" (art. 101). If, therefore, a litigant is aggrieved by the action of any inferior tribunal, and no other adequate remedy is provided by law, he is entitled to invoke the authority thus vested in this court for his relief. If his case can be brought here by appeal, then ordinarily he should avail himself of that remedy. But if the particular remedy thus provided should be inadequate, and should afford no relief with respect to his grievance, he is entitled to a remedy in some other form, since the power of this court is not restricted to granting relief in cases which may be brought before it by appeal, but extends to all cases cognizable by the inferior courts of this

state; and the case of a litigant who is entitled to an appeal, but who can derive no benefit therefrom, does not differ in this respect from that of one who has no right of appeal,—the question to be determined being whether the grievance complained of, considered with reference to its character, and with reference to the existence or non-existence of other adequate remedies, is such as to justify the interposition of the authority of this court.

The main case out of which the present controversy arises is now pending and untied in the civil district court, and is appealable, on its merits, to this court. The particular order or judgment which is the immediate subject of complaint (that is to say, the refusal of the judge *a quo* to dissolve, as on bond, the pending injunction, upon the application of the city of New Or-

the receiver in possession of certain property, describing it, of which petitioners claimed in their petition and affidavits to be in possession as owners. Several objections were made by the respondent and receiver. The court held, among other things, that the writ of prohibition, where a party makes a case showing that he is entitled to it, issues *ex debito iustitiæ*, and not in the discretion of the court. That the rule that the court will not issue the writ until the objection to its want or excess of jurisdiction has in some form been made in, and overruled by, the lower court, is merely a practice which the judges of the court have adopted and prescribed for themselves, which they may ignore in a case rendering such action necessary; citing *London v. Cox*, L. R. 2 H. L. 278, 16 Week. Rep. 44, 30 L. J. Exch. N. S. 225. The case is most valuable as a verification of the proposition that prohibition is one of the most powerful engines of superintending control, whose energies are never brought into action except in its exercise.

The case is also like *State ex rel. Brownell v. McArthur*, 13 Wis. 407; *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 193; *State ex rel. Spence v. Dick*, 103 Wis. 407, 79 N. W. 421,—cited in the principal case,—typical of a class of cases which, while exercising in the highest degree the power of superintending control, make no mention of it.

In *Schwarz v. San Francisco City & County Super. Ct.* 111 Cal. 106, 43 Pac. 580, the relators had been restrained by an injunction in an action in the superior court from using certain words in signs, lights, etc., in and about their business, which was keeping a saloon and restaurant, and was conducted on premises which had been leased for a term of years by a corporation and sublet to the relators. The corporation had in the glass windows or doors of the premises, and in the wall of the building in which the premises were situated, placed the forbidden words in a permanent manner previous to the taking possession of the premises by the relators. It also appeared that the relators had in every other way than leaving those permanent signs so placed by the corporation before their possession, abstained wholly from the use of the enjoined words or terms. The superior court held it a violation of the injunction, and was proceeding to punish the relators for contempt, and a certiorari to review its action was issued from the supreme court. The objection was made that the supreme court could not go beyond the recitals or findings in the judgment itself in reviewing 51 L. R. A.

the action of the court below. The supreme court said, in reference to this: "In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this court and all other courts having jurisdiction to review and correct the proceedings of inferior courts would be powerless unless it can compel the inferior tribunal to certify to this court, not only what is technically denominated a 'record,' but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved; and the grossest abuses of power to the great reproach of the law might be perpetrated with impunity and without the possibility of a remedy." The action of the superior court was annulled.

There was prohibition from the supreme court to the superior court to restrain the prosecution of the relators, state bank commissioners. The Penal Code of California provided for the prosecution and removal from office of certain officers, and it was claimed by the relators that by certain other sections of the Penal Code the provisions of the former sections were confined to district, county, and township officers, and that they, the relators, being state officers, were not within its provisions. The superior court held that the section under which the complaint was made did apply to relators, and was proceeding upon the charge thus made when the relators applied for a writ of prohibition to restrain the action of the superior court. The supreme court held that the relators were state officers, that the section under which the prosecution was sought to be carried on applied only to district, county, municipal, or township officers, and therefore did not apply to the relators; and a peremptory writ was issued to restrain their further prosecution. *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.

Mandamus was sought from the supreme court to the superior court. It would seem that, by the Code of Civil Procedure of California, where proof is made that a publication pursuant to an order of the superior court has been made by an executor, the latter is entitled to a decree from the court of due notice to creditors. An order to publish had directed that notice to creditors be given in the "Daily Record Union," and under that order the proper notice had been published the proper time. The judge of the superior court refused to make the order or decree of due notice because he con-

leans, defendant therein), being in the nature of an interlocutory decree, is subject, under our jurisprudence, to appeal, in the event of its being found that it may work an irreparable injury. Code Prac. art. 566; *State ex rel. Barthe v. Orleans Dist. Judge*, 28 La. Ann. 903; *State ex rel. Doullut v. Orleans Dist. Judge*, 29 La. Ann. 869. But the circumstances of the case are such that the appeal, if allowed, would afford no relief *quoad* the particular injury complained of. Those circumstances, as disclosed by the pleadings and papers in the record, are as follows, to wit: Upon December 26, 1899, the legislative department of the city of New Orleans adopted an ordinance, which was duly signed by the mayor upon the following day, providing for the sale, after ninety days' advertisement, of a certain street-railroad franchise; and the

sale was accordingly advertised, December 29, 1899, and other days succeeding, to take place March 29, 1900. Upon March 16, Peter Johnson, and E. J. Dare, claiming to be citizens of New Orleans, and owners of property assessed at more than \$2,000 to each of them, and for that reason interested in the proper administration of the affairs of the city, filed a petition in the civil district court, praying that the ordinance authorizing the sale of said franchise as proposed be decreed null, and that the sale be perpetually enjoined. A rule *nisi* was served on the city, and the matter of the issuance of the preliminary injunction prayed for in the petition was heard on the 21st, and determined on the 23d, of March, when the rule was made absolute, and the injunction issued, on a bond of \$2,500.

We are not so much concerned at this time

strued the section of the Code under which such notices are made to require that the order for notice to creditors must specify the number of times the notice should be published; and that, as the order did not so specify, it was void, and the notices given under it of no effect. The supreme court held this not to be so, and that the superior court had no discretion to refuse relief, and, "if the relief is refused, and there is, as in this instance, no appeal, or other plain, speedy, and adequate remedy, mandamus will lie to compel it." *Hensley v. Sacramento County Super. Ct.* 111 Cal. 541, 44 Pac. 232.

In the course of probate proceedings in the superior court, the latter had appointed attorneys to represent certain absent legatees, *i. e.* the petitioners. Subsequently these legatees proposed and asked the court to substitute another attorney of their own choice. The court refused to make the order, giving various reasons, and the legatees petitioned the supreme court for a mandamus to compel the substitution. From what is said in the opinion it would seem a motion had been made to vacate the appointment of the attorneys, and discharge them. The supreme court, in granting the peremptory writ, said: "It is eminently proper that the court should appoint attorneys to guard the interests of absent heirs and legatees, and such attorneys are entitled, not only to a reasonable compensation for their services, but to considerate treatment. The motion originally made to vacate their appointment and to discharge them was therefore properly denied; but, on the present motion for a substitution, the petitioners being *sui juris* and insisting upon their rights, the statute makes the granting of the order imperative." *Lee v. San Joaquin County Super. Ct.* 112 Cal. 354, 44 Pac. 666.

In an action in the superior court, after judgment recovered for plaintiff and the reversal of the same on appeal to the supreme court, the cause was remanded to the superior court with leave to plaintiff to amend his complaint in certain respects specified. The superior court sought to impose costs upon the plaintiff as a condition of allowing the amendment. The petitioner applied to the supreme court for a mandamus to compel the superior court to allow the amendment without terms. In awarding the peremptory writ the supreme court said: "When the [superior] court refuses to allow the amendments which were ordered by this court, even as understood by the trial court, it refuses to obey the directions of this court, and obedience may be compelled. It is not the province of that court to affix conditions to the

exercise of privileges granted by this." *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5.

An execution upon a judgment in an action in the superior court had been placed in the hands of the petitioner, the sheriff, and with it certain written instructions from the plaintiff's attorney to the sheriff. The attorney for the defendant in the execution applied to the sheriff to see these instructions, which the sheriff declined to furnish. The defendant's attorney then obtained an order from the superior court directing the sheriff to grant him an inspection thereof. Upon a certiorari to review the action of the respondents in making such order the court annulled the order, holding that there was no jurisdiction in the superior court to make it. *Whelan v. San Francisco City & County Super. Ct.* 114 Cal. 548, 46 Pac. 468.

An article appeared in the "Sacramento Bee" purporting to be an account of testimony given by witnesses in a trial which was being had in the superior court. At the opening of the court on the following day attention was called to the article. The judge stated from the bench that he had no hesitation in saying that the statement referred to was a grossly false statement, a gross fabrication, and that there was not the slightest ground in the testimony of the witness upon which such a statement could be based. In the afternoon of the same day the "Bee" published in its editorial columns an article which the supreme court in its opinion in this matter characterized as coarse and vituperative. Similar articles appeared in the newspaper on the two succeeding days. The petitioner is the editor and one of the proprietors of the "Bee," and upon an affidavit setting forth the publications, and that the same were an interference with the proceedings of the court in the trial of the cause and constituted a contempt of court, a citation was issued directing petitioner to show cause why he should not be punished for the contempt. Upon the hearing the court reporter was sworn, and his testimony given as to the testimony of the witness alluded to in the first publication. The petitioner then offered to prove that the publication in the "Bee" was in point of fact true. The court held that he would allow no testimony except from the reporter's notes. The supreme court held that this was error, that the petitioner should have been allowed to prove the truth of his reports of the proceedings of the court, and that the judge could not restrict the evidence to the reporter's notes; and, in holding that the petitioner should have been allowed to at least attempt to prove the statement correct, said: "A judge on the bench,

with the allegations of the petition upon which the order for the injunction was made, and it might be conceded, for the purposes of the question which we are called upon to decide, that, if sustained, after a trial upon the merits, they, or some of them, may be sufficient to entitle the plaintiffs to a judgment annulling the ordinance which is the subject of attack, and annulling any sale made under its authority, though upon this point we reserve our opinion. It suffices for the present to say that it was made to appear upon the trial of the rule nisi that the ordinance received the votes of all the members of the council except three, of whom two were absent, and one was excused from voting, and it was thereafter duly signed by the mayor. It also appears that by the terms of said ordinance the right is reserved to the council to reject any and all bids, and

that in the event of the acceptance of any bid the city and the successful bidder are, fifteen days thereafter, to enter into a contract, before a notary public, declaring and defining their respective rights and obligations. There is therefore a *locus penitentie*. provided for the city, in case the franchise should be adjudicated under the advertisement, of which she could avail herself before becoming bound by such adjudication, and of which it would be equally practicable for the plaintiffs in injunction, or any other complaining citizens, to avail themselves, in order to defeat the consummation of what the plaintiffs allege to be an illegal and *ultra vires* proceeding. The effect of the injunction, therefore, is to arrest the officers upon whom is imposed the responsibility of administering the government of the city of New Orleans, in both its legislative and ex-

no more than any other, can cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself." The court held, finally, that the petitioner on his trial in the court below was denied that due process of law requisite to a valid conviction, and the order convicting him of contempt was annulled. *McClatchy v. Sacramento County Super. Ct.* 119 Cal. 413, 39 L. R. A. 691, 51 Pac. 696.

The superior court of California has jurisdiction of appeals from justice's court judgments. It would seem that proceedings supplementary to execution may be entertained by a justice of the peace; and a certain proceeding upon a judgment obtained by the petitioner before a justice of the peace was being had before a justice, and in such proceeding he had made an order requiring the judgment debtor to pay to the constable holding the execution a certain sum, which he found as a matter of fact was in the possession and under the control of the judgment debtor at the time that the order for his examination was served. The judgment debtor appealed from this order of the justice to the superior court. A motion to dismiss the appeal was overruled, and the appeal set down for trial. Upon an application for a writ of prohibition restraining the superior court from proceeding on the appeal the supreme court held that appeals from justice's courts could only be taken to the superior court from a judgment; that the order appealed from was not a judgment, and that the superior court therefore had no jurisdiction to hear or try the appeal, and the peremptory writ of prohibition was awarded. *Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626.

Connecticut.

"The supreme court of errors shall have final and conclusive jurisdiction of all matters brought before it according to law, and may carry into execution all its judgments and decrees, and institute rules of practice for its regulation." Conn. Gen. Stat. § 815.

"The superior court, court of common pleas, and district court may issue writs of mandamus in cases within their jurisdictions respectively, in which such writs may by law be granted, and proceed therein and render judgment according to the course of the common law." Id. § 1294.

The superior court in any county, and any judge thereof in vacation, may issue writs of prohibition to any inferior court or tribunal. Id. § 1299.

In an action before the respondent as justice of the peace, against the petitioner, judgment 51 L. R. A.

was rendered by respondent in favor of petitioner for costs against plaintiff, which was still in full force. The plaintiff in that action brought an action against the petitioner before another justice of the peace alleging the same cause of action. The petitioner pleaded the judgment before respondent as a bar. The last-named justice rendered a judgment against the petitioner for \$50 and costs, from which judgment the petitioner appealed to the superior court. The petition showed that the petitioner had applied to respondent for a true record of all the proceedings of an action tried before him to be used as evidence on the trial before the other justice, and that afterwards he made the like application that he might plead said proceedings and judgment in bar to the action so appealed, and that it might be used in evidence in defense of said action. The supreme court of errors advised the superior court to issue the mandamus to compel the respondent to make and certify the record. *Smith v. Moore*, 38 Conn. 105.

In *Central R. & Electric Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32, the supreme court of Connecticut used this language: "A remedy equivalent to such an appeal is afforded under the practice existing in many of our sister states by the common-law writ of certiorari. It issues to revise the proceedings of municipal corporations, and, when issued, the controversy between the parties in interest becomes one of a judicial nature. . . . The fact that this writ has never been used in this state is an additional reason why statutes granting an appeal from such proceedings should not be too narrowly construed." To same effect, are *Williams v. Hartford & N. H. R. Co.* 13 Conn. 110; *Grelle v. Pinney*, 62 Conn. 478, 26 Atl. 1108.

Delaware.

"The judges of the superior court, or any two of them, shall hold pleas of assize, *scire facias*, *replevins*, informations, and actions on penal statutes, and hear and determine all and all manner of pleas and actions, suits and causes, civil, real, personal, and mixed, according to the Constitution and laws of this state, as fully and amply to all intents and purposes as the justices of the King's bench, common pleas, and exchequer, or any of them, may or can do." Del. Rev. Code, chap. 92, § 1.

In Delaware there are five judges, who are all members of the supreme court of errors and appeals. One of them is appointed chancellor, and another chief justice. The superior court consists of the chief justice and two associate judges. The court of general sessions of

ecutive departments, in the discharge of their functions, while dealing with a particular subject within the scope of the authority conferred upon them, and before any such definite action is imminent as could of itself work injury to the public at large or to any citizen. For, as we have seen, the adjudication can have no effect until ratified by the council, and the ratification must be by means of an ordinance, the question of the adoption of which is subject to the exercise of legislative discretion; and not until fifteen days after the adoption of said ordinance, which may never be adopted, is there any possibility of the city's entering into a contract whereby she will be bound by said adjudication. It is apparent, also, that no rights acquired by the plaintiffs by reason of the institution of their suit and the issuance of their injunction can be affected by

the dissolution of said injunction, as on bond, at the instance of the city. The case remains to be tried on its merits, and the judgment to be rendered will be as effective, so far as the plaintiffs are concerned, whether the injunction be released as on bond or kept in force. The dissolution could therefore work no injury to them, either irreparable or otherwise, while its maintenance, having the effect of preventing the offering of the franchise as contemplated, defeats the deliberately considered plans of the city government, and may work injury, not only serious, but perhaps irreparable, in the sense in which that word has not unfrequently been used in our jurisprudence.

Upon the one hand, then, the plaintiffs in injunction cannot be injured by its dissolution in the manner proposed, while the city of New Orleans, defendant in injunction,

the peace is of the same judges as the superior court. The court of oyer and terminer is composed of all the judges except the chancellor.

By certiorari in all cases this court has, by the act of 1760 (1 Del. Laws, 376), "a discretionary power to examine and correct the errors of justices; and to examine, correct, and punish the contempt, omissions, neglects, favors, corruptions, and defaults of justices of the peace as fully and amply as the justices of the King's bench and common pleas at Westminster may or can do. Way v. Steward, Superior Court, 1795." Bailey v. Luff, 2 Harr. (Del.) 294. note.

The acts of 1810 and 1825 give no additional superintending power to this court, nor is there any other mode provided as to the method of exercising this power. By the 40th section of the act of 1825 certiorari is recognized as a remedy. It must therefore be exercised in the manner prescribed by the act of 1760, which refers to and limits the exercise of this power to the powers and practice in England, and also by the practice heretofore established. **Florida.**

"The supreme court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts, and of appeals from the circuit courts in cases arising before judges of the county courts in matters pertaining to their probate jurisdiction, and in the management of the estates of infants, and in cases of conviction of felony in the criminal courts, and in all criminal cases originating in the circuit courts. The court shall have the power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its jurisdiction." Fla. Const. 1885, art. 5, § 5.

"The circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts. . . . They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court or before the county judge, of all misdemeanors tried in criminal courts, of judgments or sentences of any mayor's court, and of all cases arising before justices of the peace in counties in which there is no county court; and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors, and of such other matters as the legislature may provide. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, habeas corpus, and all writs proper and 51 L. R. A.

necessary to the complete exercise of their jurisdiction." Id. § 11.

There appear to be no statutes conferring jurisdiction upon the supreme or circuit courts in addition to that granted by the Constitution.

The first Constitution provided that "the supreme court . . . shall have appellate jurisdiction only, . . . provided that the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other remedial and original writs as may be necessary to give it a general superintendence and control of all other courts."

Under this Constitution it was held that the jurisdiction of the supreme court was twofold: First, appellate jurisdiction proper, by which is understood the revision of the proceedings of the subordinate courts and the correction of errors in their judgments; and secondly, a general supervision and control of all other courts, and this by means of all appropriate original and remedial writs known to the common law. The court said: "No original proceeding can be instituted in this court unless it be to exercise this power of superintendence or control over some other court." The court refused a mandamus to compel the register to execute a deed on the ground that the petition did not ask for the exercise of the superintending and controlling power of the supreme court upon the action of any other court; and that was the only question before the court. *Es parte* White, 4 Fla. 165.

In *Es parte* Henderson, 6 Fla. 279, the court said: "The circuit courts of the state perform the office and discharge the functions of the court of King's bench of England, and not the supreme court of the state. This latter is the court of last resort, and has its analogy in the Supreme Court of the United States and the courts of appeal of the states."

The writ of certiorari will lie from the supreme court to any of the inferior jurisdictions whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice. It was held, however, that in this instance the right to appeal barred the writ. *Halliday v. Jacksonville & A. Pl. Road Co.*, 6 Fla. 304.

In a case which arose in Florida growing out of the intestine troubles which existed in that state shortly after the close of the late Civil War and during the process of reconstruction which succeeded, considerable attention was paid by the supreme court to this subject. The proceeding was an information in the nature of a quo warranto to test the right of the de-

may be seriously injured by the refusal of its application for dissolution as on bond. We are of opinion, under these circumstances, that the city has a substantial grievance; and the question is, Has she any remedy? It will be remembered that the ninety-days advertisement of the franchise was begun upon December 29, 1899, and that the injunction was applied for March 16, 1900, and was issued upon the 23d of the same month,—only six days before that fixed for the sale. When, therefore, the application to dissolve as on bond was refused, the remedy by appeal was not available, because the appeal would have left the injunction in force, and the matter could not have been heard or determined in this court before the day fixed for the sale; and hence the sale could not take place as advertised. If the injunction had issued within a reasonable time after

the advertisement first appeared, the matter might, perhaps, have been determined, both in the district court and here, in time to have relieved the situation. But the plaintiffs in injunction delayed their application until practically the last moment; and, because it was then too late for the city to invoke the remedy supposed to be applicable in such cases, it is said she is without remedy. This is to say, not only that there is a wrong without a remedy, but that the very broad grant of authority conferred upon this court, by the fundamental law, with respect to the "control and general supervision over all inferior courts," is still inadequate for the purposes of what appears to be a very simple case. The difficulty, it is said, lies in the fact that the writ of mandamus will only issue to direct a judge to perform some purely ministerial act, and will not lie to

tendant to the office of lieutenant governor. While quo warranto is not used in the exertion of superintending control, the case is interesting and applicable, inasmuch as the discussion of the power of the court to issue quo warranto as original jurisdiction involved the consideration of the power to award the several writs by means of which superintending control is exercised, and at least indirectly the latter itself. It is also of value in stating the rule as to the existence of the original power in the supreme courts of the several states. The court laid down the rule that the jurisdiction of the supreme court is twofold:—appellate jurisdiction proper with power to issue all writs necessary to its full exercise, and original jurisdiction to issue the specified writs, when they are appropriate remedies. In deciding this case the court distinguished *Ex parte White*, 4 Fla. 165, in which it was held that, under the provisions of the first Constitution, the supreme court had no original jurisdiction to issue the enumerated writs, but only to aid appellate jurisdiction, and exercise superintending control; being the same doctrine as prevails in Alabama and Arkansas, *Ex parte White*, 4 Fla. 165, being one of the authorities cited and relied upon, in *Ex parte Allis*, 12 Ark. 101. *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190. It will be noticed that there is a seeming discrepancy in the statement in this case—that there was a sufficient difference between the same section of the first Constitution and the Constitution of 1868, arising from the omission of the word "only" from the latter—from that in *State v. Johnson*, 13 Fla. 33, *infra*.

In *State v. Johnson*, 13 Fla. 33, the court said: "The first Constitution (1838) art. 5, § 2, says that the supreme court shall have appellate jurisdiction only, 'provided that the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and other such remedial and original writs as may be necessary to give a general superintendence and control of other courts.' The Constitution of 1865 repeats this language verbatim. The language of the Constitution of 1808 is, as already shown, substantially the same."

The circuit court has authority to issue a certiorari to the county court as a probate court, as it is the obvious intent of the Constitution to make the county court in the exercise of this jurisdiction subject to a general supervisory and directory, as well as appellate, power of the circuit court; and whenever a writ of certiorari is the proper remedy to correct an existing evil in the probate court the power of § 1 L. R. A.

the circuit court to award it exists. *Deans v. Wilcox*, 18 Fla. 531.

A railroad company had brought an equity action to restrain the state comptroller from making a levy or sale on account of assessment for state taxes. The supreme court, in reversing a judgment of the circuit court overruling a demurrer to a supplemental bill, directed a certain decree to be entered by the circuit court in which the plaintiff was given permission to apply to the latter court for leave to file a bill of review as to new matter which had been disclosed. The circuit judge upon a petition therefor made an order that the complainant be allowed to file a bill of review to review the final decree. Thereafter (the decree so directed by the supreme court having been entered) the railroad company filed its bill of review, praying *inter alia* that the final decree be reviewed, revised, and set aside. This was demurred to, and before the demurrer was brought to a hearing the relators filed in the supreme court a suggestion praying that a writ of prohibition issue to the circuit judge and railroad company commanding them to desist from taking any further proceedings in, or otherwise entertaining jurisdiction against, relators. The defendant demurred to the suggestion, and the court, in overruling the demurrer, said: "When defendant applied for leave to file a bill to review the entire decree, it exceeded the permission granted it, and when the circuit judge granted leave to file such a bill he acted in disregard of a judgment of this court rendered in the same cause that such a bill could not be filed without leave first obtained from this court."

... *Wilson v. Fridenberg*, 21 Fla. 386. Under these circumstances the relator's remedy by appeal is inadequate as well as useless. The matter has already passed to final judgment in this court, and if that judgment is enforced the proceedings in the circuit court in disregard thereof will cease. We are given power (§ 5, art. 5, Const. 1885) to issue all writs 'necessary or proper to the complete exercise of' our jurisdiction. There is no doubt that the attempt to open up for review the decree entered in pursuance of our mandate, for errors committed by us, as well as the attempt to exercise jurisdiction over other features of the decree in disregard of our decision that such jurisdiction must not be exercised without leave first granted by this court, constitute an unwarranted interference with, and disregard of, the judgments of this court, for the correction of which prohibition is the proper remedy." *State ex rel. Wolferman v. Spokane County Super. Ct.* 8 Wash. 591, 36 Pac. 443; *Harri-*

compel him to do a thing the doing of which is within his discretion. This is undeniably true as a general proposition, but the functions of that writ have been considerably broadened by the terms in which the supervisory jurisdiction mentioned above has been conferred upon this court, since the language of the Constitution is that, in the exercise and for the purposes of that jurisdiction, we may issue "writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs," whereas, referring to the writs of mandamus and prohibition, as defined in the Code of Practice, we find that they were intended only for the use of a court, exercising appellate jurisdiction over an inferior court. Code Prac. arts. 839, 840. The authority of the Constitution, then, being superior to that of the Code of Practice, the use in this court of the writs mentioned

is no longer confined to cases as to which this court has only appellate jurisdiction, but is extended to all cases where they may be needed for the purposes contemplated by the Constitution. The Code of Practice expresses the generally accepted idea of the functions of the writ of mandamus, and the rule therein contained—that its use, as between courts, is confined to those exercising appellate jurisdiction—is as commonly received as the rule that the writ does not lie to control the discretion of a judge. And yet, acting under the authority of the Constitution, its use has been extended in the one respect by this court, and it would be difficult to find any sound reason why it should not be extended in the other. It is quite evident that if it becomes a question whether the court will exercise the jurisdiction conferred upon it, or decline to do so be-

man v. Waldo County Comrs. 53 Me. 83." State *ex rel.* Reynolds v. White, 40 Fla. 297, 24 So. 160.

The case is one which, like Havemeyer v. San Francisco City & County Super. Ct. 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121, and similar decisions illustrate the manner in which the superior court exercises the power of superintending control over the inferior tribunal by means of the extraordinary writ of prohibition, without mentioning the fact that it does so.

Georgia.

"The supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and such other like court as may be hereafter established in other cities; and shall sit at the seat of government at such times in each year as shall be prescribed by law, for the trial and determination of writs of error from said superior and city courts." Ga. Const. 1877, art. 6, § 2, ¶ 5.

"The superior courts shall have exclusive jurisdiction in cases of divorce; in criminal cases where the offender is subjected to loss of life, or confinement in the penitentiary; in cases respecting titles of land, and equity cases." Id. § 4, ¶ 1.

"Said courts shall have jurisdiction in all civil cases except as hereinafter provided." Id. ¶ 3.

"They shall have appellate jurisdiction in all such cases as may be provided by law." Id. ¶ 4.

"The superior court shall have power to correct errors in inferior judicatories by writ of certiorari, which shall only issue on the sanction of the judge; and said courts and the judges thereof shall have power to issue writs of mandamus, prohibition, *scire facias*, and all other writs that may be necessary for carrying their powers fully into effect, and shall have such other powers as are or may be conferred on them by law." Id. ¶ 5.

"The supreme court has authority: (1) To exercise appellate jurisdiction and that only, and in no case to hear facts or examine witnesses; (2) to hear and determine all causes, civil and criminal, that may come before it; and to grant judgments of affirmance or reversal or any other order, direction, or decree required therein; and if necessary to make a final disposition of the cause. It shall be within its power to award such order and direction to the cause in the court below as may

be consistent with the law and justice of the case." 3 Ga. Code, art. 3, § 1068.

"The superior courts have authority: (1) To exercise original exclusive or concurrent jurisdiction (as the case may be) of all causes, both civil and criminal, granted to them by the Constitution and laws. (2) They have exclusive jurisdiction in criminal cases where the offender is subjected to loss of life or confinement in the penitentiary." Id. art. 1, § 791.

"The judges of the superior court have authority: (1) To grant for their respective circuits writs of certiorari, *supersedeas*, quo warranto, mandamus, habeas corpus, and bills in actions *ex delicto*." Id. § 792.

The legislature had passed an act directing the justice of an inferior court of a county to levy an extra tax to pay the expense of building a courthouse, etc. The commissioners appointed to carry out the building, etc., applied to the county court to raise a tax for the amount of the expenses incurred, duly and properly certified, which the justice of that court refused to do. The supreme court, affirming the judgment of the superior court granting a mandamus to compel the justices of the inferior court to do as directed by the act, said: "A superior court will not undertake to regulate and control a discretion in the inferior judicatory which is not and cannot be governed by any fixed principles or rule." But where the act to be done is certain and fixed mandamus will lie to compel its performance. *Manon v. McCall*, 5 Ga. 522.

Idaho.

"The supreme court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof. The supreme court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const. 1889, art. 5, § 9.

"The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." Id. § 20.

The provisions of the Revised Statutes are identical with the Code of Civil Procedure of California, under which it was held that the writ there provided is the common-law writ, and that it extends only to inferior tribunals acting judicially. *Maurer v. Mitchell*, 53 Cal. 291; *Camron v. Kenfield*, 57 Cal. 550; *People v. San Francisco City & County Election Comrs.* 54 Cal. 404.

The above cited case of *Camron v. Kenfield*,

cause the writ of mandamus may not originally have been intended for such use, we ought to follow the Constitution, rather than the text writers, or even cases which have been decided by us, and in which this view of the matter was not considered. In dealing with the subject of the exercise of its supervisory jurisdiction, and of the manner of its exercise, this court said in *State ex rel. Saizan v. St. Landry Dist. Judge*, 48 La. Ann. 1501, 21 So. 94: "In the exercise of its supervisory jurisdiction, the supreme court is not rigidly tied down to form. When the facts of a given case, being recited, present a case for relief under its supervisory jurisdiction, and the prayer is for such orders and decrees as those facts will justify, and for general relief, the supreme court will not remit the relator to new, expensive, unnecessary, and sometimes fruitless reme-

dies, simply by reason of a mistake in the writ asked for." In the instant case there was absolutely no other remedy to which the relator could have been remitted, as the matter was brought to the attention of the court so late that when it was able to take action the moment for the contemplated sale had arrived. It is not necessary that we should make any radical departure from established jurisprudence for the purposes of the question now under consideration. It is well settled that when an injunction is dissolved on bond, and the plaintiff is refused an appeal from the order granting the dissolution, a mandamus will lie to compel the granting of the appeal, provided this court reaches the conclusion that such dissolution may work an irreparable injury. In order to reach this conclusion, however, it is necessary to review and reverse conclu-

57 Cal. 530, held that the legislature had no power to enlarge the power of the supreme court to issue the writ of prohibition, so as to extend the exercise of ministerial functions. Illinois.

"The supreme court . . . shall have original jurisdiction in all cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases." Ill. Const. art. 6, § 2.

"The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law." Id. § 12.

"After the year of our Lord one thousand eight hundred and seventy-four, inferior appellate courts of uniform organization and jurisdiction may be created in districts formed for that purpose to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts. . . . Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law." Id. § 11.

"The supreme court shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction according to the rules and principles of the common law and of the laws of this state." 1 Ill. Anno. Stat. (Starr & C.) 2d ed. chap. 37, § 9.

"It may issue writs of mandamus, habeas corpus, certiorari, error, and supersedeas, and all other writs not prohibited by law, which may be necessary to enforce the due administration of justice in all matters within its jurisdiction." Id. § 29.

"The said appellate courts shall be vested with all power and authority necessary to carry into complete execution all their judgments, decrees, and determinations in all matters within their jurisdiction according to the rules and principles of the common law and of the law of this state." Id. § 10.

"The said appellate courts respectively may issue the writ of mandamus to cause a proper record to be duly certified or made and certified, or to cause any other act to be done which may be necessary to enforce the due administration of justice in all matters, suits, or proceedings which could or might by appeal or writ of error, or in any other lawful manner, be brought within their respective jurisdictions. . . . And the said appellate courts respectively may also issue writs of certiorari, error, supersedeas, 51 L. R. A.

and all other writs not prohibited by law, which may be necessary to enforce the due administration of justice in all matters within their jurisdiction." Id. § 31.

"The several circuit courts in this state, and the superior court of Cook county, may make and award such judgments, decrees, orders, and injunctions, and shall issue all such writs and process as may be necessary or proper to carry into effect the powers granted to them." Id. § 66.

The supreme court has no power of superintending control, and no original jurisdiction except in cases relating to the revenue in mandamus and habeas corpus.

As there is no constitutional or statutory grant of the power under consideration, and the common law, except where changed by statute, being in force, it follows that the circuit court, as the highest court of original jurisdiction, possesses the same power of "general superintendency" over inferior tribunals as the court of King's bench. This power has been exercised by that court, and its exercise affirmed or corrected by the supreme and appellate courts on appeal.

In one case the defendant was counsel in an action previous to his election to the office of county judge. After taking office he refused to certify the cause on account of his disability in the manner provided by law, and the circuit court awarded a mandamus to compel him to do so, and its action was affirmed by the supreme court. *Graham v. People ex rel. Rutledge*, 111 Ill. 253.

In this state it has been repeatedly held, and the law is well-settled, that the circuit courts have jurisdiction to award the common-law writ of certiorari to all inferior tribunals and jurisdictions, where it is shown, either that they have exceeded the limit of their jurisdiction, or in cases where they have proceeded illegally and no appeal is allowed and no other mode is provided for reviewing their proceedings. *Hyslop v. Finch*, 99 Ill. 171; *Donahue v. Will County*, 100 Ill. 94; *Gerdes v. Champion*, 108 Ill. 141; *Lees v. Drainage Comrs. Dist. No. 2*, 125 Ill. 47, 16 N. E. 915; *Smith v. Hudson Twp. Highway Comrs.* 150 Ill. 385, 36 N. E. 987; *Deitrick v. Bishop Twp. Highway Comrs.* 6 Ill. App. 70.

Original petition for writ of prohibition, and also an appeal from an order of the appellate court for the first district dismissing the petition for a like writ.

Among the writs employed as auxiliaries of the reviewing power of appellate courts is the writ of prohibition. The general rule is that

sions reached by the trial judge, who refuses the appeal upon the ground that the plaintiff will sustain no irreparable injury by such refusal. When, therefore, the mandamus issues, and he is ordered to grant the appeal, it may be said that it is, in effect, controlling his judgment, by mandamus, in a matter with respect to which he has exercised a discretion vested in him by law. The right of appeal is in such a case not absolute, but is granted or refused by the judge as he may believe that the resulting injury will be irreparable or otherwise. If, upon the other hand, it be true that a litigant is entitled to an appeal from any interlocutory order which may cause him irreparable injury, then it follows that if the defendant in injunction is refused an order to bond, and such refusal would cause him irreparable injury, he is as much entitled to

an appeal as is the plaintiff, from an order dissolving an injunction which he has obtained. But the appeal will do the defendant in such a case no good, since the injunction which inflicts the injury is not thereby suspended; and, if he can obtain no other remedy, he must do without, although his opponent in the case would have a complete and adequate remedy if similarly threatened.

A further question which is entitled to consideration is this: The Code of Practice provides a remedy by appeal for a case of threatened irreparable injury, and it has been left to the courts to determine when an injury may be irreparable; this court having had occasion, not unfrequently, to differ with the lower courts upon that subject. In *White v. Cazenave*, 14 La. Ann. 57, it was held that the question must be determined "by the facts and circumstances of each

an appeal must be pending before the auxiliary jurisdiction of the appellate tribunal can be invoked.

The Constitution is a limitation upon the powers of the legislature, but it is regarded as a grant of power to the executive and judicial departments of the government. However, the executive and judiciary can only exercise such powers as are granted by the Constitution. (*Field v. People ex rel. McClelland*, 3 Ill. 79.) The Constitution only specifies three cases in which this court can exercise original jurisdiction, and the issuance of writs of prohibition is not one of them. Original jurisdiction being thus conferred upon the supreme court in certain specified cases, it cannot exercise original jurisdiction in cases not specified. In all other cases than those named its jurisdiction is appellate only.

The relator filed a petition, and stated that on a bill filed against him in the circuit court the court had made an order directing him to pay alimony and solicitor's fees; afterwards made like additional orders; again, more orders on appeals from those orders. The petitioner appealed. The petition averred that the judge, respondent, announced in court that he would continue each week to enter orders for alimony, and order the payment of solicitor's fees, and the petition alleged that the court exceeded its jurisdiction in entering some of the orders. The original petition filed in the supreme court asked for leave to file a petition for a writ of prohibition against the circuit court and the judge (naming him), and for a rule that they should show cause why it should not be issued, prohibiting them from enforcing the last two orders. The court said: "A writ of prohibition is an extraordinary writ issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction." It operates on the court, and not on the parties. "It is never resorted to when there is another adequate remedy, nor can it be used to correct mere irregularities or to perform the functions of an appeal or writ of error. . . . The Constitution only specifies three cases in which this court can exercise original jurisdiction, and the issuance of writs of prohibition is not one of them. . . . A prohibition is an original remedial writ as old as the common law itself. . . . Such [appellate] tribunals have a species of jurisdiction which may be called auxiliary jurisdiction. This auxiliary jurisdiction is an incident of the power to review judgments and decrees pronounced by courts of original jurisdiction, and is necessary to enable the reviewing court to maintain its independ-

ence and administer justice." *People ex rel. Earle v. Cook County Circuit Ct.* 169 Ill. 201, 48 N. E. 717.

The supreme court has no power under the Constitution to issue a writ of prohibition except in aid of its acquired appellate jurisdiction. *People ex rel. Graver v. Cook County Circuit Ct.* 173 Ill. 272, 50 N. E. 928. *Indiana.*

"The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." Ind. Const. 1851, art. 7, § 1.

"The supreme court shall have jurisdiction coextensive with the limits of the state, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer." Id. § 4.

"The circuit courts shall each consist of one judge, and shall have such civil and criminal jurisdiction as may be prescribed by law." Id. § 8.

"The supreme court shall consist of five judges, and three of whom shall form a quorum, and shall have jurisdiction in appeals coextensive with the state." 1 Ind. Stat. 1896, Horner's Anno. ed. chap. 3, § 1292.

"Said [circuit] court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace. . . . Provided, however, that in counties in which criminal or superior courts exist or may be organized nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by law. And it shall have such appellate jurisdiction as may be conferred by law; and it shall have jurisdiction of all other causes, matters, and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board, or officer." Id. § 1314.

A superior court is established in every county having, according to the United States census of 1870, a population not less than 40,000, which shall consist of three judges.

The original act was passed February 15, 1871. By act of March 5, 1877, a fourth judge was added. It is stated in this act, 1879, p. 120, in force 1879, that the intent of it is to abolish the fourth judge provided by the act of March 5, 1877. Id. § 1342.

"Said court within and for . . . counties in which it may be organized shall have origi-

case," and for the purposes of the case before it the court said: "The article 566 of the Code of Practice allows an appeal where an order may work an irreparable injury, and it appears to us that an order which necessarily compels a party, in order to protect his rights, to institute another suit for the same cause of action, is covered by this article." See also *Eltringham v. Clarke*, 49 La. Ann. 340, 21 So. 547; *De La Croix v. Villere*, 11 La. Ann. 39. From this point of view, it may well be said that where affairs of great public magnitude and interest, which are being acted upon by the constituted governmental authority of a large city, are tied up at the instance of a single citizen, or two citizens, claiming to act in the interest of the public at large, and by virtue merely of their ownership of property assessed at \$2,000, the resulting injury may

be irreparable. But even supposing that it is not absolutely irreparable, or not irreparable in the sense in which that word is used in the Code of Practice, but that nevertheless it is serious,—that it may turn out that the proceeding is an unwarrantable interference with public officers in the discharge of functions assigned to them by law, and involving the exercise of legislative discretion, over which the courts have no control,—if in such a case there is no remedy by appeal, ought not a remedy to be found in the grant of authority conferred upon this court, or are the operations of the city government to be stopped irremediably by any citizen who may differ with the city officials as to the expediency of an ordinance, or may make more serious charges against its action, without inquiry into the merits of such charges, or as to the responsibility of the cit-

ing concurrent jurisdiction with the circuit court in all civil causes except slander and except such causes of which the court of common pleas now [February 15, 1871] has original exclusive jurisdiction and jurisdiction concurrent with the circuit court in all cases of appeal from justices of the peace, boards of county commissioners, and mayors' or city courts; and all other appellate jurisdiction now vested in, or which may hereafter be vested by law in, circuit courts." Id. § 1351.

"The said court at general or special term shall have power to issue and direct all processes to courts of inferior jurisdiction and to corporations and individuals, which shall be necessary in exercising its jurisdiction, and for the regular execution of the law." Id. § 1357.

"The judges of said court, or either of them, have the same power in term or vacation to grant restraining orders, injunction, and writs of ne exeat, and to issue writs of habeas corpus, mandate, and prohibition." Id. § 1358.

(On March 6, 1873, the court of common pleas was abolished, and its jurisdiction transferred to the circuit court.)

By Stat. 1891, p. 39, in force February 28, 1891, the appellate court of Indiana was created to be composed of five judges, and to have exclusive jurisdiction subject to designated exceptions of appeals from the circuit, superior, and criminal courts, and in all cases where there is jurisdiction the decisions of the appellate court shall be final. Id. § 6562a.

In *Jared v. Hill*, 1 Blackf. 155, the following is in the minutes of the decision: "When the judgment of the circuit court is reversed, and the proceedings up to a certain point are set aside at the costs of the defendant in error, and the cause is remanded for further proceedings, if the circuit court refuse to render a judgment for the costs according to the mandate, this court will grant a rule to show cause why a mandamus should not issue."

"The issuing of this rule to show cause is under the appellate powers of the court, it having no original jurisdiction in the case. Const. art. 5, § 2. The rule is that a court of appeals as such may award a mandamus whenever it is an exercise of appellate jurisdiction, or necessary to enable it to exercise appellate jurisdiction. *Marbury v. Madison*, 1 Cranch, 175, 2 L. ed. 72; . . . *United States v. Peters*, 5 Cranch, 115, 3 L. ed. 53; . . . *Livingston v. Dorgenois*, 7 Cranch, 577, 3 L. ed. 444; . . . *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; . . . 1 Kent, Com. 301." Id. note.

The complainant filed his complaint in the circuit court for a writ of prohibition commanding

the commissioners not to enter on their order book an order establishing the boundary of a new county. The circuit court awarded the writ, and on appeal the supreme court reversed that judgment, holding that while the statute allows the writ it fails to point out the causes for which it may have been allowed. Hence, for these causes we must look to the common law. . . . Under our system of procedure it can only be used for one cause, namely, to command the parties to a suit in an inferior court to cease the prosecution thereof upon a suggestion that the cause original, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. *Jasper County Comrs. v. Spittler*, 13 Ind. 235, citing *Perkins*, Pr. 484.

In *Haggard v. Hawkins*, 14 Ind. 239, the court, in affirming the case, said: "All the objections urged against the act in this case, or nearly all, were presented and held invalid in *Jasper County Comrs. v. Spittler*, 13 Ind. 235."

The petitioners applied to the board of commissioners for a change of the boundary line between two counties. The commissioners dismissed the petition,—that is refused to order it filed. The petitioners desired to appeal, but the commissioners refused to permit any entry to be made of record of their proceedings and final order, so that a transcript could be obtained for the purposes of the appeal. The petitioner applied to the circuit court for a mandate to the commissioners to permit such entry. The court ordered the mandate, and this was an appeal from the judgment which was affirmed in the supreme court. *Warren County Comrs. v. State ex rel. Ennis*, 15 Ind. 250.

The supreme court has no jurisdiction to award a writ of mandate where the writ is not necessary to the proper discharge of the duties of said court as an appellate court. *State ex rel. Powell v. Biddle*, 36 Ind. 138.

In *State ex rel. Reynolds v. Tippecanoe County Comrs.* 45 Ind. 501, the court, after describing the writ of mandamus as issued by the King's bench, said further: "In this state the authority to issue the writ does not exist as a prerogative power, but is conferred upon the courts by the power and according to the pleasure of the legislature. By statute the power is conferred upon this court, to issue the writ only when necessary for the exercise of its functions and powers. 2 Gavin & Hord (Ind.) Stat. 320, § 738. . . . The authority to the circuit court to issue the writ is general, and it may be awarded to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law especially

izens by whom they are made? As has already been stated, this court has frequently held that a mandamus will lie to compel the granting of an appeal from an order dissolving an injunction on bond, and that in such cases it will look into the question of irreparable injury, and review the conclusions of the lower court thereon. *White v. Cazeaux*, 14 La. Ann. 57; *State ex rel. Dardenne v. Iberville Dist. Judge*, 28 La. Ann. 889; *Besbe v. Guinault*, 29 La. Ann. 795. In *State ex rel. Violet v. King*, 46 La. Ann. 78, 14 So. 423, where the question was presented, it was said: "The fact stated by the judge in his answer, that an order dissolving an injunction on bond is granted by a district judge in the exercise of a judicial discretion expressly conferred upon him by law, does not withdraw that order absolutely from being made the subject of review by

this court. . . . [The] plaintiff has the legal right to apply for a suspensive appeal from the order, . . . [and] on such an inquiry this court has necessarily to determine whether the judge's discretion, which only extends, legally, to cases wherein the dissolution of the injunction would not work irreparable injury to the plaintiff, has been legally applied or not. If we find it has not, we grant relief; otherwise, relator takes nothing by his application to us. As has been said several times by this court, each case must stand or fall upon its own special facts and circumstances." In *State ex rel. Lehman v. King*, 46 La. Ann. 163, 15 So. 283, it is said in the syllabus: "The powers of the supreme court, under article 90 of the Constitution, are not confined to writs of certiorari, prohibition, mandamus, and quo warranto, but extend to other reme-

diates, or a duty resulting from an office, trust, or station."

Where an attorney has been improperly suspended or disbarred, the judgment is a nullity, and the writ of mandate is a proper remedy to restore him to his rights. *Walls v. Palmer*, 64 Ind. 493.

A criminal case was tried by a jury before a justice of the peace, and a verdict rendered finding the defendants guilty. On a motion of the defendants the justice granted a new trial. The relator applied for a writ of mandate to compel the justice to enter judgment on the verdict of the jury, and an alternative writ issued. It would seem, although it is not stated, that the return was demurred to and the demurrer sustained, as the judgment in the supreme court is a judgment reversed with instructions to overrule the demurrer to appellant's return on the ground that the verdict was null, and the justice could not be compelled to enter judgment on it. *Moore v. State ex rel. Clegg*, 72 Ind. 358.

Where an imperative duty is enjoined by law upon an inferior tribunal a mandamus will lie to compel its performance. *State ex rel. Wintenburg v. Demaree*, 80 Ind. 519.

Where in apt time one takes the proper steps required by statute to appeal from the judgment of a justice of the peace against him in a criminal case, if the justice fail to send up to the appellate court the transcript, etc., until after the time limited, he may be compelled to do so by mandate. *State ex rel. Jacoby v. Cressinger*, 88 Ind. 499.

A justice of the peace had dismissed a suit against the relator, but refused to enter judgment in favor of relator for costs upon demand that he do so. The circuit court sustained a demurrer to the complaint for a mandamus. This was reversed by the supreme court, and the circuit court was directed to overrule the demurrer. *State ex rel. Hamilton v. Engle*, 127 Ind. 457, 26 N. E. 1077.

In *State ex rel. Godfrey v. Miami County Comrs.* 63 Ind. 497, the court said: "The hearing of the proofs and determination of the right of a party to have taxes paid by him refunded is a judicial, rather than a ministerial, act, and hence not a proper subject to be controlled by a mandate from a superior court." *Kansas.*

"The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law." Kan. Const. 1859, art. 3, § 3.

"The district courts shall have such jurisdiction in their respective districts as may be provided by law." Id. § 6.

"The supreme court may, by special mandate or other proper mode, require the district court, or any other court or tribunal of the county where any action or proceeding shall have originated, to carry the judgment or decree of the supreme court into execution. Kan. Gen. Stat. 1899, p. 400, chap. 27, § 1833.

Two courts of appeals (northern and southern departments) have original jurisdiction same as the supreme court in quo warranto, mandamus, and habeas corpus. Id. § 1864, p. 407.

The district court "shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal [in each county] (not otherwise provided by law). . . . and shall have a general supervision and control of all such inferior courts and tribunals to prevent and correct errors and abuses." Id. chap. 28, art. 1, § 1879, p. 410.

A case was brought into the supreme court by writ of error. The whole record being brought up and the judgment of the supreme court, going to the whole merits of the case, was rendered upon the findings of fact specifically stated by the district court. Thereupon a mandate was sent to the court below directing it to render the judgment it should have rendered on the facts found in the case. The supreme court held that it was the duty of the district court to render the judgment directed by the mandate, and issued a peremptory writ to the judge of the district court commanding him to do so. *Duffitt v. Crozier*, 30 Kan. 150, 1 Pac. 69.

A judgment had been rendered for the defendant, in an action in the district court which the plaintiff moved to vacate, and the court instantly vacated the judgment; to which action no objection was taken by any of the parties. The action being pending thereafter in the district court, it was removed to the superior court under the statute. The latter court declined to entertain jurisdiction for the reason that the judgment was a final determination of the rights of the parties. The supreme court took a different view, and granted a peremptory mandamus to require the judge of the superior court to try the case. *State ex rel. Morris v. Webb*, 34 Kan. 710, 9 Pac. 770. As the control exercised in the first case was to complete the revisory action of the supreme court, and in the second to compel the inferior tribunal to exercise its jurisdiction so that its action might be reviewed by the supreme court, it may be said that in both of the foregoing the power was exercised by the supreme court as well in aid

dial writs." And in the body of the opinion we find the following: "We think the rights of all parties are fairly guarded and protected in this state, under the discretionary powers of the district judges over such questions, supplemented as they are by the supervisory control over inferior tribunals which has been given to this court." In *State ex rel. Capitol City Oil Mills Co. v. Monroe*, 50 La. Ann. 266, 23 So. 839, this court said: "The whole issue before us on this application is whether or not the conclusions of the district judge that the act prohibited by the injunction which issued in this case was not of a character to work an irreparable injury to the plaintiff, at whose instance it was issued, and therefore was subject to be dissolved on bond, were well founded or not. If they were, then his action in ordering the bonding of the injunc-

tion, and in refusing to grant a suspensive appeal therefrom, must stand, as against relator's application." And in *State ex rel. Moyse Bros. v. Guion*, 50 La. Ann. 492, 23 So. 614, where the district court had issued a mandamus directing a justice of the peace to enjoin the consummation of a sale under execution, it was held that the proceeding was regular, and would not be interfered with. In *State ex rel. Murray v. Lazarus*, 36 La. Ann. 578 (being an application for a mandamus to compel a district court to grant an injunction), the judge *a quo* for answer and for cause why the writ should not issue, said: "That he has declined the relief asked, after hearing the parties on a rule nisi; that there is no suggestion in the petition that any process or writ has been applied for or issued by the defendants for the execution of the judgment, nor that they

of its appellate jurisdiction as by virtue of its original jurisdiction to issue mandamus.

On a trial in the district court the language and conduct of an attorney in presenting an application to the court were such that the court adjudged him guilty of contempt, imposed on him a fine and imprisonment; and further, that until he was purged of his contempt he was denied the right to appear in that court. He took an appeal from the judgment of contempt, and obtained from one of the justices of this court a stay of proceedings pending the appeal. The district judge was compelled, by mandamus to permit him to practise his profession in the district court until the appeal was determined. *Bird v. Gilbert*, 40 Kan. 469, 19 Pac. 924.

Under the Constitution the supreme court has original jurisdiction in quo warranto, mandamus, and habeas corpus. An action of mandamus was commenced by a railroad corporation against the board of county commissioners to compel the issue by defendants to plaintiff of certain county bonds. In an application by the plaintiff in such action for a writ of prohibition to restrain the county attorney and district court, while the action was pending in the supreme court, from further proceeding in an action pending in the district court, instituted by the county attorney in the name of the state of Kansas for the purpose of restraining and enjoining the county commissioners and county clerk from issuing bonds, the decision of the court was that while, with respect to the original jurisdiction that might be exercised by the supreme court, the intent of the Constitution is that that court should exercise only just such original jurisdiction as is prescribed by the Constitution, and not any more nor any less; and that while, as neither prohibition nor injunction is named or mentioned in the Constitution, such matters cannot rightfully come within the original jurisdiction of the supreme court,—this would not prevent the supreme court from exercising jurisdiction with regard to such matters where they were incidents or auxiliaries necessary for the rightful and proper exercise of the jurisdiction actually conferred upon the supreme court by the Constitution and statutes; that the supreme court has inherent power to protect its own jurisdiction, process, proceedings, orders, and judgments, and for this purpose may, when necessary, prohibit or restrain the performance of any act which might interfere with the proper exercise of its rightful jurisdiction in cases pending before it. *Chicago, K. & W. R. Co. v. Chase County Comrs.* 42 Kan. 223, 21 Pac. 1071.

No mention is made of "superintending control" by any of its various names, yet here is an exhibition of the exertion of that extraordinary power in the highest sense. It is an illustration of that elasticity of the common law which its admirers claim for it.

Where a duty is imposed upon the judge of a district court by statute, and the findings of fact made by him as required by the statute have been adjudged to be the exercise of judicial power, a mandamus will issue to compel the performance after refusal. *Emporia v. Randolph*, 56 Kan. 117, 42 Pac. 376.

Where an appellant offered a new appeal bond in the place of one that was insufficient in amount, which offer was refused by the district court and the appeal dismissed, mandamus was awarded to compel the latter court to accept the bond and reinstate the appeal. *St. Louis & S. F. R. Co. v. Shinn*, 60 Kan. 111, 55 Pac. 346.

Where the discretion of the probate court has been abused in the appointment of an administrator, mandamus will be issued to compel it to follow the statutory order of priority in the making of the appointment. *Grimes v. Barratt*, 60 Kan. 259, 56 Pac. 472.

Maryland.
"The jurisdiction of said [the] court of appeals shall be coextensive with the limits of the state, and such as now is, or may hereafter be, prescribed by law." Md. Const. art. 4, part 2, § 14.

"The circuit courts . . . are the highest common-law courts of record and original jurisdiction within this state, and each has full common-law powers and jurisdiction in all civil and criminal cases within its county (except where by law the jurisdiction has been taken away, or conferred upon another tribunal), and all the additional powers and jurisdiction given by the Constitution and by law." 1 Md. Pub. Gen. Laws, art. 26, § 36, p. 446.

The court of appeals and the chief judge thereof has power to grant writs of habeas corpus, and to exercise jurisdiction in all matters relating thereto, throughout the whole state.

Circuit courts and judges thereof in their respective counties, the superior court, court of common pleas, circuit court of Baltimore, and Baltimore city court, and the several judges out of court and judges of the Baltimore court of appeals have power to grant writs of habeas corpus, and exercise jurisdiction in all matters pertaining thereto. Id. art. 42, § 1, p. 768.

"All applications for granting writs of mandamus shall be made to the circuit courts for the several counties and the superior court of Baltimore city, the court of common pleas of

propose any action, except the general statement that they threatened to execute said judgment, without indication when it was done, or that any action was contemplated, except through the court; that, if he has erred in the exercise of the discretion vested in him, his error can be revised on appeal, only." Chief Justice Bermudez, as the organ of the court, referring to the Code of Practice, and disposing of the propositions presented by the return of the respondent judge, dealt with the subject as follows: "We find it distinctly stated that the object of the writ of mandamus is to prevent a denial of justice; that the writ should therefore be issued where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever. It arises,

says the Code, at the discretion of the court, even where a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay that the administration of justice may suffer from it. In cases like the present one, in which an injunction was refused *in limine* after hearing on a rule nisi, it has been held that an appeal lies; but it has never been decided that such an appeal, even if allowed as a suspensive one, would operate as the desired injunction would have done, had it been granted. Indeed, it is hard, not to say impossible, to conceive how a suspensive appeal from a decree refusing an injunction can produce the effect of preventing the act which the injunction sought would have arrested, had it been allowed. . . . So that, if there be a remedy, it is not an adequate one, and, if a party entitled to an injunction is refused the

Baltimore city, or the Baltimore city court, or to the judges of said courts respectively." 2 Md. Pub. Gen. Laws, art. 60, § 1, p. 966.

A religious corporation had endeavored to and was succeeding in removing the clergyman, who had been duly appointed as pastor of the society. He applied for a writ of mandamus to compel the officers of the corporation to permit him to exercise the duties of his clerical office. The application was made to what was then the highest court of original jurisdiction in Maryland, which was then known as the general court and court of appeals of Maryland, and the mandamus was awarded. The court, in ordering the mandamus to issue after stating the history of the writ and its origin and the reasons for its being denominated prerogative, all of which has been seen before, said: "The position that this court is invested with similar powers [as the King's bench] is generally admitted, and the decisions have invariably conformed to it, from whence the inference is plainly deducible that this court may, and of right ought, for the sake of justice, to interpose in a summary way to supply a remedy where for the want of a specific one there would otherwise be a failure of justice." Runkel v. Winemiller, 4 Harr. & M'H. 429, 1 Am. Dec. 411.

In a case arising in Maryland the court, by way of illustration of the manner in which the common law with all its attributes came to be granted in that state, said: "They [our ancestors] were therefore in the predicament of a people discovering and planting an uninhabited country; and as they brought with them all the rights and privileges of native Englishmen, they consequently brought with them also as their birthright all the laws of England which were necessary to the preservation and protection of those rights and privileges." State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534.

It has always been held in Maryland that the county courts, being the only courts of record with original common-law jurisdiction, can rightfully exercise all the powers exercised in England by the court of King's bench so far as these powers are derived from rules and principles of the common-law, and so far as the same are suited to the change in our political institutions, and are not modified by Constitution or statutory enactments.

The court of King's bench has the power of removal as acknowledged, if not an essential, part of its ordinary common-law jurisdiction, both with respect to civil and criminal cases. "At common law the court has the power of directing the trial to take place in the next adjoining county when justice requires it." [Chit-51 L. R. A.

ty, Crim. Law, 201.] . . . During the existence of the general court the process of certiorari answered every necessary purpose, and was in consequence the familiar practice; but when that court was abolished . . . it was considered, as doubtless it must have been, that, the courts being of co-ordinate grade and each equally supreme within its territorial limits, some mode was proper to be adopted as a substitute for the certiorari or other common-law process to continue the enjoyment of this privilege. That it was not the intention of those who amended the Constitution to destroy this right, is not a debatable question. They not only express a contrary design, but they make the privilege for the first time an object of constitutional security, leaving to the legislature no longer the power to deprive a party of its exercise, but only the power of extending it or prescribing the mode of its exercise." Price v. State, 8 Gill, 295. Minnesota.

"The supreme court . . . shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases." Minn. Const. art. 6, § 2.

"District courts have original jurisdiction in all civil cases, both in law and equity." Id. § 5.

"The supreme court has power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and also all other writs and processes not especially provided for by law to all courts of inferior jurisdiction, to corporations and to individuals, that are necessary to the furtherance of justice and the execution of the laws." 2 Minn. Stat. 1894, chap. 63, § 4823.

It has "full power and authority necessary for carrying into complete execution all its judgments, decrees, and determinations in the matter aforesaid, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state." Id. § 4824.

District courts have original jurisdiction in all civil matters over \$100, etc.; criminal matters over \$100 fine and three months' imprisonment; and appellate jurisdiction over courts of probate and justices of the peace. Id. chap. 64, § 4833.

"The said courts in term time, and the said judges thereof in vacation, have power to award throughout the state, returnable to the proper county, writs of injunction, ne exeat, certiorari, and all other writs or processes necessary to the perfect exercise of the powers with which they are vested and the due administration of justice." Id. § 4837.

In State *ex rel.* Lawton v. Ramsey County

same, he remains with a right, but without a remedy,—at the mercy of a district judge, unless this court can interfere and relieve him from the effect of a denial of justice. Where a clear case for an injunction is presented, it is the duty of the judge to grant the relief. He has, then, no more discretion to exercise than when a seasonable application is made, and a proper bond tendered for an appeal, in an appealable case. In such a case it is manifest that justice and reason require that some mode should exist of redressing at once the wrong or the abuse of power on the part of the district judge, even if there be other means of relief, or the slowness of ordinary legal forms would produce such a delay that the administration of justice may suffer from it." And so, in *State ex rel. Gaynor v. Young*, 38 La. Ann. 923, Mr. Justice Watkins, being the organ of the

court, refers to the writ of mandamus as being a writ, the object of which is "to prevent a denial of justice, . . . and should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever." And finally, in *State ex rel. Lafitte v. Orleans Dist. Judge*, 51 La. Ann. 1768, 26 So. 374, being an application for a mandamus to compel the respondent judge to grant an injunction, this court, referring to the case of *Citizens' Bank v. Webre*, 44 La. Ann. 1083, 11 So. 706, and *Chatard v. New Orleans*, 10 La. Ann. 752, said: "We affirm anew the doctrine of these decisions; it being always understood that the discretion so to be exercised by the lower judge is subject

Dist. Ct. 44 Minn. 244, 46 N. W. 849, the court said: "In this state certiorari is employed strictly as in the nature of a writ of error, its legitimate office being to review and correct decisions and final determinations of inferior tribunals, not to devert them of the right of terminating the proceedings."

Mississippi.

"The supreme court shall have such jurisdiction as properly belongs to a court of appeals." Miss. Const. art. 6, § 146.

The circuit court shall have original jurisdiction in all matters, civil and criminal, in this state not vested by this Constitution in some other court." Id. § 156.

In a case arising under the Constitution and statutes of Mississippi the supreme court held that there was no court in Mississippi possessing the extraordinary powers of the court of King's bench, to whose cognizance the writ of mandamus would belong without constitutional or statutory regulation, and then cites the provision of the Constitution as to the original jurisdiction of the circuit court and the provisions of Rev. Code, 482, art. 29, 479, art. 9, and 561, art. 3, and stated that under these provisions, in the absence of further regulations, the practice had been adopted of applying by petition to a judge in vacation for an alternative writ of mandamus; and that the petition thus comes in place of the rule to show cause in England, and the order of the judge is equivalent to the rule absolute. Beyond these modifications the court is guided in the proceedings by the rules of common law. *Swann v. Buck*, 40 Miss. 268.

The right to use the writ of prohibition which the courts of Westminster possessed over all inferior courts in order to prevent innovation and usurpation of power not given them, or in excess of power in reference to some collateral matter arising in the suit, did not emanate from the King's bench, common pleas, or exchequer because of any appellate or revisory jurisdiction, but by reason of their being superior courts of original jurisdiction. And unless the claim to a supervisory power over inferior jurisdictions as exerted by the superior courts in England can be granted upon the words "properly belongs to the supreme court," as used in the Constitution, it has no foundation. The supreme court does not possess this power, but the circuit court does as the superior court of original jurisdiction analogous to the courts of Westminster. *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

A justice of the peace had, as the supreme court held, erroneously refused to approve a 51 L. R. A.

bond given on an appeal to the circuit court. The appellant had moved in the circuit court for a certiorari, and afterwards that his bond be approved. The circuit court overruled the motion, and the appellant appealed. The court held that, upon the facts, the circuit court should not only have granted the motion, but approved the bond, if the sureties were found solvent, and proceeded with the trial. And in doing so said, in conclusion, "the misconduct of an official should not be permitted to defeat litigants of clear rights accorded them by law, and the circuit court, by virtue of its inherent powers as an appellate tribunal, in proper cases should exercise its authority in restraining the inferior tribunal, and constraining it to yield obedience to lawful requirement." *Robinson v. Mhoon*, 68 Miss. 712, 9 So. 857.

Nebraska.

"The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdictions as may be provided by law." Neb. Const. art. 6, § 2.

"The district courts shall have both chancery and common-law jurisdiction, and such other jurisdiction as the legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty, and pass such sentence as may be prescribed by law." Id. § 9.

No general jurisdiction is conferred upon any of the courts of record, either supreme or district, beyond that conferred by the Constitution.

The supreme court has no power to grant a writ of prohibition for the reason that it is not authorized to do so by the Constitution. Art. 6, § 2, is a grant of power, and by implication limits the original jurisdiction of the supreme court to the subjects therein enumerated. *Miller v. Wheeler*, 33 Neb. 765, 51 N. W. 137; *State ex rel. King v. Hall*, 47 Neb. 579, 66 N. W. 642.

As there is no grant of superintending control by any of its designations, nor of the right to issue prohibition or a certiorari, it would seem that the only way in which the supreme court can control inferior jurisdiction is by mandamus. This it did in *State ex rel. Fuller v. Beall*, 48 Neb. 817, 67 N. W. 868, where it awarded a mandamus to compel a judge of the district court to receive and enter a verdict, and in doing so cited *Thompson on Trials*, §

to review by this court in case of abuse of such discretion."

The whole question, then, resolves itself into this: No one denies that this court may make orders and render decrees which will necessarily control the discretion of the judges presiding in the inferior courts, but it is said that this cannot be done by means of the writ of mandamus. Where, however, a case is presented requiring the interposition of this court in the exercise of its power of control and general supervision, and no other adequate remedy suggests itself, the mandamus, as defined by our law, seems to be the appropriate writ to be used. In the cases to which we have been referred, that of *State ex rel. New Orleans & H. S. S. & Lottery Co. v. Eighth Dist. Judge*, 23 La. Ann. 766, was decided before the adoption of the Constitution of 1879; while in the oth-

ers, in which it was held that a mandamus would not lie to compel the dissolution of an injunction on bond, it did not appear, as far as we can see, that the parties were left entirely without remedy, or that such serious consequences were possible as in a case such as this, where organized governmental authority is arrested in its action, with reference to a matter of public concern, which is still subject to legislative consideration, and has not yet reached such definite shape as to threaten injury to the individuals who complain, or to the public at large, whom they are undertaking to represent, and where the dissolution of the injunction can, therefore, work them no injury.

Blanchard, J., dissenting:

Peter Johnson and E. J. Dare, alleging themselves to be citizens and taxpayers of

2636, and quoted therefrom as follows: "If the verdict has been unanimously agreed upon by the jury, reduced to writing in due form, returned by the jury, and regularly presented to the court; and if, for insufficient reasons, the court refuses to receive and record the same, — it may be compelled to do so by a mandamus sued out in a tribunal possessing superintending jurisdiction over it." Nevada.

"The [supreme] court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Nev. Const. art. 6, § 4.

District courts are the highest courts of original jurisdiction. "The district courts and the judges thereof shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of habeas corpus." Id. § 6.

No additional power is conferred by statute on either court.

"This writ [certiorari] may be granted by any court . . . except a justice's or recorder's or mayor's court; the writ shall be granted in all cases when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal . . . and there is no appeal, nor in the judgment of the court any plain, speedy, and adequate remedy." Nev. Gen. Stat. § 3458.

The petitioner was sued in a justice's court and judgment rendered against him. He took the necessary steps to perfect an appeal to the district court according to the provisions of an act of the legislature. The act directs that trials on appeal from justice's court shall be *de novo* in the district court. The district court had refused to proceed with the trial of the appeal upon the ground that the court had no constitutional power so to do, and that the act authorizing such trial *de novo* was unconstitutional and void. The supreme court held otherwise, and granted a peremptory writ of mandamus to the district court directing it to assume jurisdiction and try the appeal *de novo*. *Cavanaugh v. Wright*, 2 Nev. 166.

The petitioner was convicted of felony in the district court. When the time within which he might have appealed from the judgment had elapsed he presented his petition to the supreme court for a certiorari commanding the district court to certify its proceedings on the trial of the indictment. The court adopted the lan-

guage of the judge delivering the opinion in the case of *People ex rel. Seward v. Dutchess County Judges*, 23 Wend. 362, and held that, inasmuch as the statute provided that the review upon this writ shall not be extended further than to determine if the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer, and it appearing that the district court had not transcended its authority, the certiorari was denied. *Re Wilcox*, 12 Nev. 219.

In *Wiggins v. Henderson*, 22 Nev. 103, 86 Pac. 459, it was held that no appeal to the district court lies from a judgment by default rendered in a justice's court, there being no issue of law or fact to be tried upon such appeal. And where, in such case, the justice's court has exceeded its jurisdiction, certiorari is the proper remedy.

On an application for a mandamus to compel the judge of the district court to settle a statement on motion for a new trial, it was held that where it was the duty of the judge to settle such statement mandamus was the proper remedy to compel him to do so, and that the rule that mandamus would not issue to control discretion or revise judicial action, does not apply to a case of determining the preliminary questions relating to such settlement. *State ex rel. Keane v. Murphy*, 19 Nev. 89, 6 Pac. 840. New Jersey.

No jurisdiction is conferred by Constitution on the supreme court.

"The circuit courts shall be held in every county of this state by one or more of the justices of the supreme court, or a judge appointed for that purpose, and shall in all cases within the county, except in those of a criminal nature, have common-law jurisdiction concurrent with the supreme court." N. J. Const. art. 6, § 5, subd. 2.

There is no statute conferring additional jurisdiction.

A statute provided for a fine of not more than \$50 against military delinquents, but constituted no court to judge of the neglect or impose the fine. A general of brigade assumed by general order to create such a court, and the court thus founded assumed to impose a fine on a relator. It was held by the supreme court on certiorari that there was a mistake in the general's creating this new court, and in giving this new jurisdiction to the captains under his command, and the proceedings were set aside. *State v. Davis*, 4 N. J. L. 311.

The superintending power vested in the supreme court is certainly very high; it can direct the proceedings of all inferior courts, civil

New Orleans, filed a suit in the civil district court, setting forth that the St. Charles Street-Railroad Company owns and operates, under existing franchises, which will not expire by limitation until April 11, 1906, certain street-railway lines in the city of New Orleans; that in December, 1899, the city council purported to finally adopt, and the mayor to approve, an ordinance whereby the comptroller of the city was authorized and directed to advertise and sell at public auction an extension for fifty years from April 11, 1906, of the said company's present street-railway rights and franchises, and also the right and franchise to construct, maintain, and operate lines of street railway on certain authorized extensions and additions to its existing lines or routes, not only during the fifty years, as above, from April 11, 1906, but also for the years subsequent

to this date and prior to April 11, 1906, the whole to be sold in block; that the total length of street railways included in this franchise thus advertised for sale aggregates 22.08 miles, of which the lines it now owns and operates constitute 11.77 miles, and the proposed extension and additions 10.91 miles; that the latter have no connection with each other, are of no value except to the person owning and operating the present, existing lines of the said company, and are not capable of being operated as independent lines of street railway; and that the comptroller had advertised the sale of said franchises to take place March 29, 1900, and will sell the same at that time in block, at auction, unless restrained, to the irreparable injury of the petitioners, who are remediless in the premises, except through the writ of injunction. The petition then charged, in

and criminal, within the state to be certified before it in order to see that they have been in conformity to the laws of the land. *Ludlow v. Ludlow*, 4 N. J. L. 387.

A judgment had been rendered against a person upon a confession of another in an action against both, and the first-mentioned person had been discharged from imprisonment under the insolvent law and thereafter arrested on an execution regular on its face on the judgment. On production of his discharge the sheriff liberated him. In an action by the judgment creditor against the sheriff a verdict was rendered against the latter, and the proceedings were removed into the supreme court by certiorari. The court decided that the action of the sheriff in letting the defendant go at large was not, strictly speaking, justifiable, yet the supreme court, in the exercise of its high superintending powers over these inferior jurisdictions, is not merely to correct errors, technically speaking, but to inspect the whole proceeding, and see that justice is rendered according to law; and reversed the judgment. *Mills v. Slight*, 5 N. J. L. 565.

A statute required that on application by an apprentice two justices of the peace might for certain causes discharge the apprentice from service. On application of the father of the apprentice the justices discharged him, and on appeal the court of quarter sessions affirmed their action. On certiorari to review their action the supreme court held that the justice, and consequently the court of sessions, had no jurisdiction; that its general superintending power over the proceedings of inferior tribunals, especially of such as are created by statute, is unquestionable; and that, if the proceedings of the inferior tribunal are declared by the legislature to be final and conclusive, the supreme court will not inquire whether such inferior tribunals have justly and properly exercised the powers confided to them, but it is bound to take care that they do not exercise power which they do not legitimately possess. *Ackerman v. Taylor*, 9 N. J. L. 65.

A justice of the peace had entered a judgment and afterwards assumed to open it on payment of costs, having refused to issue an execution on the judgment. A mandamus was sought in the supreme court to compel him to issue it. The court issued the mandamus, saying that the justice of the case called for the remedy which can nowhere be found but in the general superintending authority of this court over inferior jurisdictions. *Terhune v. Barclaw*, 11 N. J. L. 38.

The defendant being temporarily absent from
51 L. R. A.

the state, a summons was attempted to be served by leaving it with his wife. The case was adjourned fourteen days, and then judgment was rendered for the plaintiff, the defendant being still absent from the state. On these facts and additional facts the supreme court on certiorari said, if the defendant cannot have relief in this court on certiorari he is without remedy, and held that he was entitled to the relief, and that the justice of the case called for a remedy which could nowhere be found but in the general superintending authority of the supreme court over inferior jurisdictions. *Combs v. Johnson*, 12 N. J. L. 244.

The court of common pleas had denied a motion to set aside an attachment, and the supreme court awarded a certiorari to remove the proceedings, and on the hearing vacated the attachment; the court holding that, unless the court could superintend and control the writ of attachment by keeping it within the design and intent of the act, it might become an engine of great oppression and abuse. *Branson v. Shinn*, 13 N. J. L. 250.

In a case in the court for the trial of small causes, in which a verdict and judgment for the plaintiff had been rendered in the presence of both parties, after the defendant left the court the plaintiff applied for an execution upon making what is usually called the oath of danger. The justice issued the execution. The court held that the right of reviewing such judgments in the first instance belongs to the common pleas, yet that does not in terms, and need not by implication, restrict the general superintending jurisdiction of the supreme court over other proceedings in the court for the trial of small causes, and set aside the execution. *Krumelck v. Krumelck*, 14 N. J. L. 39.

A person owned land in Cumberland on which he grazed cattle. At the time of the annual assessment, and for some time before, he had feeding on these lands ninety-nine cattle subject to taxation. An assessment was made in Downe, from which the defendant appealed, but, not obtaining the relief sought, he sued out this writ. It was objected that the court had no jurisdiction. The court held that nothing short of express words would deprive the court of jurisdiction, and exercised what it styled the power of general superintending control by sustaining a certiorari. *State v. Falkinburge*, 15 N. J. L. 320.

Commissioners had been appointed to determine the compensation and damages to the owner of land to be taken for railroad purposes. This was an application to review the proceedings. The questions were whether the commis-

effect, that the whole proceeding is a scheme to enable the St. Charles Street Railway Company to purchase the franchises offered at a price below their value; that the way in which the offer to sell is made precludes full, fair, and free competition, excluding any other than the said company from bidding; that the offer becomes a mere bargaining and sale between the city council and the car company; that the ordinance authorizing this to be done is unreasonable, illegal, and void; that the conditions and obligations attached by the ordinance to the sale of the franchises are in violation of existing statutes; that the necessary preliminaries and proceedings required by law were not legally complied with previous to the adoption of the ordinance; that the ordinance was never legally adopted; and that the same is *ultra vires* and void. The reasons,

grounds, and details of these various charges of illegality, etc., were set forth at length. Finally it was averred that there would be other bidders for said franchises, if same were advertised and sold according to law, under valid ordinances, and with opportunity for fair, open, and equal competition. The prayer was for writ of injunction to restrain the sale, and for judgment decreeing the ordinance illegal, null, and void. This petition was filed in the district court March 16, 1900. Subsequently an amended petition was filed, setting forth other grounds for the nullity of the ordinance. The district judge to whom the petitions were presented did not immediately grant the order for injunction, but, instead, directed a rule to issue, requiring the defendant city to show cause why a preliminary injunction should not issue on the showing made. This rule

alone had exceeded their jurisdiction, and if they had could the court, in the exercise of its superintending power by certiorari, set aside the award. Both questions were answered by a majority of the court in the affirmative, and the award of the commissioners set aside. *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. L. 25.

In *State, Van Vorst, Prosecutor, v. Quaife*, 23 N. J. L. 89, the court said: "At common law the province of the writ of certiorari by which this court exercises its general supervisory jurisdiction over inferior tribunals is to correct the errors of law of such tribunals, not to review the merits of their decisions. But by the very words of the statute the decision of the commissioners of appeal in cases of taxation is final. Rev. Stat. 1014, § 48."

It is true that the court is not deprived by the words of the act of its general supervisory jurisdiction, which can only be taken away by express words.

In *State, Smith, Prosecutor, v. Vandervere*, 25 N. J. L. 669, the court said: "If a court of common pleas in the appointment of surveyors should use their discretion capriciously in violation of settled principles of equity or of law, the superintending tribunal has power to review their proceedings."

In *Camden v. Mulford*, 26 N. J. L. 49, the court quotes with approval what is said in *Ludlow v. Ludlow*, 4 N. J. L. 387, and *Whitehead v. Gray*, 12 N. J. L. 41.

In proceedings before a justice of the peace to remove a tenant the court held that if the justice had no jurisdiction of the cause, but proceeded under color of the act, then the supreme court, by virtue of its general superintending power over all inferior tribunals, has jurisdiction of the case, and a writ of certiorari will afford the proper remedy. *Morris Canal & Bkg. Co. v. Mitchell*, 31 N. J. L. 99.

The circuit court had asked the advice of the supreme court as to whether it had power to use the writ of certiorari as an original proceeding. The supreme court, in advising the circuit court that it had no such power, dwelt largely on the power of the King's bench, but said that the authority was exercised by means of the various writs belonging to that high tribunal alone because the power to award them was reserved for that court, and that by the ordinance of the first provincial governor of New Jersey they were transferred to the supreme court of that colony, and were exclusively exercised by that tribunal from that time to the era of the new Constitution, and it was these extraordinary powers which belong to it 51 L. R. A.

as a supreme court which were not intended to be granted to the circuit court by that instrument. To deposit these powers in several hands would seem to be most unwise, for it is by force of this prerogative power that the superintendency is exercised over many affairs in which the people, not of a particular locality, but of the state at large, have an interest. *State, Dufford, Prosecutor, v. Decue*, 31 N. J. L. 302.

This case is of value as showing that the New Jersey supreme court takes the superintending power by transfer by the ordinance of the first provincial governor, and not by constitutional grant, except as the Constitution continues the powers of the colonial court.

In setting aside on certiorari an ordinance of the common council of the city of Newark, which ordered the filling of a ditch ostensibly to abate a nuisance, it was held that while it was true that the council should be allowed considerable discretion in the mode to be adopted, yet it was very important with due regard to private rights that the superintending jurisdiction of the supreme court over such proceedings should be firmly maintained, and the council kept within the reasonable bounds of law. *State ex rel. Rodwell v. Newark*, 34 N. J. L. 264.

The supreme court originally had the right through the writ of certiorari to superintend and review the proceedings of all inferior tribunals not proceeding according to the course of the common law. Instances have occurred in which, prior to the adoption of the said Constitution, hostile legislation has attempted to curtail the use of the writ of certiorari, and the courts have, to some extent at least, recognized the right of legislative interference.

In *Vunck v. Whorl*, 2 N. J. L. 335, notwithstanding a provision in the 10th section of the apprentice act that no writ of certiorari should be allowed to remove into the supreme court any proceeding had in pursuance of that act, that court held that it was competent by this writ to determine whether the inferior tribunal had exceeded its jurisdiction.

In *Traphagen v. West Hoboken Twp.* 89 N. J. L. 232, the judge expressed the opinion that the powers heretofore confided to the supreme court may unquestionably be abridged or taken away by the authority of the legislature, yet in both cases the legislative interdiction was held not to bar the inquiry whether the proceedings below had been in pursuance of the act, or whether the special jurisdiction had been exceeded. The court then said: "So far as the effect upon the court is

was made returnable on March 21, 1900, and on that day the city, through counsel, appeared, and, for cause why the order of injunction should not be made, averred, in effect, the regularity and legality of the ordinance in question, and the full right and power of the city in the premises. On the same day the St. Charles Street-Railway Company appeared in the case by intervention, and joined the city in resisting the writ, setting forth at length the grounds therefor. After hearing upon the rule, the judge, on March 23, 1900, discharged the same, and entered an order directing the writ of injunction *pendente lite*, to issue, upon bond being given by plaintiffs in the sum of \$2,500, whereupon the city of New Orleans on March 26, 1900, filed an application to dissolve the injunction as in case of giving a bond to indemnify plaintiffs in whatever injury might

result to them by reason of the sale of the franchise rights as advertised under the city ordinance, but averring its exemption by law from furnishing bond in legal proceedings; that is to say, claiming the right to dissolve on bond, but asserting legal exemption from giving the bond itself. The ground upon which the application to dissolve on bond was made was that the sale sought to be enjoined would not, if permitted, work plaintiffs any irreparable injury, or injury at all. The district judge denied the application to dissolve, whereupon the city of New Orleans applied to this court for its writ of mandamus to compel the judge to grant the order to dissolve on bond, or as in case of bond. The rule *visi* issued, requiring the district judge to show cause why the writ should not issue, and for answer he replies that, in the exercise of the discretion

concerned it matters not whether the writ of certiorari is denied, or a class of cases to which it before extended is attempted to be withdrawn from its operation. In the latter mode the court could be as effectually destroyed as in the former. If one class of cases may be placed beyond the superintending jurisdiction of this court relief may be denied to the entire class; and if to one class, then to every class. The thing to be preserved is the inherent power of the court to superintend the proceedings of the inferior tribunals. The writ is a mere machinery provided for accomplishing that end. The former is the substance, the latter the shadow, which would be of no avail if the legislature could at will declare that all or any of the subjects to which it can now be directed shall not in the future be reached by it. . . . These prerogative writs are the arms of the court, by which every class of subjects over which it exercises its authority is brought within its jurisdiction, and therefore every enactment which materially affects the vigor and reach of those arms substantially impairs the power of the court. It may be competent for the legislature to enact that the proceedings of a special tribunal shall be final and conclusive, and, so long as the granted power is strictly pursued, the legislative will must be respected; but in my opinion, when the inferior fails to pursue the provisions of the grant, and to keep within it, the right of this court to review the erroneous proceeding attaches, and it is beyond the power of the lawmaker to arrest the employment of the appropriate writ for that purpose." The court quoted from *Ackerman v. Taylor*, 8 N. J. L. 805, and the later case of *Ackerman v. Taylor*, 9 N. J. L. 65.

A justice of the peace had adjourned a cause to the 27th of the month, but by a clerical error entered it as the 24th. On the 24th the plaintiff appeared, and the justice tried the cause and rendered judgment for the plaintiff in the absence of the defendant. The court held that while it might be true that the statute conferred upon the defendant the right of appeal it was not the intention of that statute to preclude him from seeking relief in this court by certiorari; that, while appeal is strictly a statutory remedy originating in, and in all respects regulated and governed by, provisions of positive law, the remedy by certiorari pertains to, and results from, the general superintending jurisdiction of the supreme court over all inferior tribunals which do not proceed according to the course of the common law. *Ritter v. Kunkle*, 39 N. J. L. 259.

A motion was made in the court of chancery 51 L. R. A.

to dissolve an injunction restraining the board of chosen freeholders from building a bridge authorized by an act of the legislature. In dissolving the injunction the chancellor held that the right of correction and supervision, which in England belongs to the King's bench, in this state belongs to the supreme court. That whenever the rights of individuals are invaded by persons clothed with authority to act, who exercise that authority illegally, the persons aggrieved must seek redress by certiorari. It appertains to the general supervisory jurisdiction of the supreme court exercising in that behalf the power of the King's bench to correct abuses of that character. The jurisdiction is not a doubtful one, nor is the exercise of power under it novel either in England or this state. *Tucker v. Burlington County Freeholders*, 1 N. J. Eq. 282.

The legislature had passed an act providing that "all persons aggrieved by any order or decree of the prerogative court may appeal from the same" to this court [of errors and appeals]. In the same manner in all respects as now provided by law for appeals from the court of chancery." The act was questioned as being unconstitutional. The court held that the act was constitutional; that the legislature could not deprive the decrees and the judgments of their quality of being conclusive, nor take from the supreme court any of those prerogative writs by which inferior jurisdictions are superintended and regulated. The power to do this would involve the power to modify in essential particulars the Constitution of those courts,—a power not to be distinguished from an authority to supersede or abolish. It is entirely clear that the legislature has not the competency to impair the essential nature or jurisdiction of any of the constitutional courts. It may, however, extend that jurisdiction, as was done by the statute under consideration. *Harlis v. Vanderveer*, 21 N. J. Eq. 424. *New York*.

By the several Constitutions the supreme court has been continued with its jurisdiction as it existed at the adoption of the Constitution of 1777 unimpaired. There is no express grant of the power under consideration in any of the Constitutions, but, as will be seen, the supreme court and certain local courts possessing its general powers within their territorial jurisdiction have the same powers in regard to this subject as the King's bench of England had at the time of the separation.

The general jurisdiction of law and equity which the supreme court of the state possesses under the provisions of the Constitution in-

vested in him by law, he had declined to dissolve, as on bond, the injunction he had granted, and that this was done after due hearing of the parties in interest. He respectfully submits that his discretion in the premises is not subject to review in a proceeding by mandamus, and cites in support of this position Code Prac. art. 307; *State ex rel. Roth v. Iberville Dist. Judge*, 38 La. Ann. 49; *State ex rel. Morgan's L. & T. R. & S. S. Co. v. Twenty-first Dist. Judge*, 36 La. Ann. 394; and *State ex rel. New Orleans & H. S. S. & Lottery Co. v. Eighth Dist. Judge*, 23 La. Ann. 766. And this is the issue now presented for determination.

The language of the Code of Practice (art. 307) authorizing the dissolving of injunctions by the giving of bonds to stand in lieu thereof is as follows: "Whenever the act prohibited by the injunction is not such as

cludes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England on the 4th day of July, 1776; with the exceptions, additions, and limitations created and imposed by the Constitution and laws of the state. N. Y. Code Civ. Proc. chap. 3, art. 1, § 217.

In New York there is no express constitutional or statutory grant of the power of superintending control, but the power of general superintendence over inferior tribunals, as well as all other powers resident in the courts of King's bench, common pleas, and exchequer were, by the act of May 6, 1891, conferred upon the supreme court of the province or colony, and renewed, recognized, and continued by provincial act or royal ordinance, until the adoption of the first Constitution. *Rob't Ludlow Fowler*, in 19 Alb. L. J. 211.

The court, without any new specifications as to its common-law powers, was continued through the several Constitutions down to the present, which states that it shall have general jurisdiction in law and equity, and which, by the Code of Civil Procedure before quoted (§ 217), is stated to be "all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time," etc. *Re Steinyan*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. W. 1103.

Judge Vann, who wrote the opinion in this case, and also Mr. Fowler, are deserving of great credit, and have earned the thanks of the people of New York for resuscitating this old provincial statute from, as stated by the latter, "the back of an obsolete book on Practice and in several rare volumes preserved as unique specimens of the printers' art," and placing it, with a history of the supreme court thereby created, down to the present, with all its original powers unimpaired, but rather confirmed and continued by general constitutional grant, undisturbed by the maker of statute law, where it will endure as long as the leaves of the reports of the decisions of the court of appeals.

The court of general sessions of the peace has always been considered and treated as an inferior court subject to the general superintendence of the supreme court. Writs of error, certiorari, mandamus, and attachment issue to it from the supreme court. These writs conclusively show it to be subordinate, and prove the authority which has always been exercised over it. It is fit and proper that the courts of general sessions of the peace in the different counties should be under the control of a superior L. R. A.

may work an irreparable injury to the plaintiff, the court may in their discretion dissolve the same," etc. In the 23 La. Ann. case, cited *supra*, it was held that, the district judge being vested with discretionary power and authority to dissolve an injunction on bond, the writ of mandamus could not lie to coerce that discretion. In the 36 La. Ann. case [page 394], cited *supra*, Mr. Justice Manning, as the organ of the court, said: "The decisions of this court that the writ of mandamus will be issued by it only in aid of its appellate jurisdiction may now be relegated to the judicial lumber room, since the broad conferring upon us of supervisory powers by the existing Constitution [that of 1879]. Many articles of the Code of Practice which until then were benumbed have been quickened into beneficent life by the wand of that terse and comprehensive

intending jurisdiction. These courts are wholly independent of each other, and if their proceedings were not subject to be here reviewed we might find different rules of law and of justice in almost every county. This would introduce disorder and confusion, and be inconsistent with the regular and uniform administration of justice. *People v. Chenango County Justices*, 1 Johns. Cas. 179.

A statute authorized the laying out of highways by the highway commissioners, and provided for an appeal from their determination to the judges of the common pleas, and that the decision of the latter should be conclusive. A certiorari was issued by the supreme court to remove the proceedings to that court. The right of the supreme court to award a certiorari to inferior courts and persons invested by the legislature with power to decide on the property and rights of citizens, even in cases where they are authorized by statute finally to hear and determine, was asserted as that maintained by the King's bench in 4 Haw. 144; and further, that the necessity of superintending power was so obvious and indispensable that the court ought by no means to deny themselves a jurisdiction of such salutary influence. *Lawton v. Cambridge Highway Comrs.* 2 Cal. 179.

To the same effect, quoting and approving the above, is *Lynde v. Noble*, 20 Johns. 80; *Kinderhook Highway Comrs. v. Claw*, 15 Johns. 537; *Ex parte Albany*, 23 Wend. 277.

When the legislature confers power on any inferior tribunal, the exercise of which may affect the rights of persons or property notwithstanding their decision may be declared to be final, yet the supreme court, like the court of King's bench, has a general superintending control over its proceedings. *Bradhurst v. First G. S. W. Turnp. R. Co.* 16 Johns. 13.

That "the general superintending power of the court to award a certiorari, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine, has been frequently exercised, is considered as well established by the common law, and can only be taken away by express words." Supervisory power "will be exercised when the duty to be performed, and the manner of executing it, are clearly pointed out by law, and there shall appear to have been an essential departure from it." *Le Roy v. New York*, 20 Johns. 480, 11 Am. Dec. 289.

In the exercise of superintending power, the writ of error is a writ of right, but the writ of certiorari, a writ of discretion. *Per Bronson, J.*

provision. But, while the range of cases in which we may issue this writ is thus enlarged, it does not follow that it may be invoked always, instead of an appeal. It would revolutionize our jurisprudence to hold that every right that was formerly enforced by appeal, and every wrong that was formerly redressed by appeal, can now be enforced or redressed by mandamus, when an emergency seems to require or invite it." Referring to Code Prac. art. 307, the learned justice said: "The language is . . . permissive when dissolving upon bond,—'the court may dissolve,' and use its discretion whether it will or will not dissolve."—citing *State ex rel. New Orleans & H. S. & Lottery Co. v. Eighth Dist. Judge*, 23 La. Ann. 766. Declaring that the relator's remedy was by appeal, and not by mandamus, he concluded his opinion in these words: "We do not rule definitely that we will not grant a mandamus whenever there is a remedy by appeal. We confine ourselves to the point presented in the case at bar." And the writ was refused. In the 38 La. Ann. case [page 49], cited *supra*, it was held: "The dissolution of an injunction on bond is the exercise of the discretionary power vested expressly in the judge by the terms of the Code of Practice. When refused, a mandamus will not lie to compel a dissolution. The remedy is by appeal." See also *State ex rel. Doullut v. Orleans Dist.*

Judge, 29 La. Ann. 869. These decisions are to the point, and constitute *stare decisis*. In view of them, I think the jurisprudence may be considered settled that the remedy is by appeal, and not by mandamus, from the ruling of the judge of the court of the first instance, denying an application to dissolve on bond the preliminary injunction he has granted. I have not been able to find, nor has the able and diligent counsel for the relator cited, a single decision of this court affirming a contrary view, or sustaining the conclusion reached by the majority of the court. There are repeated decisions making peremptory writs of mandamus requiring district judges to grant orders of injunction under Code Prac. art. 298, on the *prima facie* showing made; for the language of that article is, "The injunction must be granted," etc., but not one coercing the discretion specially vested in him by Code Prac. art. 307, by requiring him to permit the injunction granted to be dissolved on bond. It is, I fear, equivalent to a new ruling, establishing that the writ of mandamus will issue to coerce the judgment of the trial judge in a case where, like the present one, by the express language of the law he is vested with discretion. For these reasons, I respectfully dissent.

Watkins, J., concurs in this dissent.

in *People ex rel. Church v. Alleghany County Supers.* 15 Wend. 198.

"This writ is an emanation from the general supervisory duty of the supreme court to restrain the action of all inferior magistrates to matters within their legal grasp." This was said in relation to the writ of certiorari. *Birdsall v. Phillips*, 17 Wend. 464.

Want of jurisdiction in the court below is equally a want of it in the appellate court, and the only direct proceeding for redress would be by a certiorari. The court said: "The books are studded with cases of certiorari grounded on excess of jurisdiction in divers departments of the law. . . . The writ goes on the assumption that powers had been usurped, and the proceeding is in England always considered as at the suit of the King. It is so entitled, and should here be entitled the *People v. Magistrates*." *People v. Suffolk County Judges*, 24 Wend. 240.

The relator was charged with being the father of a bastard child. The justice of the peace after examining the charge decided that he was not, and discharged him. The superintendents of the poor served a notice on the relator that they appealed from the determination of the justice to the next court of general sessions of the county. The relator appeared at the sessions and objected to the jurisdiction of the court to sustain the appeal, which was overruled. The supreme court awarded a writ of prohibition to restrain the court of general sessions from proceeding on the appeal. *People ex rel. Dumont v. Tompkins*, 10 Wend. 154.

A writ of certiorari issued for the purpose of enabling the supreme court to exercise its supervisory powers over inferior tribunals removes nothing but the record or other entry in the nature of the record of the proceedings in the court below. The court cannot look beyond it for the purpose of a review on the merits. *People ex rel. Agnew v. New York*, 2 Hill, 10.

51 L. R. A.

In *Re Mount Morris Square*, 2 Hill, 14, the court said: "A certiorari to reverse a mere corporate act is without precedent; though, if it should be altogether destitute of authority, and followed by a judicial decision which would therefore be void for want of jurisdiction, the corporate act might be examinable on certiorari as incidentally violating the latter; for it is too late, perhaps, to deny that there are some judicial acts of municipal corporations, or rather acts of certain officers of those institutions, which may, in the discretion of this court, be reviewed by certiorari. *Le Roy v. New York*, 20 Johns. 430, 11 Am. Dec. 289; *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322; *Starr v. Rochester*, 6 Wend. 564."

In *Ex parte Heath*, 3 Hill, 42, the court said that while certain words in a statute might be liberally construed to imply an intent to take away the power, so might a statute declaring the decision of an inferior court conclusive or final be construed to take from this court the power to review the decision by certiorari. But it has often been held that this, or the like words, should not be construed to deplete the superior court of its supervisory power; and that, to give a statute such an effect, the legislature must say in so many words that they intended to take away the power.

But in order to warrant our interference in this form, the act must be plainly judicial. The writ lies to inferior courts only. *Bacon Abr. Certiorari B*. And even then, if the act be merely ministerial, the writ will not lie. *Rex v. Lloyd*, Cald. Cas. 309.

The defendant had been convicted and sentenced in the general sessions of felony, and was afterwards granted a new trial by that court. The district attorney procured a writ of certiorari to issue out of the supreme court to the sessions, and the action of the sessions was reversed on the ground that it had no jurisdiction to grant a new trial. *People v. Donnelly*, 21 How. Pr. 406.

MISSOURI SUPREME COURT (Division 2).

STATE of Missouri *ex rel.* MONETT MILLING COMPANY

v.

James T. NEVILLE, Judge of Greene County Circuit Court.

(.....Mo.....)

1. Mandamus to compel the reinstatement of a case erroneously stricken from the docket may be issued to a circuit court by the supreme court of Missouri in the exercise of the general power of superintending control granted to the latter court by Const. art. 6, § 3, but no order will be made as to what decision the court shall render as to any question involved, or as to the course it shall pursue in disposing of the cause.
2. The general superintending control conferred by Const. art. 6, § 3, upon the supreme court over inferior courts, includes no power to control the judgment or discretion of a lower court for any particular purpose or in any particular manner.

(June 26, 1900.)

PETITION for a writ of mandamus to compel respondent to reinstate and proceed with the trial of a cause which he had stricken from the docket. *Granted.*

The facts are stated in the opinion.

Relators, commissioners of highways, had refused to lay out a highway. An appeal had been taken from their decision, and the referees had reversed the decree. The relators had procured a certiorari to issue out of the supreme court to review the proceedings of the referees. The latter had made their return to the writ, and this was a motion on the part of the relators for a further return. The court ordered a further return, and held that in general, if not universally, the supervisory power of the supreme court over inferior tribunals by means of the common-law writ of certiorari extends to questions touching the jurisdiction of the subordinate tribunal, and the regularity of its proceedings. If such tribunals neither exceed their powers nor depart from the forms prescribed to them by law, their decision upon the merits is final and conclusive. *People ex rel. Van Rensselaer v. Van Alstyne*, 32 Barb. 181; *Birdsall v. Phillips*, 17 Wend. 464; *Prindle v. Anderson*, 19 Wend. 391; *People ex rel. Seward v. Dutchess County Judges*, 23 Wend. 860. In this case the court held, further, that, although the inferior tribunal must pass upon the facts touching their jurisdiction, their decision is not conclusive, otherwise they might exercise arbitrary power, decide judicially that the case is within their jurisdiction, and bid defiance to the superior court. Hence the evidence touching these facts must be returned upon certiorari that the superior court may examine the same and determine whether the inferior tribunal came to the right conclusion upon the facts which gave it power to act. *People ex rel. Bodine v. Goodwin*, 5 N. Y. 572.

The special term of the superior court of New York city had awarded a peremptory mandamus to the justices of a district court (the district court in New York city is a somewhat enlarged justice's court) commanding him to sign the final order in a summary proceeding to recover the possession of land as of the date

Messrs. A. W. Lyon and Davis & Steele, for relator:

Mandamus will lie where the court refuses to act, and strikes the case from the docket. *State ex rel. Bayha v. Philips*, 97 Mo. 331, 3 L. R. A. 476, 10 S. W. 855; *State ex rel. Huey v. Cape Girardeau Common Pleas Ct.* 73 Mo. 560; *State ex rel. Schonhoff v. O'Bryan*, 102 Mo. 254, 14 S. W. 933; *State ex rel. Martin v. Wofford*, 121 Mo. 62, 25 S. W. 851.

The original decree was interlocutory.

A decree is not final unless it decides and disposes of the whole merits of the litigation, and reserves no further questions or directions for the future judgment of the court, so that it will be unnecessary to bring up the case again for the final decision of the court.

Deickhart v. Rutgers, 45 Mo. 132; *Butler v. Lee*, 33 How. Pr. 260; *Mutual L. Ins. Co. v. Sturges*, 32 N. J. Eq. 678; *Gerrish v. Black*, 109 Mass. 474; *Forbes v. Tuckerman*, 115 Mass. 115; *Williams v. Field*, 2 Wis. 422, 60 Am. Dec. 426; *Dickenson v. Codwise*, 11 Paige, 189; *Williamson v. Field*, 2 Barb. Ch. 283; *Forgay v. Conrad*, 6 How. 204, 12 L. ed. 405.

The decree is not final because it does not grant the relief contemplated by the bill.

when he should have done so, and to issue his warrant thereon. The action of the justice was affirmed by the general term of the superior court holding that the superior court of the city of New York had all the jurisdiction and power in civil matters of the supreme court, limited only in its territorial jurisdiction. *People ex rel. Allen v. Murray*, 2 Misc. 152, 23 N. Y. Supp. 160.

The office of the writ of certiorari is to bring up for review in the superior court the record of the inferior court or of a tribunal exercising judicial functions. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. *People ex rel. Dickinson v. Livingston County Supers.* 43 Barb. 232.

This case does not view with favor *Lawton v. Cambridge Highway Comrs. and Le Roy v. New York*, saying of them: "But this course of decisions came pretty much to an end with the cases of *People ex rel. Agnew v. New York*, 2 Hill, 10, and *Re Mount Morris Square*, 2 Hill, 14," and quoting with approval what was said by Bronson, J., in the first of the last two cases.

The relator had been legally employed by the constituted authorities of the city to perform professional services as an attorney at law. He presented his bill therefore to the common council for audit. It was audited, and the resolution by which it was audited was vetoed by the mayor, and the veto was sustained. Relator then resubmitted his bill, and it was referred to the law committee, which was afterwards discharged from consideration of it, and the claim was audited at \$1,800 less than the former audit. The charter of the city required that all claims for services, etc., should be referred to a committee to be known as the "committee on auditing accounts." The relator's claim was never so referred. The supreme court on certiorari vacated and set aside the

Bondurant v. Apperson, 4 Met. (Ky.) 32; *Phillips v. Alcorn*, 4 J. J. Marsh. 38; *Johnson v. Everett*, 9 Paige, 636; *Beebe v. Russell*, 19 How. 283, 15 L. ed. 668; *McMurtry v. Glascock*, 20 Mo. 432.

It is not now a question as to whether the circuit court of Barry county acted correctly or incorrectly in setting aside the original decree.

State ex rel. Herriford v. McKee, 150 Mo. 233, 51 S. W. 421.

Jurisdiction of the subject-matter means jurisdiction of similar actions.

Rosenheim v. Hartsock, 90 Mo. 365, 2 S. W. 473; *Postklevaite v. Ghieslin*, 97 Mo. 424, 10 S. W. 482; *State ex rel. Union Depot R. Co. v. Southern R. Co.* 100 Mo. 59, 13 S. W. 398.

Mcssrs. George Hubbert, D. H. Kemp, and Cloud & Davis, for respondent:

After judgment and lapse of term, a cir-

cuit court has no further control of the case or its issues, nor power to set aside the judgment, nor authority to make new issues or grant appeal from its decisions therein, nor jurisdiction to correct errors of judgment.

Roberts v. St. Louis Merchants' Land Improv. Co. 126 Mo. 460, 29 S. W. 584; *State ex rel. Brown v. Walls*, 113 Mo. 42, 20 S. W. 883; *Jackson v. St. Louis & S. F. R. Co.* 89 Mo. 104, 1 S. W. 224; *Danforth v. Lowe*, 53 Mo. 217; *State ex rel. Ozark County v. Tate*, 109 Mo. 265, 18 S. W. 1088; *Little Rock v. Bullock*, 6 Ark. 282; *Rawdon v. Rappley*, 14 Ark. 203, 58 Am. Dec. 370; *Cossitt v. Biscoe*, 12 Ark. 95; *Brady v. Hamlett*, 33 Ark. 105; *Turner v. Johnson*, 18 Ky. L. Rep. 202, 35 S. W. 923; *Coffeen v. Thomas*, 65 Ill. App. 117; *Kamp v. Kamp*, 59 N. Y. 212; *Delajfield v. Illinois*, 2 Hill, 159; *Re Mousseau*, 30 Minn. 202, 14

audit and allowance of relator's claim. *People ex rel. Nisbet v. Amsterdam*, 90 Hun. 488, 36 N. Y. Supp. 50.

While the claim of the relator in the preceding case was before the law committee of the common council that committee proceeded to take testimony as to the value of relator's services. Relator requested leave to attend to such hearing and take part in the investigation, which was refused by the committee; whereupon the supreme court, at special term, granted an order prohibiting such committee from proceeding with such investigation, and from making any report of the result of their investigation to the common council. On appeal from that order to the general term of the supreme court the order was affirmed, the court saying that it had been "stated in the discussion of the principal case that the charter of the city of Amsterdam provides that claims against such city shall be referred to the 'committee on auditing accounts,' and that such provision of the statute excludes other committees from acting. The law committee was therefore without jurisdiction." *People ex rel. Nisbet v. Amsterdam*, 90 Hun. 495, 36 N. Y. Supp. 64.

In these two cases the action of the court in the allowance of the certiorari in the first, and the making of the order (which was simply a writ of prohibition) in the last, was in both instances the exercise of the power under consideration without giving it a name.

The case of *Appo v. People*, decided by the court of appeals and reported in 20 N. Y. 531, affirms the exercise of the power of supervision of the supreme court. *Appo* had been convicted of murder in the oyer and terminer, and, after conviction and sentence, that court at a subsequent term thereof, on the application of the defendant, announced its intention to grant a new trial. Thereupon the prosecuting attorney sued out a writ of prohibition in the supreme court to prevent such action by the oyer and terminer. The supreme court made the writ absolute, and this was a writ of error to the court of appeals to reverse that judgment. There had been decisions of the question both ways, which the court of appeals held to be almost evenly balanced, and that they were entitled to treat it as an original proposition. The court held that, although the courts of oyer and terminer were in one sense not inferior courts, in the view that they were subordinate to the supreme court they were; and as such were, in common with all other minor tribunals, subject to its supervisory 51 L. R. A.

control, as much so as the court of general sessions, and, applying the decision in *People v. Chenango County Justices*, 1 Johns. Cas. 179, held that they had no authority to grant a new trial after conviction, and affirmed the judgment of the supreme court awarding a prohibition.

Where it is plain that assessors have committed an error in making an assessment, the supreme court, in virtue of its supervisory power over inferior tribunals, by means of the common-law writ of certiorari, has jurisdiction, and ought, in plain and clear duty under the law, to correct such error by means of that writ. *People ex rel. Citizens' Gaslight Co. v. Brooklyn Bd. of Assessors*, 39 N. Y. 81.

People ex rel. Ryan v. Green, 58 N. Y. 295, holds that the legislature has power to confer upon a local court all the powers of the supreme court, including the right to issue a mandamus within its territorial jurisdiction. After the stating of the reason which is so frequently given for the existence of the power in the King's bench, the court said: "Another reason more applicable to this case and to this time is 'because of the general superintendence which it exercised over all inferior jurisdictions and persons.'" And again, "there is great force in the position that there is a necessity that the power to compel inferior or subordinate tribunals, magistrates, and all others exercising public powers to perform their duty should, in a well-constituted government, reside in the highest judicial authority having original jurisdiction." For the origin of this proposition, see *Strong, Petitioner*, 20 Pick. 484 (not cited here).

The general superintendence of the court of King's bench over all courts of inferior jurisdiction, and the power to award a certiorari to remove the proceedings from any of them, was transmitted by the several Constitutions to, and is now possessed by, the supreme court.

The right to issue a certiorari to remove an indictment from the oyer and terminer is in the discretion of the supreme court, and its decision thereon is conclusive and not reviewable by the court of appeals. *Jones v. People*, 79 N. Y. 45.

The right to issue a writ of prohibition is discretionary with the supreme court, and its order denying the writ is not appealable to the court of appeals. *People ex rel. Adams v. Westbrook*, 89 N. Y. 152; *St. David v. Lucy*, 1 Ld. Raym. 539; *Ex parte Braudacht*, 2 Ill. 367, 38 Am. Dec. 593; *State v. Hudnall*, 2 Nott & M'C. 419.

N. W. 887; *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120; *Woodruff v. Bacon*, 34 Conn. 182; *Hamill v. Bosworth*, 12 R. I. 124; *State v. Hall*, 49 Me. 412; *People ex rel. Many v. Whitson*, 74 Ill. 20; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Hill v. St. Louis*, 20 Mo. 584; *Ross v. Ross*, 83 Mo. 100; *Hall v. Lane*, 123 Mo. 633, 27 S. W. 546; *Garner v. Tucker*, 61 Mo. 427; *Baker v. Hannibal & St. J. R. Co.* 36 Mo. 543; *Green v. Castello*, 35 Mo. App. 127; *First Nat. Bank v. Garton*, 40 Mo. App. 113; *Smith v. Hackley*, 44 Mo. App. 614; *State v. Williams*, 147 Mo. 14, 47 S. W. 891; *Be-shcars v. Vandulia Bkg. Asso.* 73 Mo. App. 293.

The absence of both duty and power to adjudicate the matters as presented is apparent from want of lawful authority to disturb the final judgment in either the man-

ner or for the cause presented by the record to the Greene circuit court.

The question whether a court rightfully refused to entertain jurisdiction of a cause may be reviewed in proceedings for a mandamus.

Beguhl v. Swan, 39 Cal. 411; *Reid v. Benzie*, 115 Mich. 418, 73 N. W. 391; *State ex rel. Walker v. Murphy*, 132 Mo. 382, 33 S. W. 1136; *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *Appo v. People*, 20 N. Y. 531.

The original judgment of the Barry circuit court was a final judgment in its entirety, and closed the case, so that it could no longer be said to be a pending action.

Caulfield v. Parish, 24 Mo. App. 110; *Bruce Lumber Co. v. Moos*, 67 Mo. App. 264; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9.

Proceedings before the mayor of a city seeking the removal of a city official, who, by the provisions of the governing statute, could be removed only "for cause and after opportunity to be heard," is judicial in its character, and as a necessary consequence is subject to review by writ of certiorari issued by the supreme court in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions. The court of appeals decided that the justice of the supreme court at special term had the right to grant an order to show cause why the certiorari should not issue to review the proceedings before the mayor, and that the general term of the supreme court was without authority to award a prohibition to restrain the justice at special term from proceeding on the return of the order to show cause, and reversed the order of the general term awarding such prohibition. *People ex rel. New York v. Nichols*, 79 N. Y. 582.

A party other than the relator applied to the commissioner of the land office to acquire title to a strip of land under the waters of Lake Ontario. The relator contested the claim, and a decision was made against him by the commissioners. Upon a certiorari brought by him to review the proceedings, they were moved into the supreme court, and the award of the commissioners reversed. The court of appeals, in affirming the decision of the supreme court, held, in regard to the right to a certiorari in a case like this, that it is clearly the right of relator in a controversy between him and another holding that he is not such owner and therefore not entitled to such grant. He was entitled at common law, as he is now by the Code, to review the determination by certiorari. *People ex rel. Burnham v. Jones*, 112 N. Y. 597, 20 N. E. 577.

The power to issue the writs of mandamus and prohibition is in the supreme court, and not in the justices thereof when not holding the court. A justice of the supreme court had issued and made returnable before him on the day of general election an order to show cause why a mandamus should not issue to compel inspectors of election to receive relator's vote; and, no cause having been shown, he on the same day issued a peremptory mandamus; and, the same not having been obeyed, he proceeded to fine and imprison the inspectors for contempt. Under a statute no court could be opened within the state on the day of any general election except to receive a verdict or discharge a jury. The court of appeals held that, as the court only could award the writ, and as

the court could not legally be opened for such purposes on election day, the proceedings were without authority, and reversed the order of the special term, and of the general term affirming it. *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 81 N. E. 1009.

Ohio.

"The supreme court shall . . . have original jurisdiction in quo warranto, mandamus, habeas corpus, procedendo, and such appellate jurisdiction as may be provided by law." Ohio Const. art. 4, § 2.

"The circuit court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law." Id. § 6.

In *Hollister v. Lucas County Dist. Judges*, 8 Ohio St. 201, the court said: "A writ of mandamus to a subordinate judicial tribunal is properly directed to the judge or judges of the court, and especially where there may be other judges authorized to hold or participate in holding the court. In case of disobedience to the mandate of the supervisory court the authority to compel obedience is exercised over the judges personally having the power to exercise the functions of the court."

Pennsylvania.

The jurisdiction of the supreme court shall extend over the state, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer, etc.; they shall have original jurisdiction where a corporation is defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the commonwealth, etc., but no other original jurisdiction; appellate jurisdiction by appeal, certiorari, or writ of error in all cases, as is now or may hereafter be provided by law. Pa. Const. art. 5, § 3.

"The judges of the courts of common pleas within their respective counties shall have power to issue writs of certiorari to justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them and right and justice to be done." Id. § 10.

A motion was made for a rule to show cause why a mandamus should not be issued against the judges of the court of common pleas commanding them to proceed to the examination of the relator, and, if found competent, to admit him to practice as attorney of their court. The supreme court decided that the courts of common pleas were not inferior courts in a legal sense, subject to the superintendence and control of the supreme court by writs of mandamus, and that such authority was never meant

Where the rights of the parties are settled as to the subject-matter by judgment or decree, so that it only remains to execute the same under the process of the court, either under execution or by judicial sale proper, the adjudication is final and *res judicata*.

1 Black, Judgm. §§ 43, 44, 48; 1 Freeman, Judgm. §§ 22 *et seq.*; *Myers v. Manny*, 63 Ill. 211; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; *Grant v. Phoenix Mut. L. Ins. Co.* 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; *Mills v. Hoag*, 7 Paige, 18, 31 Am. Dec. 271; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Morris v. Morange*, 38 N. Y. 172; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Guardian Sav. Bank v. Reilly*, 8 Mo. App. 544; 2 Bailey, Jurisdiction, § 446; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep.

570; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894, 3 Sup. Ct. Rep. 84; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *State ex rel. De Puy v. Evans*, 88 Wis. 255, 60 N. W. 433; *Curtis v. San Francisco City & County Super. Ct.* 63 Cal. 435; *Coleman v. Dalton*, 71 Mo. App. 14.

A final decree in equity with regard to mortgage foreclosure is as binding under the principle of *res judicata* as a judgment at law, and it includes everything the parties might have brought forward had they exercised reasonable diligence.

Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; *Greenabaum v. Elliott*, 60 Mo. 25; *Shelbina Hotel Asso. v. Parker*, 58 Mo. 327; *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810; *Phelan v. Gardner*, 43 Cal. 306; *Rogers v. Higgins*, 57 Ill. 244; *Chesapeake & O. Canal Co. v. Gittings*, 36 Md. 276; *Shepard*

to be conferred on lt. Com. *ex rel. Brackenridge v. Cumberland County Common Pleas Judges*, 1 Serg. & R. 187. Compare this case with *Hagerty's case*, 4 Watts, 305, and Com. *ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393.

The relator had made an affirmation before a justice of the peace that he had found fourteen hogs on his land, some without rings in their noses, and all without yokes or poles about their necks, and that he took and drove them away. The justice issued his precept appointing and ordering two citizens to make a just and reasonable appraisement of the hogs. They made return that they found the number to be fourteen, the whole without yokes, ten without rings in their noses, valued at \$67. This was a certiorari to review the action of the justices. The court, in quashing the proceedings, held that a certiorari would lie to reverse the proceedings, that the court would examine the proceedings of all jurisdictions created by act of assembly, and if they, under pretense of such act, proceed to encroach jurisdiction to themselves greater than the act warrants, the supreme court will send a certiorari to them to have the proceedings returned to that court to the end that it may see that they keep themselves within their jurisdiction, and if they exceed it to restrain them (*Rex v. Glamorganshire*, 1 Ld. Raym. 580); and this superintending power can only be taken from the court by express words. Com. *ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393.

The supreme court issued a rule to show cause why a mandamus should not issue to the county commissioners commanding them to receive the return of an assessment made by the relator and others, and to make payment of the amount prescribed by law for their services, and appoint as collector of taxes one of the individuals returned by them to the commissioners. The court decided that, conceding that commissioners had no discretion in relation to the returns, yet it is not perceived how this helps the relator's case unless it can be shown that the return is conclusive on the supreme court, and that in fact there is no tribunal in the commonwealth competent to examine into and correct gross frauds or illegalities of the procedure on the part of the returning officer. That it was vain to deny that the supreme court has a superintending power by information to examine and correct abuses in such cases. Com. *ex rel. Leslie v. Philadelphia County Comrs.* 5 Rawle, 75.

In *Hagerty's Case*, 4 Watts, 305, the court, in reviewing the proceedings of the court 51 L. R. A.

of common pleas upon a petition for leave to prove the contract for a sale of land by a decedent, held that its power, in a case like the present, to issue a certiorari to the court of common pleas, and remove their proceedings for the purposes of inquiring whether they had exceeded their jurisdiction, could not be doubted. That, if the court of common pleas could assume a jurisdiction not given them by the laws, and no superintending authority to restrain them existed, the consequences would be exceedingly mischievous. Under the provisions of the Constitution and acts of assembly such authority has been uniformly exercised by the supreme court; citing *Burginhofen v. Martin*, 3 Yeates, 480. It was decided that in this case the common pleas had exceeded its jurisdiction, and its adjudication and proceedings were quashed.

It is the duty of three county commissioners, in connection with the sheriff, to make the selection of the jurors for services of the year. The court of common pleas had sustained a challenge to the array of grand and petit jurors in consequence of failure by the sheriff and commissioners to make a new selection in the way designated by the court as being in accordance with the law. The sheriff and one of the commissioners assayed to obey the order of the court, but the other two refused to unite with them in making the selection as had been directed by the common pleas, and insisted on selecting the jurors in another manner as they had been accustomed; the result being that the court was obliged to adjourn on account of improper selection of jurors. The court of common pleas thereafter caused the commissioners who had refused to obey its order to appear before it and proceeded to adjudge them in contempt, and to impose a fine upon them therefor. This was a writ of error to review the action of the common pleas. It was objected, among other things, that the common pleas was not an inferior court. The supreme court, in deciding the case, cited *Hagerty's Case* as having decided that the proceedings of the common pleas might be removed into the supreme court and examined into on certiorari, and that that was a civil case; and that there was a still stronger reason why the proceedings of an inferior tribunal for a contempt of court, which had always ranked as a criminal proceeding, should be subject to the power of the court to see that they had not overstepped their jurisdiction and exercised this summary power in a case not warranted by law; that the supreme court possesses a superintending jurisdiction, and that the question as to whether the power was prop-

son v. Cary, 29 Wis. 34; *Petersine v. Thomas*, 28 Ohio St. 596.

The order of the court to set its own judgment of a former term aside for the alleged causes was not the exercise of any lawful power.

Paine v. Mooreland, 15 Ohio, 444, 45 Am. Dec. 585; *Freeman v. Thompson*, 53 Mo. 183; *Gray v. Bowles*, 74 Mo. 419; *Babb v. Bruere*, 23 Mo. App. 604; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595.

Burgess, J., delivered the opinion of the court:

This is an original proceeding by mandamus begun in this court the purpose of which is to compel the respondent judge of the circuit court of Greene county to reinstate and to proceed with the trial of the cause of A.

erly exercisable by writ of error had not been made a question, but that, if it had, the court would have thought a certiorari the appropriate mode of bringing the matter before the court. This, however, does not affect the merits of the case, but merely the form of removal, and it therefore is not material. *Hummel's Case*, 9 Watts, 416.

In *Com. ex rel. Johnson v. Betta*, 76 Pa. 465, it was stated that it had been held in several cases that the jurisdiction of the supreme court cannot be taken away except by express terms or necessary implication. It was held in that case that if it should be decided that the jurisdiction was taken away it would be upon the merest inference not necessary, and certainly not irresistible. That while the act gave the remedy for the recovery of the penalty incurred under it, it adopted the provision of the act of 1810 for the form of the action and mode of proceeding to recover the penalty, but did not necessarily take away the jurisdiction of the supreme court to supervise the proceeding and keep the inferior tribunals within their bounds. In an action such as this in the name of the commonwealth to recover a penalty for statutory offenses the supervision which the essential interests of the public requires, belongs to the supreme court.

In *Com. v. Balph*, 111 Pa. 365, 8 Atl. 220, the court says: "It will be observed that the act of 1722 expressly confers upon this court the powers of the King's bench in criminal cases. This is plain from the language of the act itself, and authority is scarcely needed for so plain a proposition. That there may be no doubt, however, upon this question, I will refer to the case of *Com. v. Simpson*, 2 Grant Cas. 438, where the act of 1722 was under consideration, and the construction I have indicated placed upon it by this court." Then follows a dissertation upon the powers of the King's bench at considerable length, citing and quoting from many and various authorities on the powers of that court, and finally saying: "This is the settled law of England, and in this country in those states in which the supreme court is clothed with King's bench powers, the same rule prevails;" citing and quoting as authorities for this statement, *People v. Vermilyea*, 7 Cow. 137; *Kendrick v. State*, Cooke (Tenn.) 475; *Bob v. State*, 2 Yerg. 176; *State v. Hunt*, 1 N. J. L. 287; *State v. Gibbons*, 4 N. J. L. 41; *Nicholls v. State*, 5 N. J. L. 539; *State v. Stone*, 3 Harr. & M'H. 115. In conclusion the court said further: "The general powers of supervision over criminal cases inherent to the King's bench, and expressly conferred upon this 51 L. R. A.

J. Webber against the Monett Milling Company, H. J. Webber, Submit M. Mills, Harry N. Mills, and Alberta B. Mills, which is now depending in said circuit court of Greene county on a change of venue from the circuit court of Barry county, where it was begun, but which said suit the respondent, before the institution of this proceeding, ordered and caused to be stricken from the docket, and declined to entertain jurisdiction thereof and to proceed therewith. On the 20th day of February, 1900, there was duly issued from this court an original writ of mandamus, directed to said Neville as judge of the circuit court of Greene county, commanding him to forthwith set aside the order striking said cause from the docket, and to proceed to hear said cause, or that he appear and show cause before division 2 of the supreme court on the 10th day of April, 1900,

court by statute, means something more than the trial of the case before a jury. . . . That it is a power to be exercised with extreme caution is admitted. That it may be abused is possible. But I can readily imagine circumstances in the future which would make the exercise of this power the only barrier between a good citizen and gross oppression. . . . The mere knowledge that such a power exists in this court it is believed will make its frequent use unnecessary."

Rhode Island.

"The supreme court in its respective divisions shall have cognisance of all pleas, real, personal, and mixed, and of all civil actions between party and party, and between the state and citizens thereof, and of all criminal proceedings which may be legally brought before it." R. I. Gen. Laws 1896, chap. 221, § 6.

In *Wheeler v. Westerly Probate Ct.* 21 R. I. 49, 41 Atl. 574, the supreme court decided that, in exercising its supervisory jurisdiction over quasi-judicial tribunals from whose decisions no appeal or writ of error lies, it had examined the regularity of their proceedings very critically. See *Providence License Comrs. v. O'Connor*, 17 R. I. 40, 19 Atl. 1080; *Lonsdale Co. v. Cumberland License Comrs.* 18 R. I. 5, 25 Atl. 655; *Maroney v. Pawtucket*, 19 R. I. 3, 31 Atl. 265.

Certiorari in Rhode Island is the common-law certiorari, neither more nor less, and not the statutory certiorari (which in some states serves as an appeal from the minor courts) wherever it is used in that state. Therefore it must be considered as directed to tribunals exercising judicial functions. *Smith v. Burrillville*, 19 R. I. 61, 31 Atl. 578, and cases there cited.

Tennessee.

"The jurisdiction of this [supreme] court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present supreme court." Tenn. Const. art. 6, § 2.

"The jurisdiction of the circuit, chancery, and other inferior courts shall be as now established by law, until changed by the legislature." Id. § 8.

The statute as to supreme courts is identical with the Constitution. Tenn. Code, § 344.

"The circuit courts . . . are courts of general jurisdiction, and the judges thereof shall administer right and justice according to law in all cases where the jurisdiction is not conferred upon another tribunal." Id. § 4997.

why he should not do so. On May 17, 1900, the respondent made return to said writ as follows: "(1) That on the first day of the May term of the above circuit court, on the 14th day of May, 1900, the respondent, as presiding judge thereof, ordered and caused the case of *A. J. Webber, Plaintiff, v. Monnett Milling Company et al., Defendants*, to be duly docketed, with the purpose and intention to exercise the jurisdiction of the respondent's court over the said cause and its subject-matter, on the record and pleadings therein. (2) That, in pursuance of said purpose, respondent has received and filed in his said court second amended answer of the relator as defendant company, and amended motions of plaintiff and other defendants, and received the resignation of J. W. Vance as receiver, and appointed a new receiver in his stead, and directed care and lease of the

mill property in question, by consent of the parties, for the coming year. (3) That the respondent and his said court stand ready to and will exercise such further power and jurisdiction, according to his best judgment, as the law seems to require, upon the issues presented, or to be presented, by the parties under their pleadings, and has proceeded to hear, and is ready to pass upon, a motion that will determine the cause. (4) That respondent does not understand that he is required to decide in any particular way, or to follow any special course, in passing upon the issues or disposing of the cause by his legal judgment; and prays specific directions, if any be intended, by this honorable court, still waiving, however, technical writ and formal service thereof. Counsel for the parties disagree as to the directions; defendants' claiming that the order is to proceed

"They have exclusive original jurisdiction of all pleas of the state for crimes and misdemeanors, either at common law or by statute, unless otherwise expressly provided by this Code." *Id.* § 4998.

The circuit court by the common law had a control over all inferior jurisdictions. The writ of certiorari was the proper means of exercising this control, and the power of the circuit court to issue writs of certiorari could not be taken away except by express words. *Murfree v. Leeper*, 1 Overt. 1.

The English authorities show that the superior court, or court of King's bench, exercises controlling superintendence over all inferior jurisdictions. A certiorari is one of the writs adapted to this purpose.

Upon the principles of the common law the power cannot be taken away by inference. *May v. Campbell*, 1 Overt. 61.

By the common law the court of King's bench, whose province it is to supervise the proceedings of inferior tribunals, could have issued a certiorari. Our supervisory courts were the only ones of a general and supervisory jurisdiction, and are supposed to have a similar power in such a case. The act of 1794, chap. 1, § 1, expressly recognises this writ as one by which criminal cases may be removed from inferior jurisdictions. *Kendrick v. State*, *Cooke (Tenn.)* 474.

Petitioner filed his petition in the circuit court, stating that a fine was assessed against him by a court martial for delinquency for not appearing when drafted, and that he knew not when or by whom the court was holden. The return showed that it was a court martial held under the laws of the state. The return does not state any notification. The fine was assessed under the laws of the United States, and was claimed by the United States. The court held that as the United States claimed a fine assessed by a state court martial, they so far recognized the authority of the state courts. Of consequence, they must recognise the authority of the state court which was constituted to superintend them. That all inferior courts erected by statute and proceeding under the laws of the state are subject to the superintendence of the circuit courts. Exercising that power of superintendence, the court held the assessment of the fine void, the person acted upon having no notice, and quashed the proceedings of the court martial. *Durham v. United States*, 4 Hayw. (Tenn.) 54.

Writs of certiorari and supersedeas are instruments in the hands of superior jurisdictions by which they can inquire into and control the 61 L. R. A.

exercise of inferior jurisdictions. *Linebaugh v. Rinker*, *Peck (Tenn.)* 362.

The circuit court of Tennessee has jurisdiction to issue a writ of certiorari to all courts of inferior jurisdiction not proceeding according to the course of the common law, and may bring up all such criminal matters as could be brought by such writ into the court of King's bench, except such cases as are prohibited by statute. Where an application to the circuit court for a writ of certiorari to review the decision of a court created by statute for the trial of slaves was denied by that court, the case was taken by writ of error to the supreme court, which reversed the judgment of the circuit court, holding that in denying the writ that court had not exercised its discretion according to law, but arbitrarily, and ordered the circuit court to grant the certiorari, and, on the proceedings being brought before it, to proceed to give such judgment thereon as in its opinion ought to be done. *Bob v. State*, 2 Yerg. 173.

The statutes of Tennessee give no power to justices of the peace to award the issuance of writs of certiorari and supersedeas which are to be used in the place of an *audita querela*. An attempt to do so is illegal and void. The circuit courts exercise this power, not by virtue of positive enactment, but by virtue of the general jurisdiction with which they are vested, and the control which they necessarily have the right of exercising over the proceedings of the inferior tribunal. *Rogers v. Ferrell*, 10 Yerg. 254.

From the earliest period in the state history the certiorari has had given to it a much more extended application than in England, and it has been used for purposes wholly unknown to the common law. It has been adopted as the almost universal method by which the circuit courts as courts of general jurisdiction, both civil and criminal, exercise control over all inferior jurisdictions, however constituted and whatever their course of proceeding,—as well where they have attempted to exercise a jurisdiction not conferred, as where there had been an irregular or erroneous exercise of jurisdiction, and in criminal proceedings as well as in civil. *Nashville v. Pearl*, 11 Humph. 249; *Friedman Bros. v. Mathes*, 8 Heisk. 488.

The writ of certiorari has been adopted in this state as the universal method by which the circuit court as a court of general jurisdiction exercises control over all inferior jurisdictions however constituted and whatever their course of proceeding. The circuit court has the supervisory power of general jurisdiction over

to hear the case on its merits, plaintiff's counsel contending otherwise. Respectfully submitted. James T. Neville, Judge of the Circuit Court of Greene Co."

The action by Webber against the Monett Milling Company and others was begun in the circuit court of Barry county on the 6th day of February, 1897. It was alleged in the petition that plaintiff was the owner and assignee of certain promissory notes aggregating the sum of \$8,500, theretofore executed by the Monett Milling Company to one A. D. Butler, and secured by deed of trust on said milling company's mill plant at Monett, Missouri, in which H. J. Webber was named as trustee, and that the said defendant Mills claimed the title to the land on which the mill stood, and that there were other liens against said property, and prayed judgment against the said Monett Milling Company

for the amount of said notes, and a foreclosure of said deed of trust. On the 7th day of April, 1897, during the regular term of the Barry circuit court, T. H. Jeffries, who was then president of the milling company, filed an answer to said petition, denying generally all the allegations therein contained. On the next day following, and during the same term, a cross bill was filed in said cause by the defendants Mills therein, in which they alleged that they were the owners of the land upon which the mill was located, and, in effect, that they had sold the land to the milling company for the sum of \$1,500, and asked judgment for said amount, and that it be declared a vendor's lien against said premises. Thereafter, and on the same day, a decree was rendered in said cause for the sale of said premises, providing for the distribution arising from sale among certain creditors,

all inferior jurisdictions, even courts martial, by virtue of the constitutional writ of certiorari analogous to the King's bench in England. *State v. Green*, 2 Head, 356.

Certiorari is the appropriate method by which the circuit court as a court of general jurisdiction exercises control over all inferior tribunals. *Wade v. Murry*, 2 Sneed, 50.

In *Ex parte Knight*, 3 Lea, 401, after stating that no appeal to the supreme court lies from an order of a judge of the circuit court refusing to approve the bond of a county officer and declaring the office vacant for failure of the officer to furnish a proper bond, the court says: "If, however, an attempt should be made to remove an officer without authority or color of law,—that is, if the judge so far depart from the mode pointed out by the statute as to render his action void,—then, according to the case of *Wade v. Murry*, 2 Sneed, 50, the remedy would be by certiorari to quash the proceeding in the circuit court, that court having this jurisdiction by virtue of its general revisory powers over inferior tribunals."

The general supervision of the circuit court over inferior tribunals must ordinarily be restricted to tribunals within the limits of its jurisdiction, and the judgment rendered would be such as the inferior tribunal ought to have rendered. *Saunders v. Russell*, 10 Lea, 293.

The circuit court has supervisory power over the city council to determine whether that tribunal pursued legal methods in removing the petitioner as a member of the council, and could require by its writ of certiorari the record of the proceedings for the removal to be brought before it for revision. *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182.

Vermont.

"The supreme court shall have exclusive jurisdiction of such petitions not triable by jury as are by law brought before it, and may issue and determine writs of error, certiorari, mandamus, prohibition, and quo warranto, and other writs and processes to courts of inferior jurisdictions, to corporations and individuals that may be necessary to the furtherance of justice and the regular execution of the laws." Vt. Stat. 1894, chap. 51, § 998.

Judges of the supreme court shall be justices of the peace. There is no other constitutional grant of power or authority. Const. chap. 2, § 4.

The writ of prohibition was granted prohibiting one branch of the circuit court from issuing a mandamus to compel the clerk to determine by lot how an action on the docket and subject to another branch should be disposed 51 L. R. A.

of. The court quoted and approved *Appo v. People*, 20 N. Y. 531. *Bullard v. Thorpe*, 66 Vt. 599, 25 L. R. A. 606, 30 Atl. 86.

The chief difference in the remedy by certiorari and mandamus is that by the former the record is brought into the superior court, and that the court then proceeds with the case, while by the latter the case is to be proceeded with according to the order of the superior court, but in the inferior court. The court said further: "It must be always borne in mind that in regard to all these prerogative writs whereby this court assumes a supervisory jurisdiction over subordinate tribunals we have, and in many cases exercise, a discretion in withholding the remedy, even when it is obvious that some formal error has intervened. . . . And when a civil case is utterly insignificant in point of pecuniary amount it becomes almost impossible to gird ourselves up to a point of painful solemnity in order to discuss the vital importance of the principles involved." *Palme v. Leicester*, 22 Vt. 44.

Mandamus is not a writ of right, but a prerogative writ. *Bates v. Keith*, 66 Vt. 163, 28 Atl. 865.

The judge of a court of insolvency, who refuses to appoint commissioners as required by statute, will be compelled to do so by mandamus. *Sowles v. Bailey*, 69 Vt. 515, 38 Atl. 237.

Virginia.

"It [the supreme court of appeals] shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition." Va. Const. art. 6, § 11.

The supreme court "shall have jurisdiction to issue writs of mandamus and prohibition to the circuit and corporation courts and to the hustings court and the chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, and in which a mandamus may issue according to the principles of the common law." Va. Code, chap. 150, § 8086.

"The circuit courts shall have jurisdiction . . . to issue writs of mandamus, prohibition, and certiorari, to the county courts and judges thereof, and to other inferior tribunals, and to issue the writ of mandamus in all cases in which it may be necessary to prevent a failure of justice, and in which a mandamus may issue according to the principles of the common law." Id. chap. 148, § 8058.

The county court assumed to give a judgment prohibiting a justice of the peace from enforcing a judgment rendered before him. The county court has no jurisdiction by prohibition in any instance, and when the county court

and judgment rendered in favor of the Millses in the sum of \$1,500, which was declared to be a vendor's lien against the premises. Said trustee, J. H. Webber, was authorized by and empowered by the decree to sell the premises. On the 13th day of April, 1898, A. J. Webber, the plaintiff, filed his motion to set aside said judgment and decree; which being overruled, he appealed the case to the supreme court, where it was affirmed, on the 21st day of February, 1899, because of the failure of the appellant to prosecute his appeal. Thereafter, on the 9th day of March, 1899, the said milling company filed in the circuit court of Barry county its amended answer to plaintiff's petition. On the 16th day of October, 1899, at the October term of said court, plaintiff, Webber, filed his motion in said cause, asking that the judgment of the court theretofore made, setting aside the

original decree, be set aside, and that the cause be stricken from the docket. On the 30th day of October, 1899, a similar motion was filed on the part of said Millses. And afterwards, on the 1st day of November, 1899, the court overruled plaintiff's said motion, and sustained defendants Mills' motion, as follows: "Now, at this day, the motion to set aside the order of the court setting aside the judgment heretofore rendered herein is taken up, and the court finds from an examination of the records in this cause, including the bill of exceptions, that the plaintiff appeared to the proceedings had in this court to set aside said judgment, and appealed from said order, and that the judgment of the court in said appeal was affirmed, and the court determines plaintiff is bound by said order, and the motion of plaintiff to set aside the same is overruled." The court

shall extend its jurisdiction by granting such writ the superior court of law may, and ought, upon proper application, to award a writ of prohibition prohibiting such county court from the further exercise of such jurisdiction, or the enforcing of any order or judgment made under color thereof. *Jackson v. Maxwell*, 5 Band. (Va.) 636.

James, a free negro, presented a petition to the judge of the circuit court stating that he had been unlawfully prosecuted before the mayor for violation of an ordinance of the city of Richmond providing that no negro should keep a cook shop in that city under the penalty of stripes, at the discretion of the mayor; that he had been duly licensed to keep a cook shop according to the provisions of an act of the assembly, and that the ordinance was in conflict with that act and therefore void; and prayed for a writ of prohibition to restrain the mayor from holding cognizance of the prosecution. The writ was awarded by the judge in vacation, and when it was returnable the mayor moved to discharge it. The court overruled the motion, and rendered judgment for costs against the city, and to that order a supersedeas was awarded by the supreme court. The court said: "The writ of prohibition has not very often been resorted to in this state, the present being the first case of the kind which has been before this court. . . . It has always, however, been regarded as an existing legal remedy in this state." After stating that it was not a part or continuance of the prohibited proceedings by removing it from that court to another for the purpose of adjudication in the latter, the court said further: "It is in effect a proceeding between two courts,—a superior and an inferior,—and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law." *Mayo v. James*, 12 Gratt. 17.

In *Burch v. Hardwicke*, 23 Gratt. 61, the court said: "The restriction of the writ [of prohibition] to judicial proceedings—to courts alone—has been distinctly and repeatedly sanctioned by this [supreme] court;" citing the language used in *Mayo v. James*, 12 Gratt. 17, and also citing *Culpepper County Supers. v. Gorrell*, 20 Gratt. 484, in which the court said: "A prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction or from exceeding the bounds of its jurisdiction." It thus appears that both in England and Virginia the writ of prohibition is a proceeding by courts alone, and 51 L. R. A.

furthermore, that such courts must bear the relation of superior and inferior, the superior having authority to exercise "due superintendence over the inferior." Now it cannot with any propriety be said, in the first place, that the mayor of a city, constituted by law the chief executive officer thereof, and clothed with discretionary powers to supervise the officers in his own department, to investigate their conduct, and to remove them from office, acts as a court in the discharge of these executive functions. This case was a writ of error to the corporation court of Lynchburg, which had granted a prohibition to restrain the charges against *Hardwicke*, and the court reversed the judgment of the corporation court, and directed judgment discharging the rule for prohibition.

The respondents appeared in response to a complaint filed alleging fraud, etc., in an election for county officers and without demurrer or any dilatory motion or proceeding filed with counter-complaint, as they might do under the statute, and the matter in issue thus formed was adjourned to take testimony, and the petitioners took 240 pages of depositions, but the respondents took none. At the following term the respondents were permitted to make a motion to dismiss the complaint, and other dilatory motions which the county court entertained and at a subsequent term sustained, and on the writ of error the circuit court sustained the action of the county court. This was an application to the original jurisdiction of the supreme court to award a peremptory mandamus to the judge of the county court commanding him to set aside and annul the order of that court dismissing the relator's complaint. In awarding the writ the judge delivering the prevailing opinion gives copious citations of authorities as to the power of superior courts to send the writs to inferior tribunals to compel them to the performance of their duties and the undoing of their illegal acts. *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117.

Washington.

"The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Wash. Const. art. 4, § 4.

"The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. . . . Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habe-

further finds that the defendants Mills had no notice of said motion, and did not appear thereto, and as to said defendants the said order setting aside said judgment is nugatory and of no effect. Immediately thereafter plaintiff filed his application for a change of venue, which was thereafter awarded to Greene county, where a complete transcript of the record and papers in said cause was sent by the clerk of the circuit court of Barry county, and the said cause was docketed in said last-mentioned court at the January term thereof, 1900. Plaintiff and said defendants Mills filed motions in said cause and court, asking that the said cause be stricken from the docket; whereupon the said court refused to pass upon said motion, or to take any action in said cause, or to have anything to do therewith, and ordered the same stricken from the

docket by the following order, entered of record, to wit: "Now, at this day, on an inspection of the record, the court ascertains that it has no jurisdiction of anything therein contained, and orders this cause stricken from the docket, and the court, and the judge thereof, declines and refuses further to proceed."

It appears from the return of the respondent that after the alternative writ was issued to him, to wit, on May 14, 1900, he, as presiding judge of the circuit court of Greene county, caused said cause of Webber against the Monett Milling Company and others to be docketed, with the purpose of exercising jurisdiction of said court over it, and the subject-matter involved therein, and that he, as judge of said court, now stands ready and willing to exercise such further power and jurisdiction, according to his best

as corpus, on petition by or on behalf of any person in actual custody in their respective counties." Id. § 6.

Statutes confer no additional power upon either court.

The superior court made an order declaring an attorney guilty of contempt of court, and ordering that he pay a fine and stand committed until it is paid, and that he purge himself of the contempt; and also an order adjudging that the attorney will not be permitted to appear as attorney or counsel before that court until he comply with said order, and until the further order of the court. The supreme court awarded a mandamus to the judge of the superior court commanding him to vacate the last order. *State ex rel. Rohde v. Sacha*, 2 Wash. 373, 26 Pac. 865.

In *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076, the supreme court awarded a mandamus compelling the judge of the superior court to reinstate and hear a case.

Where a judge was allotted to have charge of the equity business of the superior court, and declined to fulfil it, the supreme court awarded a mandamus to compel him to do so. *State ex rel. Hill v. Lichtenberg*, 4 Wash. 553, 30 Pac. 859.

In *State ex rel. Maltby v. Spokane County Super. Ct.* 7 Wash. 223, 34 Pac. 922, the supreme court granted a mandamus to the superior court commanding it to entertain an appeal from the justice's court.

The relators brought an action to recover possession of certain premises under the forcible entry and detainer act which was commenced by summons, which on the return day the defendant moved to quash. This motion was granted by the court except that it gave to the plaintiff leave to issue and serve a new summons. By this proceeding it is sought to procure from this court a peremptory writ of mandate requiring the court to take jurisdiction of the cause and proceed therein. The defendant, *inter alia*, raised the question as to jurisdiction to grant the relief prayed for in the petition, that the supreme court has no jurisdiction to issue a writ of mandate to a superior court excepting in aid of its appellate jurisdiction. ("Superior court" is the name of the inferior court.) The court held that, conceding this to be true, it would not deprive the supreme court of jurisdiction to compel by such writ the superior court to proceed in a cause to such a final determination as would authorize an appeal to the supreme court. To compel it thus to proceed would be necessary to make effective the right of appeal; and that whether it be for

this reason, or because of the provision of the Constitution which specially authorizes writs of mandate to issue from the supreme court by reason of its supervisory jurisdiction, the authority to issue such writs has often been exercised, and is well sustained by the practice in this court; citing *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076, and holding that upon that case, and the authorities therein cited, the court had jurisdiction to grant the relief prayed for in the petition. *State ex rel. Smith v. Parker*, 12 Wash. 685, 42 Pac. 113.

V. In courts of the United States.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." U. S. Const. art. 3, § 1.

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens, or subjects." Id. § 2, subd. 1.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." Id. subd. 2.

"The trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed." Id. subd. 3.

"The [United States] Supreme Court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law to any courts appointed

judgment, as the law seems to require upon the issues presented, or to be presented, by the parties under their pleadings, and is ready to pass upon a motion that will determine the case; but we are not advised as to the character of the motion or by whom presented. The change of venue was in regular order, and it is clear that, when the transcript of the record was filed in the office of the clerk of the circuit court of Greene county, that court had full and complete jurisdiction of the cause, and that it was its duty to proceed therewith in accordance with the rules of law applicable in such cases, and not to order the case stricken from the docket, and to decline and refuse to further proceed with it, as it was its duty to do. But as to what decision the court shall render upon any question that may be involved in the case, or what course it shall pursue in disposing of the cause by its legal judgment,

it is not our province to say; for while, under the Constitution of this state (art. 6, § 3), "a general superintending control" is given the supreme court over the circuit courts, and to require them by the writ of mandamus to reinstate a cause which has been erroneously stricken from the docket, and to proceed therewith (*State ex rel. Huey v. Cape Girardeau Common Pleas Ct.* 73 Mo. 560), its discretion or judgment must be left free to act, and cannot be controlled for any particular purpose or in any particular direction. From an inspection of the record, it appears that the case has not been finally disposed of upon its merits, and, as the Greene circuit court has jurisdiction of it, it should not be dismissed because of the want of such jurisdiction.

We therefore award a peremptory writ.

Gantt, Ch. J., and Sherwood, J., concur.

under the authority of the United States or to persons holding office under the authority of the United States, where a state or an ambassador or other public minister, or a consul or a vice consul, is a party." U. S. Rev. Stat. § 688. *United States v. Peters*, 8 Dall. 121, 1 L. ed. 535.

The United States Supreme Court is not authorized to issue the writ of prohibition to the district court in any case except where the latter is proceeding as a court of admiralty and maritime jurisdiction. *Es parte City Bank*, 3 How. 292, 11 L. ed. 603; *Es parte Gordon*, 1 Black, 503, 17 L. ed. 134; *Es parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

To enable the United States Supreme Court to issue a mandamus it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable it to exercise appellate jurisdiction. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

"The Supreme Court and the circuit court and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." U. S. Rev. Stat. § 716, Judiciary Act, § 14.

Under the provisions of the acts of Congress, the courts of the United States never had the power to acquire jurisdiction of a case or question by the issue of a writ of mandamus. Their authority in this regard was limited to the issue of writs of mandamus in aid of their jurisdiction in such cases as were already pending in those courts, and in which jurisdiction had been obtained on other grounds and by other process. *United States ex rel. Harless v. United States Court of Appeals Judges*, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. Rep. 177, and cases there cited.

The circuit courts of appeals shall have the powers specified in § 716 of the Revised Statutes of U. S. act March 3, 1891, § 12 (1 Supp. Rev. Stat. chap. 517, p. 905). Since the circuit court of appeals has no greater power to issue a writ of mandamus than the courts of the United States had under § 716, it follows that it has no power to issue such a writ in any case which is not pending in its court, and in which it has not already acquired jurisdiction by other appropriate proceedings. *Ibid.*

Under the Constitution the power to issue mandamus as an original writ in the general sense of the common law cannot be given to 51 L. R. A.

the supreme court. Under Rev. Stat. § 716, the supreme court issues the writ to circuit courts to compel them to proceed to a final judgment or decree in a cause, in order that it may exercise the jurisdiction of review given by law; and the same power is exercised by the circuit courts over the district courts when a writ of error lies to the circuit court. But this power is not exercised, as in England by the King's bench, as having a general supervisory power over inferior courts, but only for the purpose of bringing the case to a final judgment or decree so that it may be reviewed. *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 9 L. ed. 1181.

Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. *Es parte Bollman*, 4 Cranch, 75, 2 L. ed. 554.

The nearest the Supreme Court of the United States has come to asserting the power of general superintendence of the inferior tribunals is this: In *Sikes v. Ransom*, 6 Johns. 279, the supreme court of New York had decided that by virtue of its general superintendence of inferior tribunals it had the power to issue a writ of mandamus to compel the inferior tribunal to amend a bill of exceptions. Thereafter a motion was made in the Supreme Court of the United States for a mandamus to compel the circuit court for the southern district of New York to review and settle a bill of exceptions. The court, per Marshall, Ch. J., said: "In the opinion, then, of the very respectable court which decided the motion made for a mandamus in *Sikes v. Ransom*, 6 Johns. 279, the supreme court of New York possesses the power to issue this writ in virtue of its general superintendence of inferior tribunals. The judicial act confers the power expressly on this court. No other tribunal exists by which it can be exercised." It was also stated in the same case to be in aid of appellate jurisdiction, the Chief Justice making the following distinction: "A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of an appellate jurisdiction." Two judges dissented on the ground that it was an essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. And that mandamus is always the commencement of an original proceeding. *Crane v. Kelly*, 5 Pet. 190, 8 L. ed. 92.

Certain actions known as writs of right had

COLORADO SUPREME COURT.

PEOPLE of the State of Colorado *ex rel.*
Frederick I. GREEN, *Petitioner*,
v.

COURT OF APPEALS OF THE STATE OF
COLORADO.

(.....Colo.....)

1. Under its general superintending control over inferior courts conferred by Const. art. 6, § 2, the supreme court has no power to review on certiorari a judgment of the court of appeals in a habeas corpus proceeding to determine the right to the custody of a child, as between the father and relatives of the deceased mother, upon the theory that the court exceeded its jurisdiction by applying a rule of law at variance with the settled doctrine upon the subject, where it

had jurisdiction to determine the question, and its judgment was not in conflict with any prior decision of the supreme court, since its jurisdiction is not affected by the correctness or incorrectness of its decision.

2. A habeas corpus proceeding to determine the right to the custody of a child being a civil suit, a judgment of the district court awarding the custody to the father as against the relatives of the deceased mother may be reviewed by the court of appeals on writ of error.

(June 4, 1900.)

PETITION for a writ of certiorari to review a judgment of the Court of Appeals reversing a judgment of the District Court for Arapahoe County in a habeas cor-

been prosecuted by the petitioner against certain tenants in the United States district court for the northern district of New York. The district judge dismissed them for want of jurisdiction. The Supreme Court of the United States awarded a mandamus to the district judge to compel him to reinstate and proceed to try them. *Re parte* Bradstreet, 7 Pet. 634, 8 L. ed. 810.

This is said to be in aid of appellate jurisdiction, to the end that a decision may be had which may be reviewed by the supreme court in its appellate character. To the same effect, *Re parte* Parker, 120 U. S. 787, 30 L. ed. 818, 7 Sup. Ct. Rep. 767, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

In England the court of King's bench has a superintendence over all courts of an inferior criminal jurisdiction, and may by the plenitude of its power award a certiorari to have any indictment removed and brought before it; and where such certiorari is allowable it is awarded at the instance of the King, and he has a prerogative of suing in whatever court he pleases.

The courts of the United States derived authority to issue such a writ from the Constitution and legislation of Congress. The decision was that the Supreme Court of the United States has no power to review by certiorari the proceedings of a military commission. *Re parte* Vallandigham, 1 Wall. 243, 17 L. ed. 580.

Under the judiciary act, § 14 (Rev. Stat. § 716), the circuit court has power to, and should, award a mandamus to county authorities to compel the levy of a tax to pay a judgment in such circuit court rendered upon county obligations; and the decision of the circuit court denying a mandamus under such circumstances will be reversed by the Supreme Court of the United States on writ of error. *Riggs v. Johnson County*, 6 Wall. 166, *sub nom.* *United States ex rel. Riggs v. Johnson County Supers.* 18 L. ed. 768.

A person had been indicted by a grand jury of a state court for murder. On his application stating that the facts for which he was indicted arose while he was executing the duties of the office of United States marshal, the indictment was removed to the United States circuit court by order of that court, and he taken from the custody of the state authorities and let to bail. On the application of the state the Supreme Court of the United States awarded a mandamus to the United States circuit court commanding it to restore the case and the custody of the person indicted to the state courts and authorities. *Virginia v. Paul*, 51 L. R. A.

148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

Receivers had been appointed for the Philadelphia & Reading Railroad and the Philadelphia & Reading Coal & Iron Companies. The receivers and railroad company afterwards filed a petition in the circuit court, which was afterwards referred by the court to a special master by agreement of parties, who afterwards reported to the court a scheme for the raising of money and paying off the indebtedness of the companies, and also for their reorganization. The circuit court afterwards made an order which did not approve the proposed plan of reorganization nor disapprove it, but directed the parties interested to go on without any constraint from the court, directing the receivers not to enlist on either side in conflicts amongst those interested in the property they had in charge, but that they accord facilities to all alike with regard to every plan advanced in good faith, and that the court, while it would not pass upon the comparative merits of rival schemes of reorganization, would regard with satisfaction any and every legitimate effort to terminate the receivership. The petitioner subsequently made application to the circuit court to set aside the decretal order made upon the receivers' and companies' petition, and for leave to file a demurrer, plea, and answer to that petition; and that, if the demurrer or plea should be overruled, a reference be had and evidence adduced for and against the proposed action, and for a stay in the meantime; and, in the alternative, that the decretal order be opened with leave to petitioner to file *nunc pro tunc* such demurrer, plea, and answer; and with leave to file *nunc pro tunc* exceptions to the master's report, upon the ground that such proceedings had been had and decree made without regard to the rules and regulations of practice; and for general relief; which application the circuit court denied. The petitioner thereupon applied to this court for leave to file a petition for a writ of prohibition to prohibit the circuit judge from further proceeding upon the petition of the receivers, and from enforcing or carrying out the decree thereunder; and for a writ of mandamus directing the circuit judge to cause securities deposited under the proposed plan to be returned to their owners, and to restore the parties to their original positions, or to vacate the decree and require the parties in interest to be brought in, and thereafter to proceed according to the rules and forms of law for such cases made and provided. The court, per Mr. Chief Justice Fuller, in denying the leave to file the petition, said: 1.

pus proceeding to obtain the custody of an infant. *Dismissed.*

The facts are stated in the opinion.

Messrs. Henry T. Sale and Morgan Edgar, for petitioner:

The court of appeals, no Colorado statute giving the right, had no jurisdiction to issue the writ of error, or review the order of the district court releasing the child of petitioner from unlawful detention.

Neither writ of error nor appeal will lie to a judgment or order in habeas corpus, as the judgment is not a final one.

See *Church, Habeas Corpus*, §§ 386, 389; also 9 *Am. & Eng. Enc. Law*, p. 239, § 4, *Id.* p. 237, § 14. See also Haynes, *New Trial & Appeals*, § 11, pp. 542, 1006; *People v. Schuster*, 40 Cal. 627; *Houghton's Ap-*

peal, 42 Cal. 35; *Re Goldsmith*, 12 Or. 420, 7 Pac. 97, 9 Pac. 585; *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513; *People ex rel. Keator v. Moss*, 6 App. Div. 414, 39 N. Y. Supp. 692; *Re Farrell*, 22 Colo. 461, 45 Pac. 428.

Habeas corpus loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint.

Weir v. Marley, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *Hammond v. People ex rel. Vaaco*, 32 Ill. 446; *Ex parte Thompson*, 93 Ill. 89; *Napier v. People ex rel. Napier*, 9 Ill. App. 523; *People ex rel. Reeve v. Gilbert*, 57 Ill. App. 505; *State ex rel. Malone*

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings. (*Smith v. Whitney*, 110 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Re Cooper*, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453.) Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition." *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149.

It is believed that this is the first time in the history of the Supreme Court of the United States that it has been stated as the opinion of the court that a prohibition could issue from the Supreme Court of the United States, except to a district court in the exercise of its admiralty and maritime jurisdiction.

A petition addressed to the supreme court of the District of Columbia stated that a justice of the peace of the District had in a case before him acted with apparent partiality, and refused on proper application and grounds therefor to remove the case to another justice as provided by law; had entered judgment against the petitioner regardless of a proper affidavit of defense; and had refused to approve a proposed appeal bond or any bond that might be offered by the petitioner, and wilfully refused the petitioner an appeal; and prayed for a writ of certiorari to the justice commanding him to quash the execution issued on the judgment, and to certify the record and proceedings to the supreme court of the District. The supreme court quashed the certiorari, and on appeal to the court of appeals of the District the latter court, in affirming the order quashing the certiorari, decided that the several grants of power to the supreme court of the District contained in the several acts of Congress in reference to that court necessarily implied a general supervision by the supreme court over the official conduct of a justice of the peace of the District,—and this by analogy to the power of supervision of the superior courts of England exercised over the inferior courts and officers of that Kingdom engaged in the adminis-

tration of justice. The court then stated the remedy, which was a rule upon the justice to show cause why an appeal should not be allowed and the bond approved. *Fidelity & Deposit Co. v. Beck*, 12 App. D. C. 237.

A mandamus was afterwards awarded by the supreme court of the District commanding the justice of the peace to consider the question of the sufficiency of the proposed sureties, and, if found sufficient to approve the bond, allow the appeal, and send the papers to the supreme court. The justice of the peace appealed from the order awarding the mandamus to the court of appeals, and the petitioner moved to dismiss the appeal. The court of appeals granted the motion, and in doing so, speaking of the supreme court of the District, said: "That court had a right in the exercise of its appellate jurisdiction and its general power of supervision over the proceedings of justices of the peace, to issue the writ of mandamus as a means to effectuate its appellate jurisdiction. *Church v. United States ex rel. Fidelity & Deposit Co.* 12 App. D. C. 264.

Indian Territory.

"The provisions of chapter 18, title 13, of the Revised Statutes of the United States shall govern such court so far as applicable; provided, that the practice, pleadings, and forms of proceedings in civil causes shall conform as near as may be to the practice, pleadings, and forms of proceeding existing at the time in like causes in the courts of record of the state of Arkansas." (25 U. S. Stat. at L. chap. 333, § 6, p. 784.) *Ind. Terr. Stat. 1899, § 6.*

"That certain general laws of the state of Arkansas, in force at the close of the session of the general assembly of that state in 1883, as published in 1884, in the volume known as 'Mansfield's Digest of the Statutes of Arkansas,' which are not locally inapplicable or in conflict with this act or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over, and put in force in, the Indian territory until Congress shall otherwise provide, that is to say, the provisions of the said General Statutes of Arkansas relating to . . . pleadings and practice, chapter 119; . . . and wherever in said laws of Arkansas the courts of record of said state are mentioned the said court in the Indian territory shall be substituted therefor." (26 U. S. Stat. at L. chap. 182, § 31, p. 94.) *Ind. Terr. Stat. 1899, § 31.*

The jurisdiction of the court of appeals of Indian Territory is the same as that of the supreme court of Arkansas. It had authority to issue certiorari, mandamus, and prohibition only in aid of its appellate jurisdiction. *Walker v. Wantland* (*Ind. Terr.*) 47 S. W. 354.

v. Malone, 3 Sneed, 413; *Coston v. Coston*, 25 Md. 500; *State v. Boyle*, 25 Md. 510; *Matthews v. Hobbs*, 51 Ala. 210.

No review is allowed in the absence of statute.

Hammond v. People ex rel. Vacaro, 32 Ill. 446; *Napier v. People ex rel. Napier*, 9 Ill. App. 523; *Bell v. Com.* 7 Gratt. 201; *Wade v. Judge*, 5 Ala. 130; *State ex rel. Malone v. Malone*, 3 Sneed, 413; *Weddington v. Sloan*, 15 B. Mon. 147; *Broadwell v. Com.* 98 Ky. 15, 32 S. W. 141; *Bell v. State use of Miller*, 4 Gill, 301, 45 Am. Dec. 130; *Coston v. Coston*, 25 Md. 500; *State v. Boyle*, 25 Md. 510; *Mead v. Metcalf*, 7 Utah, 103, 25 Pac. 729; *Ex parte Mitchell*, 1 La. Ann. 413; *State ex rel. Cook v. Parish Prison Keeper*, 15 La. Ann. 347; *Howe v. State*, 9

Mo. 682; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *Com. ex rel. Crispin v. Jones*, 3 Serg. & R. 158; *Russell v. Com.* 1 Penr. & W. 82; *Wyeth v. Richardson*, 10 Gray, 240; *Yates v. Lansing*, 9 Johns. 395, 6 Am. Dec. 290; *Mitchell's Case*, 12 Abb. Pr. 249; *Yarbrough v. State*, 2 Tex. 519; *Skinner v. Sedgbeer*, 8 Kan. App. 624, 56 Pac. 136.

As a general rule, the parents are entitled to the custody of their infant children. *Field, Infants*, 63, 64; *Browne, Dom. Rel.* 342, § 248.

The law presumes that it is to the interest of the child to be under the care of its natural protector for maintenance and education.

Schleuter v. Canatsy, 148 Ind. 388, 47 N.

VI. Where the application to correct should be first made.

a. To the court sought to be controlled.

As a rule the application to correct what is complained of must be first made to the court sought to be controlled. *Southern P. R. Co. v. Kern County Super. Ct.* 59 Cal. 476; *Lloyd v. Spurrier*, 103 Iowa, 744, 72 N. W. 688; *Hitchcock v. Hosmer*, 97 Mich. 614, 57 N. W. 189; *State ex rel. Atty. Gen. v. Gill*, 137 Mo. 627, 39 S. W. 81; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494.

This is a rule of practice, however, and its enforcement or nonenforcement is wholly in the discretion of the court; as where it cannot be made without impairing the remedy; or where it would be of no avail; or where it has been practically made, though not formally. *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121; *London v. Cox*, L. R. 2 H. L. 278, 16 Week. Rep. 44, 36 L. J. Exch. N. S. 225; *State ex rel. St. Louis & K. R. Co. v. Hirsch*, 187 Mo. 435, 37 S. W. 921, 38 S. W. 961; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494.

b. To an inferior jurisdiction having the power.

It is also usually held that a court will require the application to be first made to an inferior jurisdiction where there is such an one that can exercise the power. *Ex parte Mansony*, 1 Ala. 98; *State ex rel. Atty. Gen. v. Williams*, 1 Ala. 342; *Marion v. Chandler*, 6 Ala. 899; *Ex parte Tarlton*, 2 Ala. 35; *Ex parte Croom*, 19 Ala. 561; *Ex parte Russell*, 29 Ala. 717; *Ex parte Henderson*, 48 Ala. 302; *Ex parte Pearson*, 76 Ala. 521; *State ex rel. Brennan v. Walbridge*, 116 Mo. 650, 22 S. W. 893; *Ex parte Roanoke*, 117 Ala. 547, 23 S. 524; *Carnall v. Crawford County*, 11 Ark. 604; *Ex parte Marr*, 12 Ark. 84, 87; *Ex parte Allis*, 42 Ark. 101; *Troegel v. King*, 46 La. Ann. 421, 15 So. 410; *Ex parte McMeechen*, 12 Ark. 70; *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Howard v. Pierce*, 38 Mo. 206; *State v. Nelson County*, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 83; *Fleming v. Kanawha County Comrs.* 31 W. Va. 608, 8 S. E. 267; *Alderson v. Kanawha County Comrs.* 31 W. Va. 633, 8 S. E. 274; *State ex rel. Tallmadge v. Flint*, 19 Wis. 621; *State ex rel. Marsh v. Whittet*, 61 Wis. 351, 21 N. W. 245.

To this rule laid down in the foregoing cases are the following exceptions, *viz.*:

1. Where the two courts having the power have also concurrent appellate jurisdiction of the tribunal sought to be controlled; or the latter

has the particular jurisdiction concurrent with the inferior superintending court. *Ex parte Burnett*, 30 Ala. 461; *Ray v. Porter*, 42 Ala. 327; *Ex parte Boynton*, 44 Ala. 261; *Dunbar v. Frazer*, 78 Ala. 529.

2. Where the inferior court having the power or its incumbent is disqualified or unable to act. *State ex rel. Atty. Gen. v. Porter*, 1 Ala. 688; *Carnall v. Crawford County*, 11 Ark. 604; *Ex parte Marr*, 12 Ark. 84; *Ex parte Allis*, 42 Ark. 101.

3. Or refuses to act or mistakes the law. *Ex parte Tarlton*, 2 Ala. 35; *Ex parte Russell* 29 Ala. 717; *Ex parte Pearson*, 76 Ala. 521; *Ex parte McMeechen*, 12 Ark. 70.

VII. When the power is exercised without designating it as such.

a. By courts of original jurisdiction as successors of the King's bench.

In some instances this is done by courts in states having no grant of the jurisdiction, but in which, as has been stated, the court of original general jurisdiction takes the power as successor of the King's bench. *Heimlich v. Johnson*, Morris (Iowa) 89; *Beaubien v. Brinckherhoff*, 3 Ill. 260; *People ex rel. Loomis v. Wilkinson*, 13 Ill. 660; *Sonora Highway Comrs. v. Carthage Supers.* 27 Ill. 140; *Geneseo Comrs. v. Harper*, 38 Ill. 103; *Miller v. Trustees of Schools*, 88 Ill. 26, 33; *Hyslop v. Finch*, 99 Ill. 171; *Donahue v. Will County*, 100 Ill. 94; *Gerdes v. Champion*, 108 Ill. 137; *Graham v. People ex rel. Rutledge*, 111 Ill. 253; *Lees v. Drainage Comrs.* Dist. No. 2, 125 Ill. 47, 16 N. E. 915; *Smith v. Hudson Twp. Highway Comrs.* 150 Ill. 385, 36 N. E. 967; *Gordon v. State ex rel. Boder*, 4 Kan. 489; *Munkers v. Watson*, 9 Kan. 668; *Emporia v. Randolph*, 56 Kan. 117, 42 Pac. 376; *Chicago, K. & W. R. Co. v. Chase County Comrs.* 42 Kan. 223, 21 Pac. 1071; *State ex rel. Barnes v. Belmont County Comrs.* 31 Ohio St. 451; *Providence License Comrs. v. O'Connor*, 17 R. I. 40, 19 Atl. 1080; *Lonsdale County v. Cumberland License Comrs.* 18 R. I. 5, 25 Atl. 655; *Maroney v. Pawtucket*, 19 R. I. 3, 31 Atl. 265; *State ex rel. Fuller v. Beall*, 48 Neb. 817, 67 N. W. 868; *State v. Davis*, 4 N. J. L. 311; *Tenbrook v. M'Colm*, 10 N. J. L. 323; *People ex rel. Nisbet v. Amsterdam*, 90 Hun, 405, 36 N. Y. Supp. 64; *People ex rel. Hess v. Inman*, 74 Hun, 130, 26 N. Y. Supp. 329; *People ex rel. Howes v. Grady*, 66 Hun, 465, 21 N. Y. Supp. 381; *People ex rel. Spencer v. New Rochelle*, 83 Hun, 185, 31 N. Y. Supp. 592; *Kinderhook Highway Comrs. v. Claw*, 15 Johns. 537; *Ex parte Albany*, 23 Wend. 277; *People*

E. 825; *Norval v. Zinsmaster*, 57 Neb. 158, 77 N. W. 313; *State ex rel. Lynch v. Bratton* (Del.) 15 Am. L. Reg. N. S. 362, 363; *United States v. Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; *Gregg v. Spencer*, 96 Iowa, 501, 65 N. W. 411.

The statute of Colorado gives the surviving parent the right to custody of his or her child, and no act or declaration on the part of a deceased person can deprive a worthy surviving parent, who is able to provide for his or her child, of the custody of the child, unless the surviving parent acquiesce in the intended disposition of the child by the deceased.

Stringfellow v. Somerville, 95 Va. 704, 40 L. R. A. 623, 29 S. E. 685.

Assuming that the court of appeals had jurisdiction to issue the writ of error, to review the case, and to render the particu-

lar judgment, the awarding of the custody of the infant to the McKerchers was manifestly a great abuse of discretion, apparent from an inspection of the opinion of the court of appeals.

People ex rel. Oebriicks v. New York City Super. Ct. 5 Wend. 115; Powell, Appellate Proceedings, 398, note 2, Appx.; *State, Baird, Prosecutor, v. Baird*, 18 N. J. Eq. 195, 19 N. J. Eq. 481, 21 N. J. Eq. 384.

Messrs. Patterson, Richardson, & Hawkins, for respondent:

There is nothing in the constitutional provisions which warrants this court in undertaking to review by certiorari the decisions of the court of appeals.

Even if we are mistaken in this view, this court, for reasons of public policy, and because of the comity which has existed be-

v. Suffolk County Judges, 24 Wend. 249; *Snoddy v. Madison County Ct. Sneed* (Ky.) 74; *Craddock v. Croghan, Sneed* (Ky.) 100; *Bartlett v. Franklin County Ct. Sneed* (Ky.) 184; *Jackson v. Maxwell*, 5 Rand. (Va.) 636.

b. By courts having no grant of the specific power.

In other instances this power is exercised by courts having no grant of the jurisdiction as such, but having a constitutional or statutory grant of original jurisdiction to issue the writs by which the general superintendence is generally exercised. *Merced Min. Co. v. Fremont*, 7 Cal. 130; *Hyatt v. Allen*, 54 Cal. 353; *Avery v. Contra Costa County Super. Ct.* 57 Cal. 247; *Camron v. Kenfield*, 57 Cal. 550; *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, 10 L. R. A. 627, 24 Pac. 121; *Mastick v. San Francisco City & County Super. Ct.* 94 Cal. 347, 29 Pac. 869; *Philbrook v. San Francisco City & County Super. Ct.* 111 Cal. 43, 48 Pac. 402; *Schwartz v. San Francisco City & County Super. Ct.* 111 Cal. 106, 43 Pac. 580; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615; *Hensley v. Sacramento County Super. Ct.* 111 Cal. 541, 44 Pac. 232; *Lee v. San Joaquin County Super. Ct.* 112 Cal. 354, 44 Pac. 666; *Dixon v. Risley*, 114 Cal. 204, 46 Pac. 5; *Whelan v. San Francisco City & County Super. Ct.* 114 Cal. 548, 46 Pac. 468; *Foster v. San Francisco City & County Super. Ct.* 115 Cal. 279, 47 Pac. 58; *Grimwood v. Barry*, 118 Cal. 274, 50 Pac. 430; *McClatchy v. Sacramento County Super. Ct.* 119 Cal. 413, 39 L. R. A. 691, 51 Pac. 696; *Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626; *White v. San Francisco City & County Super. Ct.* 126 Cal. 245, 58 Pac. 450; *State Investment & Ins. Co. v. San Francisco City & County Super. Ct.* 101 Cal. 135, 35 Pac. 549; *Murray v. Los Angeles County Super. Ct.* 129 Cal. 628, 62 Pac. 191; *State ex rel. Reynolds v. White*, 40 Fla. 297, 24 So. 160; *Macon v. Shaw*, 16 Ga. 172; *Fleld v. Putman*, 22 Ga. 98; *Livingston v. Livingston*, 24 Ga. 379; *Cherokee Ins. & Bkg. Co. v. Whitfield County Justices*, 28 Ga. 121; *Twiggs County Inferior Ct. Justices v. Griffin*, 36 Ga. 398; *Taylor v. Americus*, 39 Ga. 59; *Redd v. Dure*, 40 Ga. 389; *Harrell v. Pickett*, 43 Ga. 271; *Maxwell v. Tumlin*, 79 Ga. 570, 4 S. E. 858; *Pope v. Jones*, 79 Ga. 487, 4 S. E. 860; *Memmler v. Roberts*, 81 Ga. 351, 8 S. E. 525; *Fite v. Black*, 85 Ga. 413, 11 S. E. 782; *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117; *State ex rel. Rohde v. Sachs*, 2 Wash. 373, 26 Pac. 865; *State ex rel. Hill v. Lichtenberg*, 4 Wash. 558, 30 Pac. 659; *State ex rel. 51 L. R. A.*

Maltby v. Spokane County Super. Ct. 7 Wash. 223, 34 Pac. 922.

c. By courts having grants of the jurisdiction.

And in still other instances the power is exercised by courts having grants of the jurisdiction, but which, in the exercise of it, make no mention of it. *Hill v. Bridges*, 6 Port. (Ala.) 197; *Ex parte Bibb*, 44 Ala. 141; *Reynolds v. Crook*, 95 Ala. 570, 11 So. 412; *Ex parte Sayre*, 95 Ala. 288, 11 So. 378; *Ex parte Green*, 109 Ala. 680, 20 So. 56; *Ex parte Breedlove*, 113 Ala. 172, 24 So. 363; *Day v. Fleming County Ct. Justices*, 3 B. Mon. 198; *Lawless v. Reese*, 3 Bibb, 479; *Applegate v. Applegate*, 4 Met. (Ky.) 236; *Reese v. Lawless*, 4 Bibb, 394; *Rodman v. Larue County Justices*, 8 Bush, 144; *Sheby County Ct. v. Cumberland & O. R. Co.* 8 Bush, 209; *Clarke County Ct. Justices v. Paris, W. & K. River Turnp. Co.* 11 B. Mon. 143; *Louisville v. Kean*, 18 B. Mon. 16; *Anderson County Ct. v. Stone*, 18 B. Mon. 848; *Blanton v. Breckinridge*, Litt. Sel. Cas. 25; *Sanders v. Nelson Circuit Ct. Hardin* (Ky.) 17; *Spencer County Ct. v. Com. 84 Ky. 36*; *Cumberland & O. R. Co. v. Washington County Ct.* 10 Bush, 564; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Glider-sleeve v. Adair*, 97 Mich. 606, 57 N. W. 187; *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051; *Rosenthal v. Dickerman*, 98 Mich. 208, 22 L. R. A. 693, 57 N. W. 112; *Combs v. Wilber*, 99 Mich. 234, 58 N. W. 71; *People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge*, 31 Mich. 456; *Maclean v. Speed*, 52 Mich. 257, 18 N. W. 396; *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272, 26 N. W. 802, 806; *Buettner v. Fraser*, 100 Mich. 179, 58 N. W. 834; *Ionis, E. & B. Farmers' Mut. F. Ins. Co. v. Davis*, 100 Mich. 606, 32 L. R. A. 481, 59 N. W. 250; *Wayne County Supers. v. Wayne Circuit Judges*, 106 Mich. 166, 64 N. W. 42; *Thomas v. Mead*, 36 Mo. 232; *State ex rel. Webster v. Knight*, 46 Mo. 83; *State v. Snyder*, 98 Mo. 555, 12 S. W. 369; *State ex rel. Richardson v. Withrow*, 141 Mo. 69, 41 S. W. 980; *State ex rel. Scales v. Zachrits*, 145 Mo. 269, 46 S. W. 961; *State ex rel. Smith v. Smith*, 152 Mo. 444, 54 S. W. 218; *State ex rel. Mathews v. Eddy*, 10 Mont. 311, 25 Pac. 1032; *State ex rel. Gleim v. Evans*, 13 Mont. 239, 33 Pac. 1010; *State ex rel. Bartlett v. Second Jud. Dist. Ct.* 18 Mont. 481, 46 Pac. 259; *Burgdorf v. Bentley*, 27 Or. 268, 41 Pac. 163; *Gilbert v. Salt Lake City Police & Fire Comrs* 11 Utah, 378, 40 Pac. 264; *Bullard v. Thorpe*, 66 Vt. 590, 25 L. R. A. 605, 30 Atl. 36; *Dryden v. Swinburn*, 15 W. Va. 234; *Re*

tween our appellate courts, should refuse to do so.

Re Rogers, 14 Colo. 21, 22 Pac. 1053; *People ex rel. Baxter v. Court of Appeals*, 24 Colo. 186, 49 Pac. 36.

The petition for a certiorari is simply an attempt to get this court to review, under the guise of a certiorari, a judgment which it is powerless to review by writ of error or appeal.

Loveland v. Sears, 1 Colo. 195.

The writ of certiorari is a writ of discretion, and not to be issued except when a case appeals strongly to the discretion of the court.

Leonard v. Bartels, 4 Colo. 95; *Molnerney v. Denver*, 17 Colo. 304, 29 Pac. 516.

We could admit that the court of appeals didn't have the least particle of jurisdiction in this case, and still the certiorari should be refused, because the fact that substan-

tial justice had been arrived at would prevent this court from issuing its discretionary writ of certiorari.

Hopkins v. Folger, 60 Me. 286; *Rutland v. Worcester County Comrs.* 20 Pick. 71; *People ex rel. Roediger v. Wayne County Drain Comrs.* 40 Mich. 745.

Such a controversy is nothing more nor less than a civil suit, in which the forms of habeas corpus are used to effectuate the power of the court; and when a judgment is rendered it is a final one which can be reviewed.

Legate v. Legate, 87 Tex. 248, 28 S. W. 281; *Ex parte Reed*, 34 Tex. Crim. App. 9, 28 S. W. 689; *Ex parte Miskimins* (Wyo.) 49 L. R. A. 831, 58 Pac. 412.

Per Curiam:

This is a petition for a writ of certiorari to review a judgment of the court of ap-

Booth, 3 Wis. 49; *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 193.

VIII. Use in place of appeal or other remedy.

This power of superintending control will not be exercised in the place of appellate jurisdiction, or where other remedy exists. *Baxter v. Brooks*, 29 Ark. 173; *Halliday v. Jacksonville & A. Pl. Road Co.* 6 Fla. 304; *Trustees of Schools v. School Directors*, 88 Ill. 100; *Gonhot v. Hipkins*, 3 Ky. L. Rep. 613; *State ex rel. New Orleans v. Sixth Dist. Judge*, 32 La. Ann. 549; *State ex rel. Wints v. Orleans Dist. Judge*, 32 La. Ann. 1222; *Brown v. Ragland*, 35 La. Ann. 837; *State ex rel. Charity Hospital v. Monroe*, 39 La. Ann. 664, 2 So. 215; *State ex rel. Jaffray v. Ninth Jud. Dist. Judge*, 39 La. Ann. 1108, 3 So. 342; *State ex rel. Henderson v. McCrea*, 40 La. Ann. 20, 3 So. 380; *State ex rel. Shakespeare v. Civil Dist. Judge*, 40 La. Ann. 607, 4 So. 485; *State ex rel. Patton v. Houston*, 40 La. Ann. 393, 4 So. 50; *State ex rel. Matranga v. Criminal Dist. Judge*, 42 La. Ann. 1089, 10 L. R. A. 248, 8 So. 277; *State ex rel. Moree v. Second Recorder's Judge*, 44 La. Ann. 1100, 11 So. 683; *State ex rel. Rocchi v. Orleans Dist. Judge*, 45 La. Ann. 532, 12 So. 941; *Troegel v. King*, 46 La. Ann. 421, 15 So. 410; *State ex rel. Keplinger v. Peres*, 48 La. Ann. 1848, 20 So. 164; *State ex rel. Butler v. Ferguson*, 48 La. Ann. 787, 19 So. 947; *State ex rel. Wells-Fargo Exp. Co. v. Martin*, 48 La. Ann. 1249, 20 So. 729; *State ex rel. Moore v. Hingle*, 50 La. Ann. 688, 23 So. 616; *State ex rel. Harris v. Laughlin*, 75 Mo. 358; *State ex rel. Giovanoni v. Rombauer*, 125 Mo. 682, 28 S. W. 968; *Mendon v. Worcester County Comrs.* 2 Allen, 463; *Farmington River Water Power Co. v. Berkshire County Comrs.* 112 Mass. 206; *Freud v. Snow* (Mich.) 85 N. W. 193; *State ex rel. King v. Second Jud. Dist. Ct.* (Mont.) 62 Pac. 820; *Eastham v. Holt*, 48 W. Va. 599, 27 S. E. 863, 31 S. E. 259; *Norfolk & W. R. Co. v. Pinnacle Coal Co.* 44 W. Va. 574, 41 L. R. A. 414, 30 S. E. 196; *State ex rel. Meggett v. O'Neill*, 104 Wis. 227, 80 N. W. 447; *State ex rel. Oshkosh*, A. & B. W. R. Co. v. Burnell, 104 Wis. 246, 80 N. W. 460.

There are other Louisiana cases to the same effect, but the foregoing are deemed sufficient from that state.

Where, however, the appeal, writ of error, or other remedy is slow, difficult, or inadequate the power will be exerted. *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 827, 51 L. R. A.

10 L. R. A. 627, 24 Pac. 121; *Merced Min. Co. v. Fremont*, 7 Cal. 130; *Hensley v. Sacramento County Super. Ct.* 111 Cal. 541, 44 Pac. 282; *People ex rel. L'Abbe v. Lake County Dist. Ct.* 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604; *State ex rel. Murray v. Lazarus*, 36 La. Ann. 578; *State ex rel. Crozier v. Root*, 49 La. Ann. 1451, 22 So. 421; *People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge*, 31 Mich. 456; *Tawas & B. C. R. Co. v. Iosco County Circuit Judge*, 44 Mich. 479, 7 N. W. 65; *Van Norman v. Jackson County Circuit Judges*, 45 Mich. 204, 7 N. W. 796; *Maclean v. Speed*, 52 Mich. 257, 18 N. W. 396; *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272, 26 N. W. 802, 805; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Rosenthal v. Dickerman*, 98 Mich. 208, 22 L. R. A. 693, 57 N. W. 112; *Buettner v. Fraser*, 100 Mich. 179, 58 N. W. 834; *Ionia, E. & B. Farmers' Mut. F. Ins. Co. v. Davis*, 100 Mich. 606, 32 L. R. A. 481, 59 N. W. 250; *Wayne County Supers. v. Wayne Circuit Judges*, 106 Mich. 106, 64 N. W. 42; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, sub nom. *State ex rel. St. Louis, K. & S. R. Co. v. Wear*, 38 L. R. A. 841, 36 S. W. 357, 658; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95; *State ex rel. Simpson v. Votaw*, 18 Mont. 279, 44 Pac. 982; *Huron v. Campbell*, 3 S. D. 309, 53 N. W. 182; *St. Paul's Parish Comrs. of Poor v. Lynah*, 2 McCord, L. 170.

The principal case is a striking example of this exception.

IX. For what purposes exercised.

a. Compelling lower court to act.

Where the subordinate tribunal improperly dismisses the application, action, or proceeding on the ground of lack of jurisdiction or power, the court exercising the power of superintending control will compel it to act.

Where the application to the subordinate tribunal is for the award of one of the writs for the purpose of exercising superintending control, and that tribunal improperly dismisses the proceeding, the court will in some jurisdictions compel the lower court to act by reversing its judgment on appeal and issuing its mandate to that effect. *State ex rel. Hamilton v. Engle*, 127 Ind. 457, 26 N. E. 1077; *Pennington v. Woolfolk*, 79 Ky. 18; *Thompson v. School Dist. No. 6*, 25 Mich. 483; *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95; *Kendrick v.*

peals in the case of *Eliza J. McKercher* and others v. *Frederick I. Green*, brought to that court on a writ of error to a judgment of the district court of Arapahoe county. A proceeding in habeas corpus was instituted in the district court to determine the right to the custody of an infant child, as between the father and the immediate family of the deceased mother. The district court awarded the custody of the child to the father. The court of appeals reversed this judgment, and remanded the case to the district court, with instructions that a decree be entered dismissing the writ, and awarding the custody of the child to respondents, upon the ground that the best interests of the child would be thereby subserved. *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406.

The grounds upon which the right to the

writ is predicated are—First, that the court of appeals had no jurisdiction to review the judgment of the district court; second, that, if it should be held that it had jurisdiction to review the judgment, it exceeded its jurisdiction, and greatly abused its discretion, in rendering the particular judgment it did render.

It is conceded that no appeal to, or writ of error from, this court would lie to review the judgment rendered by the district court in the first instance, and that, if reviewable at all on appeal or error, it was within the exclusive and final jurisdiction of the court of appeals, and the review now asked can only be had in the exercise of our "general superintending control over all inferior courts," lodged in the supreme court by § 2, art. 6, of the Constitution, which reads as follows: "The supreme court, except as

State, Cooke (Tenn.) 474; *Bob v. State*, 2 Yerg. 178; *State ex rel. Rogers v. Wheeler*, 97 Wis. 96, 72 N. W. 225.

In other instances, and in cases where the proceeding in the lower court is not for the purpose of the issuing of any such writs, the superintending control over the subordinate tribunal to compel it to act will be exerted by mandamus or certiorari. *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051 (mandamus); *People ex rel. Robinson v. Swift*, 59 Mich. 529, 26 N. W. 694 (mandamus); *State ex rel. Bayha v. Phillips*, 97 Mo. 331, 8 L. R. A. 476, 10 S. W. 855 (mandamus); *State ex rel. Schonhoff v. O'Bryan*, 102 Mo. 254, 14 S. W. 933 (mandamus); *State ex rel. Ensworth v. Albin*, 44 Mo. 346 (mandamus); *State ex rel. Monratt Mill Co. v. Neville* (mandamus); *State ex rel. Mathews v. Eddy*, 10 Mont. 311, 25 Pac. 1032 (mandamus); *State ex rel. Seres v. First Jud. Dist. Ct.* 19 Mont. 501, 48 Pac. 1104 (mandamus); *Vine v. Jones* (S. D.) 82 N. W. 82 (mandamus); *State ex rel. Northern P. R. Co. v. Loud* (Mont.) 62 Pac. 497 (mandamus); *Cavanaugh v. Wright*, 2 Nev. 166 (mandamus); *State v. Swepson*, 83 N. C. 584 (certiorari); *State ex rel. Maltby v. Spokane County Super. Ct.* 7 Wash. 223, 34 Pac. 922 (mandamus); *State ex rel. Shannon v. Hunter*, 8 Wash. 92, 27 Pac. 1076 (mandamus); *Wheeler Bridge & Terminal R. Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551 (mandamus); *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810 (mandamus).

b. Controlling lower court's discretion or judgment.

The general rule is that the power will not be exercised to review or control the discretion of a subordinate tribunal. *Detroit Tug & Wrecking Co. v. Gartner*, 75 Mich. 360, 42 N. W. 968; *Lane v. Charless*, 5 Mo. 285; *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 221; *State ex rel. Jackson v. Howard County Ct.* 41 Mo. 247; *State ex rel. Castillo v. Edwards*, 11 Mo. App. 152; *State ex rel. Gazzalo v. Hudson*, 13 Mo. App. 61; *Re Wilson*, 12 Nev. 219; *People ex rel. Seward v. Dutchess County Judges*, 23 Wend. 362.

But where an inferior court has been guilty of an abuse or a capricious or arbitrary exercise of such discretion, the superior court will interfere by the exercise of its superintending power. *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 221; *State ex rel. Jackson v. Howard County Ct.* 41 Mo. 247; *State ex rel. Kelleher v. St. Louis Public* 51 L. R. A.

Schools, 134 Mo. 296, 35 S. W. 617; *State, Smith, Prosecutor, v. Vandervere*, 25 N. J. L. 669; *Bob v. State*, 2 Yerg. 178.

c. To aid appellate jurisdiction.

The power has been frequently exerted, where the subordinate tribunal from whose judgment or order the appeal or writ of error was taken has done, omitted, refused, or neglected to do something that interferes with, or prevents, the procession in the appellate court.

As where the tribunal whose judgment or order is appealed from has omitted or refused to sign the necessary case or bill of exceptions, or otherwise neglected to complete the record essential to the review on appeal. *Warren County Comra. v. State ex rel. Ennis*, 15 Ind. 250; *State ex rel. Jacoby v. Cressinger*, 88 Ind. 499; *Swarts v. Nash*, 45 Kan. 841, 25 Pac. 873; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810; *State ex rel. Keane v. Murphy*, 19 Nev. 89, 6 Pac. 840; *State ex rel. Richards v. Sneed*, (Tenn.) 58 S. W. 1070.

Or improperly refused to grant an appeal. *Louisville Industrial School of Reform v. Louisville*, 88 Ky. 584, 11 S. W. 603; *Kelly v. Toney*, 95 Ky. 338, 25 S. W. 264.

Or where the subordinate tribunal has improperly refused to entertain jurisdiction and proceed to the trial or determination of the application, action, or proceeding. *Purcell v. McKune*, 14 Cal. 230; *People ex rel. Green v. De La Guerra*, 43 Cal. 225; *State ex rel. Morris v. Webb*, 84 Kan. 710, 9 Pac. 770; *State ex rel. Shannon v. Hunter*, 8 Wash. 92, 27 Pac. 1076; *State ex rel. Maltby v. Spokane County Super. Ct.* 7 Wash. 223, 34 Pac. 922; *State ex rel. Smith v. Parker*, 12 Wash. 685, 42 Pac. 113.

Where the appellate court has reversed or modified the judgment or order of the inferior tribunal, and remitted the case with instructions to enter a particular judgment or proceed in a particular manner, and the lower court omits or refuses to obey the mandate, the appellate court, in the exercise of this jurisdiction, will compel it to do so by mandamus. *Jared v. Hill*, 1 Blackf. 155.

The trial court announced an opinion that the defendant was indebted to the plaintiff, and the trial judge privately directed the clerk not to enter the judgment. Two days after the trial term had adjourned the court granted the defendant an appeal, and thereafter caused an entry to be made giving a judgment *nunc pro tunc* as of the last day of the trial term. The supreme court awarded a mandamus to compel the trial judge to annul the judgment and re-

otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

We are directly called upon, in this and three other cases now pending, to lay down the rule which should govern us in the exercise of the power of "superintending control" conferred upon us by the foregoing provision, in reference to the action and decisions of the court of appeals. It is strenuously insisted by some of the petitioners in these cases that it should be exercised in all cases where the court of appeals ignores or

misconceives any well-settled rule of law upon any given subject, or fails to regularly pursue the authority conferred upon it. We do not think that this is the intentment of this provision. As was said in *People v. Richmond*, 16 Colo. 285, 26 Pac. 933: "It was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction," but "it was, rather, intended that the power thus lodged in the supreme court should be exercised only in special or extreme cases, whose peculiar circumstances as to the facts, or the law governing the same, justify, in the opinion of this court, a resort to it." *Ingersoll v. Minge*, 50 La. Ann. 748, 23 So. 889. Without attempting to specify the reasons that

instate the case so that the defendant might not lose the benefit of an appeal to the supreme court. *State ex rel. Richards v. Sneed* (Tenn.) 58 S. W. 1070.

d. In exercise of revisory jurisdiction.

The following cases are to the effect that the power may be exerted in the exercise of revisory jurisdiction: *Carnall v. Crawford County*, 11 Ark. 604; *Lane v. Charles*, 5 Mo. 285; *State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551; and see cases in Alabama and Arkansas, III.

It is doubtful, however, if this doctrine obtains except in Alabama, Arkansas, and Missouri; and it is by no means certain that it now prevails in the latter state.

X. Power of legislature to interfere.

a. To enlarge the power.

The provisions of the Constitution of a state conferring upon the supreme court the power to issue, hear, and determine the writ of prohibition, does not enlarge the common-law office of the writ so as to permit the arrest of proceedings not of a judicial character; and, this being so, the legislature is without power to so enlarge it. *Camron v. Kenfield*, 57 Cal. 550; *State ex rel. Scharnikow v. Hogan* (Mont.) 62 Pac. 493.

To the same effect as to superintending control, *Vail v. Dinning*, 44 Mo. 210.

b. To encroach upon the power.

Where the Constitution confers upon the supreme judicial tribunal of the state the power of superintending control over inferior jurisdictions, either in express terms or by grant of the power to award the various writs by means of which that control is generally exercised; the legislature has no power to encroach upon and impair or limit the jurisdiction thus conferred by organic law. *Ex parte Candee*, 48 Ala. 386; *Brooks v. Morgan*, 27 N. C. (5 Ired. L.) 481 (by implication); *Detroit v. Wabash, St. L. & P. R. Co.* 63 Mich. 712, 30 N. W. 321; *Vail v. Dinning*, 44 Mo. 210; *Thompson v. Multnomah County*, 2 Or. 34; *O'Brien v. Dunn*, 5 Tex. 570; *State ex rel. Vaughn v. Ashland*, 71 Wis. 502, 37 N. W. 809.

Neither can the legislature encroach upon, impair, or limit the power where the same inhered in the superior jurisdiction at the time of the formation of the Constitution: and where by the Constitution all the then existing powers of the superior jurisdiction are continued. *Traphagen v. West Hoboken Twp.* 39 N. J. L. 232; *State, Flanagan, Prosecutor, v. Plainfield Treasurer*, 44 N. J. L. 118; *State*, 51 L. R. A.

McCullough, Prosecutor, v. Essex County Circuit Ct. 59 N. J. L. 103, 34 Atl. 1072; *Harris v. Vanderveer*, 21 N. J. Eq. 424.

XI. Exercise of the power by courts of local jurisdiction.

Where the legislature, under the provisions of the Constitution therefor, has organized courts of local jurisdiction, and conferred upon them within their territorial jurisdiction the power and authority of courts of original general jurisdiction, such local courts take and have all the powers of superintending control over inferior tribunals within their territorial jurisdiction possessed by the courts of original jurisdiction. *State ex rel. Pinney v. Williams*, 69 Ala. 311; *Knight v. Farrell*, 113 Ala. 258, 21 So. 974; *Wilson v. Duncan*, 114 Ala. 659, 21 So. 1017; *People ex rel. Ryan v. Green*, 58 N. Y. 295; *People ex rel. Allen v. Murray*, 2 Misc. 152, 23 N. Y. Supp. 160; *People ex rel. Van Rensselaer v. Van Alstyne*, 32 Barb. 131; *Swinburn v. Smith*, 15 W. Va. 483.

XII. Conclusion.

In conclusion it may be said:

That the constitutional or statutory grant of power to issue the writs by means of which the power of superintending control is exercised comprehends and carries with it the authority to exercise the power of superintending control to the extent that it can be exerted by those writs.

That the constitutional or statutory grant of superintending control comprehends and carries with it the power and authority to issue all writs and other processes essential to its complete exercise.

In either case where the grant is constitutional, it is a grant of the "general superintendency" as it was exerted, and of the right to issue the writs as they were awarded, according to the course of the common law,—which can neither be enlarged nor pared down by the legislature.

As is so often stated in the decisions, the power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur it will be found able to cope with them. And, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted.

P. H. V.

may be sufficient to justify us in exercising the power in other cases, we are of the opinion that it may be resorted to in the following instances: First, when the court of appeals is without jurisdiction to review the judgment in question; second, when in a clear case it refuses to be guided or controlled by the law as laid down in the prior decisions of this court. In this event it would become our imperative duty to resort to it, in order to enforce uniformity of decision in the appellate courts of the state.

In the present case it is not claimed that the judgment of the court of appeals is contrary to any prior decision of this court, but that in rendering the particular judgment complained of it applied to the undisputed facts of the case a rule of law at variance with the settled doctrine upon the subject under consideration, and that, if its jurisdiction to review the judgment of the district court be conceded, it nevertheless had no authority to render the judgment it did. In other words, it appearing from the testimony that no moral disqualification prevented the father from receiving the custody of the child, and that he was financially able to provide for all its wants, and raise it in the station of life in which it was born, the court had no power to deprive him of its custody, notwithstanding, under all the circumstances, the best interests of the child would be subserved by its remaining with respondents. It is said that no court has the authority, for such reason, to deprive the father of his natural and statutory right to the guardianship of his infant child, and in so doing the court of appeals exceeded its lawful authority in the premises. If the court of appeals had jurisdiction to review the case before it, it is clear that such jurisdiction was not affected by the manner in which it decided. While it is true that jurisdiction includes, not only the power to hear and determine, but also the power of the court to render the particular judgment in the particular case,—that is, it may not render a judgment not within the issues, but must have properly before it the particular question

it assumes to decide,—yet from this it by no means follows that, if it wrongly decides a question within the issues, it thereby exceeds its jurisdiction. In other words, its jurisdiction is not affected by the correctness or incorrectness of its decision. In this case the court of appeals was called upon to determine whether, under the facts and circumstances of the case as presented by the record before it, the district court had correctly adjudged the right to the custody of the child. It was therefore within its jurisdiction to determine that question, and whether it correctly or incorrectly applied the rule of law to the facts thus presented is not open to inquiry in this proceeding. If it is, as contended by counsel, a proper exercise of our superintending control, to determine this question, then every case within the final jurisdiction of the court of appeals might be brought before this court for review.

The remaining question is whether the court of appeals had jurisdiction to review the judgment of the district court, it being a judgment in a habeas corpus proceeding. Counsel for petitioner contend that no review of such judgment can be had on appeal or error unless the same is expressly provided for by statute. Whatever may be the rule in this regard applicable to the usual judgment in habeas corpus discharging a party from illegal imprisonment, we think that in a case where the controversy involves the right to the custody of an infant, although the writ of habeas corpus is used to determine that right, it is nevertheless a civil suit, and, the judgment rendered being a final adjudication in regard to such custody, it is clearly reviewable by the court of appeals, under the statute creating that court.

Our conclusion is that the petition presented is insufficient to justify the issuance of the writ prayed for, and the demurrer thereto should be sustained, and *the petition dismissed*, which is accordingly done.

Rehearing denied.

ALABAMA SUPREME COURT.

Charles T. LEHMAN *et al.*, *Appts.*,
v.

William R. GUNN *et al.*

(124 Ala. 218.)

The proceeds of a life insurance policy which is taken out by an insolvent for the benefit of his parents as a mere gift to them will be subjected to the claims of his creditors, where he created a valid liability against himself or his estate by giving a check

NOTE.—In connection with this case should be noticed that of *Roberts v. Winton* (Tenn.) 41 L. R. A. 275, in which a different conclusion was reached by the supreme court of Tennessee in a similar case.
51 L. R. A.

for a part of the premium, which is held as an existing obligation at the time of his death, although no part of the premium is actually paid by him or out of his property, and the check is never presented against his estate, but is paid gratuitously by his administrator out of the latter's own funds.

(February 7, 1900.)

A PPEAL by plaintiffs from a decree of the Chancery Court for Jefferson County dismissing a bill filed to reach the proceeds of a life insurance policy which was alleged to have been taken out in fraud of creditors.
Reversed.

The facts are stated in the opinion.

Mr. James A. Mitchell, with Mr. Henry Kirk White, for appellants:

The purchase of life insurance by Winton, and gift of the policy, which was property—chose in action—to his parents, by having them made beneficiaries, when he was insolvent and owed complainants, was a fraud upon his creditors, and therefore void as to creditors.

Caldwell v. King, 76 Ala. 149; *Fearn v. Ward*, 65 Ala. 33, 80 Ala. 555, 2 So. 114; *Anderson v. Anderson*, 64 Ala. 403.

Winton purchased personal property, a life insurance policy, for the benefit of his father, on merely a good, not a valuable, consideration, as his father paid him nothing for it. No title to this property—life policy—did or could pass into Winton's father; it became and remained the property of George Winton, the debtor, as to his creditors, and the instant Winton died his creditors had the right to subject that policy to the debts Winton owed them.

Fearn v. Ward, 80 Ala. 564, 2 So. 114; *Drake v. Stone*, 58 Ala. 133; *Pinkston v. McEmore*, 31 Ala. 308; *Friedman Bros. v. Fennell*, 94 Ala. 570, 10 So. 649.

Creditors' rights depend, not on whether Winton paid the premium on his policy, but on what he did with the policy.

The question as to whether creditors could subject insurance, the premium on which was paid by the debtor out of exempt property which creditors could not reach at the time he applied it to such payment, has been decided in favor of creditors, for the reason that exemption is personal to the debtor, and ceases to exist when he dies, and exempt property is then on the same basis as all other property as to payment of creditors.

Fellous v. Lewis, 65 Ala. 343; *Martin v. Crosby*, 11 Lea, 198.

Roberts v. Winton, 100 Tenn. 484, 41 L. R. A. 275, 45 S. W. 673, was in direct conflict with *Martin v. Crosby*, 11 Lea, 198, and *Fellous v. Lewis*, 65 Ala. 343.

The creditors' rights are not determined by what Winton parted with in exchange for the policy, but whether or not the policy belonged to Winton,—was his chose in action, his property,—and what he did with it.

Fearn v. Ward, 80 Ala. 564, 2 So. 114; *Elliot's Appeal*, 50 Pa. 75, 88 Am. Dec. 525.

The two obligations given for this insurance by Geo. T. Winton increased the amount of his personal obligations while he lived, and diminished *pro rata* the assets to be divided among the other creditors of his estate after his death.

Messrs. H. C. Selheimer and A. Latady for appellees.

Dowdell, J., delivered the opinion of the court:

The bill in this case is filed by the creditors of George T. Winton, deceased, and seeks to subject to the payment of their claims and demands as such creditors the proceeds of a policy of life insurance issued on the life of said Winton by the Mutual Benefit Life Insurance Company of Newark, New Jersey, in 51 L. R. A.

December, 1895, in which policy T. J. Winton and Sarah F. Winton, the father and mother of the insured, were named as beneficiaries. A motion was made to dismiss the bill for want of equity, which was sustained by the chancellor, and from that decree this appeal is prosecuted.

The bill charges that at the date of the issuance of the policy the said George T. Winton was indebted to complainants in the sums and manner alleged, and also that he was at that time wholly insolvent, and that the making of the policy payable to his father and mother was a voluntary conveyance or gift of the insurance covered by said policy, and therefore fraudulent and void as to creditors. The bill also avers that the policy was applied for, purchased, and received by the said George T. Winton, and that the premium, which was divided into quarterly instalments, was paid for in the following manner: The first instalment, being for the sum of \$29.65, was divided into a cash premium of \$20.76, and a premium loan of \$8.89; that for the cash premium the insured gave to one Halstead, the local agent of the defendant company, and through whom the insurance was negotiated, his personal check on the Berney National Bank, with which the insured did his business, and for the premium loan, executed his promissory note to the defendant company. It is also averred that at the time of the giving of the check for the cash premium the said Halstead remitted the amount of the cash premium to the company out of his own funds, holding the check as his individual claim against the said George T. Winton. On the 15th of January, 1896, within a month after the policy was taken out, Winton died, and at the time of his death the check in question had not been paid, but for what reason is not stated in the bill. Letters of administration were granted in February, 1896, on Winton's estate to the respondent W. R. Gunn, who immediately entered upon the discharge of his duties as administrator. It is alleged that Gunn knew that his intestate's estate at that time was totally insolvent, and he was also notified and informed that the creditors were claiming the insurance covered by the policy in question, and it is also charged that the defendant insurance company likewise had knowledge of the claims of these creditors at the time and before it made the compromise settlement charged. Shortly after the grant of letters of administration the said Gunn sought out Halstead, and took up the check which Winton had given, paying the same out of his own funds, and, as it is charged in the bill, for the purpose of preventing said check from being presented as a claim against the estate of Winton. In March following the grant of administration, the administrator Gunn, having the policy of insurance in his possession for collection, went to the state of Tennessee where the beneficiaries named in the policy resided, and there received on said policy from an agent of defendant company \$2,500, that be-

ing one half the amount of the said insurance, in settlement of said policy, and delivered it up to the company; that out of the \$2,500 so collected he, Gunn, retained \$1,000 paying over the remainder, \$1,500, to T. J. and Sarah F. Winton, the beneficiaries named in the policy. Subsequently the estate of George T. Winton was decreed insolvent, and a final settlement of the administration was made by Gunn, but no accounting was had by him for any money collected on said policy. The bill also charges that the settlement had by the insurance company with said Gunn and the beneficiaries in the state of Tennessee was a collusive one. We have not undertaken to set out here all of the averments of the bill, but only so much as we deemed necessary for the application of the legal principles involved in the controversy.

It will be observed from the foregoing statement of facts that there is nothing to bring the case within the influence of either § 2535 or § 2607 of the Code of 1896. The beneficiaries named in the present policy fall without the class of persons named in the former section; and the transactions, the subject of this suit, arose prior to the enactment of the latter statute. So the solution of this case must depend upon the law as it is, independent of these statutes.

That, as against existing creditors, a voluntary conveyance by the debtor is in law *per se* fraudulent and void, without regard to the intention of the debtor, is a proposition too familiar and well settled to require citation of authority. The nature and form of the conveyance, or the ways and means employed in bestowing the gift or donation, is immaterial. It is enough if the thing given be liable to the satisfaction of the demands of creditors, to render the conveyance void.

In the solution of this case some difficulty will be obviated by first determining what it is that the debtor has conveyed or donated. It must be conceded that the benefits to be derived under the present policy by the beneficiaries named therein proceed from the acts of the insured who procured the policy. The policy was issued by the company for a valuable consideration; the consideration moving from the insured, and not from the beneficiaries. It cannot be doubted that if the policy had been taken out payable to the estate of the insured, and subsequently transferred by him as a gift to his father and mother, that such a transaction would have been void as against existing creditors. So, too, though the policy be issued in favor of the father and mother, if the premiums be paid out of the funds of the debtor, will the transaction be void as against existing creditors. *Fearn v. Ward*, 80 Ala. 560, 2 So. 114; *Friedman Bros. v. Fennell*, 94 Ala. 570, 10 So. 649.

It is contended by appellees, however, that as the check given by the insured to the agent Halstead was never paid out of the funds of Winton during his life, nor presented as a claim against his estate, but was

gratuitously paid by the administrator Gunn out of his own funds, that no injury resulted to the creditors by any diversion of the assets of the debtor, to which they had the right to look for the satisfaction of their demands; that fraud without injury affords no grounds for relief to the creditor. It is a well-settled principle that fraud and injury must coexist to create a cause of action or grounds for relief, but the fallacy of appellees' contention rests in the misapprehension as to wherein the injury arises in the present case.

The policy, or the insurance which it represented, was the subject-matter of the gift, and not the premium—the premium is used in the purchase of the property donated, and it is in the gift of this property so purchased that the creditor complains he has been injured. In *Fearn v. Ward*, 80 Ala. 560, 2 So. 114, this court said: "The insurance constitutes the property purchased, and is the subject-matter of the investment. If the father be in debt, such voluntary investment is fraudulent in law as to his existing creditors, without regard to his intent, or to his circumstances and condition as to ability to pay. . . . In such case the donee will be regarded as a trustee of the investment for the benefit of the creditors of the donor;" citing *Caldwell v. King*, 76 Ala. 149, and *Anderson v. Anderson*, 64 Ala. 403.

Under the facts in this case, when the policy was delivered to the insured, he having executed his note for the premium loan, and given his check for the cash premium to the agent, which was held by the agent as a claim against the insured, the agent having paid out of his funds the cash premium to his company, the contract of purchase of insurance was complete, and a vested interest in the insurance arose to the beneficiary, subject, of course, to the conditions and stipulations contained in the contract. But if the beneficiary named in the policy be a mere donee, his interest in the insurance will be postponed to the claims and demands of existing creditors of the donor. The insurance being the subject-matter of the gift by the debtor, as to the rights of creditors, it is immaterial whether the purchase of insurance be made by the debtor for cash or on credit; the principle remains the same. The right of creditors to proceed against the fund for the satisfaction of their demands arises as soon as the insurance becomes due and payable, under the stipulations of the contract of insurance. Under the present policy the insurance was payable at death, and upon the happening of that event the right of creditors of the insured to proceed to subject the insurance to the satisfaction of their debts arose. The payment by the administrator Gunn of the check given by Winton to Halstead could not, under the law, alter the terms of the contract of insurance, or affect the rights of parties thereunder; nor could it impair the rights of creditors arising upon the death of Winton. It cannot be denied that, if Winton had paid the pre-

mium in cash out of his own funds, this would have been a diversion of assets to which his creditors had a right to look for the payment of their debts; and the fact that the amount in question was small cannot vary the principle. It is diminution of the fund to which the creditor had the right to look for the payment of his demands that gives him the right to complain. The fund may be diminished by the improper diversion of assets which constitute it, or by fraudulently creating additional claims against it. In other words, the diminution may result by either diminishing the dividend or increasing the divisor. If the dividend be diminished by an improper diversion of his assets by the insolvent debtor, the creditor may in a court of equity follow the same into the hands of a donee or fraudulent grantee, and subject to his demand, not only the assets themselves so diverted, but also the profits and increase growing or springing out of their use. So if the insolvent debtor, by way of credit, creates a valid claim against himself or his estate, thereby augmenting the divisor, which in effect is equivalent to diminishing the dividend, and at the same time making a donation to another of the property acquired by the credit given him, upon plain equitable principles the creditor should have the right to subject the property thus created and acquired in the hands of a donee or fraudulent grantee.

It cannot be denied that when Winton received the policy of insurance and gave his check to Halstead, who immediately remitted out of his own funds the cash premium to the insurance company, that upon the dishonor of the check by the bank, a valid claim or demand arose in favor of Halstead against Winton for the amount of the check or cash premium so paid. Halstead became the creditor of Winton for that amount, and the claim was a valid one against the estate of Winton at his death. He, Halstead, was entitled to share with other creditors in the assets of the common debtor's estate. The shares of the other creditors were thereby diminished by the augmentation of the divisor through the fraud, actual or constructive, of the debtor. If the wrong and injury to the creditor be accomplished through the fraud of the debtor, actual or constructive,

it is immaterial what form it assumed, equity will deal with the facts, the substance, without regard to forms or shadows. Halstead held the dishonored check as a claim against the common debtor Winton, and after his, Winton's death, Gunn, the administrator of Winton's estate, paid this debt. It is insisted that, inasmuch as the claim was never filed against the estate, and having been gratuitously paid by Gunn out of his own funds, no injury resulted to the creditors. As we have said above, the rights of the creditors to proceed against the fund arose upon the death of Winton, and of which they could not be deprived by the gratuitous act of the administrator, whose duty it was to collect and preserve the assets of his intestate's estate for the benefit of creditors. If the right of the creditor to subject the fund to his demand arose upon the death of Winton, then it became a vested right, and its termination or continuance did not, and could not, depend upon the mistaken generosity of the administrator in the gratuitous payment out of his own funds of Halstead's claim. Our attention has been directed by counsel for appellees to the case of *Roberts v. Winton*, 100 Tenn. 484, 41 L. R. A. 275, 45 S. W. 673. It appears from the opinion in that case that the insurance was purchased with property exempt to the debtor under the law. That is a question not presented by the record in this case, and we decline to express any opinion upon it. The reasoning employed by the court in *Roberts v. Winton*, 100 Tenn. 484, 41 L. R. A. 275, 45 S. W. 673, upon the proposition of a purchase by an insolvent debtor, of life insurance on a credit basis, is not in harmony with the views we have hereinabove expressed, and we therefore decline to follow that case as authority.

Taking the allegations of the bill as true, upon the death of Winton the insurance became a trust fund for the benefit of creditors, and all parties dealing with such a fund with notice may be held to an accounting. The chancellor erred in sustaining the motion to dismiss the bill for want of equity, and the decree must be reversed.

Reversed and remanded.

Sharpe, J., not sitting.

CALIFORNIA SUPREME COURT.

Joseph BRITTON, Appt.,

v.

BOARD OF ELECTION COMMISSIONERS
of the City and County of San Francisco
et al., *Respts.*

(129 Cal. 337.)

1. The denial to a political party
which cast less than 3 per cent of the

vote at the next preceding election, of the right to the privileges and protection accorded to other political parties, by the primary election law of March 3, 1899 (Stat. 1899, p. 47), and thereby prohibiting the members of such party from holding a nominating convention, is a deprivation of the right of franchise, and a violation of the constitutional rights under Const. art. 1, § 10, giving them the right to freely assemble together

NOTE.—For limitation of right to a place on official ballot to parties casting certain per cent of vote at last election, see also *De Walt v. Bartley* (Pa.) 15 L. R. A. 771; *State, Ransom, Prosecutor, v. Black* (N. J.) 16 L. R. A. 51 L. R. A.

769; *State ex rel. Plimmer v. Poston* (Ohio) 42 L. R. A. 237; *State ex rel. Runge v. Anderson* (Wia.) 42 L. R. A. 239; and *Higgins v. Berg* (Minn.) 42 L. R. A. 245.

to consult for the common good, etc., § 21, providing for equality of privileges and immunities, and § 11, requiring laws of a general nature to have a uniform operation. Per *Henshaw, Van Dyke, and McFarland, JJ.*

2. Permitting a voter, without regard to party affiliations, to vote at a primary election under act March 3, 1899 (Stat. 1899, p. 47), for delegates to the political convention of any party that he chooses to select, whether he is a member of that party or not, or ever intends to become a member of it, gives an opportunity for the disruption and destruction of a political party by its opponents, and constitutes a violation of the reserved rights of the people, which, it is provided by Const. art. 1, § 23, shall not be impaired or denied by the enumeration of rights declared.
3. A deprivation of the right to participate in the selection of candidates for office is a deprivation of the right of franchise.

(*Beatty, Ch. J., and Garoutte, J., dissent.*)

(July 28, 1900.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in a proceeding to enjoin the enforcement of the primary election law. *Reversed.*

The facts are stated in the opinions.

Messrs. Myrick & Deering and L. A. Gibbons, for appellant:

The primary law of 1899 violates § 11 of art. 1, and subdvs. 33, 11, § 25, art. 4, of the Constitution of the state of California.

Each and every voter has the constitutional right to his political faith; he may join others in promulgating their political faith; may abandon the old for the new.

A political party is a body of men in a state, district, county, or city, united in political thought and action for the accomplishment of a political end, or united in political opposition to another body of men joined in political action; and each body of men so united is entitled to the same and equal rights before the law.

Fields v. Osborne, 60 Conn. 544, 12 L. R. A. 551, 21 Atl. 1070.

A primary law giving to some political parties rights which it denies other political parties is special legislation.

Eaton v. Brown, 96 Cal. 375, 17 L. R. A. 697, 31 Pac. 250; *Cooley*, Const. Lim. pp. 758, 759; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

The legislature has attempted to select from the genus political parties, a certain species, and to confer upon that species privileges which it denies to others.

Dougherty v. Austin, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *Bruch v. Colombet*, 104 Cal. 347, 38 Pac. 45; *Darcy v. San José*, 104 Cal. 642, 38 Pac. 500; *State ex rel. Richards v. Hammer*, 42 N. J. L. 439; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

The primary act is void in that it violates 51 L. R. A.

§ 1, art. 2, of the Constitution. It prohibits and prevents electors from freely exercising the right of suffrage.

A primary election is an election authorized by law, and no elector can be denied the right of voting thereat.

Spier v. Baker, 120 Cal. 370, 41 L. R. A. 196, 52 Pac. 659.

A voter is not alone to vote, but to cast his vote upon the same free and untrammelled conditions as other voters.

Eaton v. Bruton, 96 Cal. 373, 17 L. R. A. 697, 31 Pac. 250.

The legislature may regulate the mode of exercising the right of suffrage, but this regulation must be subordinate to the Constitution and the rights of voters.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *Monroe v. Collins*, 17 Ohio St. 665; *State ex rel. Lamar v. Dillon*, 32 Fla. 579, 22 L. R. A. 124, 14 So. 383; *Sanner v. Patton*, 165 Ill. 563, 40 N. E. 290.

The primary law is contrary to § 1, art. 2, of the Constitution, and therefore void, in that it deprives voters physically incapable of writing or fixing "pasters" to the ballot, of the right of suffrage.

Spier v. Baker, 120 Cal. 370, 41 L. R. A. 196, 52 Pac. 659; *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388; *Dells v. Kennedy*, 49 Wis. 555, 6 N. W. 246, 381; *Daggett v. Hudson*, 43 Ohio St. 548, 3 N. E. 538; *Edmonds v. Banbury*, 28 Iowa, 207, 4 Am. Rep. 177.

The primary law provides that the delegates to conventions shall be voted for, indiscriminately, by the members of all parties, and prevents each party from holding a convention composed of delegates elected by the voters exclusively of its party. It takes from parties the right of representation, and authorizes frauds upon the parties and the public.

People v. Cavanaugh, 112 Cal. 675, 44 Pac. 1057; *State ex rel. Metcalf v. Johnson*, 18 Mont. 548, 34 L. R. A. 313, 46 Pac. 534; *Ex parte Jentzsch*, 112 Cal. 472, 32 L. R. A. 664, 44 Pac. 803; *Spier v. Baker*, 120 Cal. 380, 41 L. R. A. 196, 52 Pac. 659; *McDonald v. Hinton*, 114 Cal. 487, 35 L. R. A. 152, 46 Pac. 870.

Messrs. Franklin K. Lane, M. M. Eatee, and Gavin McNab, for respondents:

It is only laws of a general nature which must have a uniform operation.

Hellman v. Shoulters, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057; *People ex rel. Smith v. Twelfth Dist. Judge*, 17 Cal. 547; *Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600; *People v. Central P. R. Co.* 105 Cal. 576, 38 Pac. 905; *Abeel v. Clark*, 84 Cal. 227, 24 Pac. 383.

The primary election law answers precisely the constitutional requirement of uniformity. It relates to, and operates uniformly upon, the whole of a single class; it operates uniformly upon that class of voters who seek to manifest their selection of nominees to party offices through the medium of party conventions. It operates uniformly upon the whole of the class of candidates for public office who seek to obtain

place upon the official ballot at general and local elections through the medium of those conventions.

It does not, and is not intended to, operate upon those electors who desire to manifest their selection of nominees to public office by means of individual petition.

Abeel v. Clark, 84 Cal. 230, 24 Pac. 383.

In many states a per cent limit has been adopted and upheld as constitutional.

McCrary, Elections, § 699; *De Walt v. Bartley*, 146 Pa. 543, 15 L. R. A. 771, 24 Atl. 185; *Schulcr v. Hogan*, 168 Ill. 369, 48 N. E. 195; *State ex rel. Lewis v. Kinney*, 57 Ohio St. 221, 48 N. E. 942; *Re Cantine*, 14 Misc. 139, 35 N. Y. Supp. 584; *Corcoran v. Bennett*, 20 R. I. 3, 36 Atl. 1122; *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35; *Miner v. Olin*, 159 Mass. 489, 34 N. E. 721.

The primary election law does not take from political parties the right of representation, nor authorize frauds upon the parties and the public.

This court will not seek for trifling reasons to declare the primary law void. It must appear to be violative of the cardinal principles of constitutional government before this will be done.

Stockton & V. R. Co. v. Stockton, 41 Cal. 147; *University of California v. Bernard*, 57 Cal. 613; *Bourland v. Hildreth*, 26 Cal. 161; *Day v. Jones*, 31 Cal. 263; *Pratt v. Oran*, 58 Cal. 535; *Woodward v. Fruitvale Sanitary Dist.* 99 Cal. 554, 34 Pac. 239; *People ex rel. Morgan v. Hayne*, 83 Cal. 111, 7 L. R. A. 348, 23 Pac. 1; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675.

Mr. W. B. Treadwell, amicus curiæ:

The legislature of this state is not omnipotent. Its power is limited, not merely by the express restraints imposed upon it by the words of the Constitution, but by certain principles inherent in the nature of free government by the people, which are presupposed by, and implied in, the Constitution, and to which it owes all of its operative force.

Cooley, Const. Lim. 174-176; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Durkee v. Janesville*, 28 Wis. 467, 9 Am. Rep. 500; *People ex rel. Detroit & H. R. Co. v. Salem Twp. Bd.* 20 Mich. 452, 4 Am. Rep. 400; *Janesville v. Carpenter*, 77 Wis. 303, 8 L. R. A. 808, 46 N. W. 128; *Ingram v. Colgan*, 106 Cal. 113, 28 L. R. A. 187, 38 Pac. 315, 39 Pac. 437.

If there be any inherent and inalienable right of the electors of the state, which cannot be supposed to have been surrendered to the legislature, it is the right of political association.

Self-preservation is an inherent right of political parties as well as of individuals.

Whipple v. Broad, 25 Colo. 407, 55 Pac. 172.

Mr. T. C. Spelling, also, amicus curiæ.

Henshaw, J., delivered the opinion of the court:

An act approved March 3, 1899 (Stat. 51 L. R. A.

1899, p. 47), the legislature added certain sections to the Political Code, providing thereby an exclusive scheme controlling political parties in holding their conventions for the nomination of candidates to public office. The act is known as the "Primary Election Law," and for convenience may be so designated. Plaintiff, a resident and taxpayer of the city and county of San Francisco, by his complaint sought an injunction against the defendants, constituting the board of election commissioners of the county of San Francisco, to restrain them from expending the public moneys of the city and county under the terms of this law, alleging it to be unconstitutional and void. Defendants' general demurrer to the complaint was sustained, and plaintiff, declining to amend, appeals from the judgment against him which followed.

Conventions of political parties, consisting of representatives of the voters of such parties, assembled to deliberate and place in nomination their candidates for various public offices, have long been known in the history of this country. Heretofore the methods which political parties might adopt for the selection of delegates to such nominating conventions have usually been left to party organization, and the legislature has contented itself, when it has seen fit to act at all, with conservative, tentative, and permissive acts, such as found expression in the earlier primary law of this state (Stat. 1866-66, p. 438), popularly called the "Porter Primary Law." In 1897 the legislature made its first essay in mandatory and compulsory legislation touching the holding of primary elections. Stat. 1897, p. 115. That law was declared unconstitutional, as imposing limitations and conditions upon the right of suffrage other than such as were named in the Constitution itself; and grave doubt was expressed as to the power of the legislature to prescribe a voting test, and impose it upon political parties and their members as a prerequisite to their right to participate in party affairs. *Spier v. Baker*, 120 Cal. 370, 41 L. R. A. 196, 52 Pac. 659. In the present law the legislature has omitted certain obnoxious features found in the earlier act, but has introduced others which go to the essence of the legislation, and which we are earnestly told, in argument, are violative of the constitutional rights of the people, both express and implied.

That a compulsory primary law, such as this, forms a part of the general election laws of the state, is not, we think, debatable, and has been distinctly decided. *Spier v. Baker*, 120 Cal. 370, 41 L. R. A. 196, 52 Pac. 659. At the outset the law declares that all delegates to conventions of political parties for the purpose of making nominations of candidates for public offices shall be elected at elections conducted under the regulations in the act provided. There is at once to be perceived an express limitation upon the powers of political parties, which heretofore they have exercised, of adopting their own modes for the selection of their

representatives. It is a part of the political history of this state and of the United States that such powers, whether resting in right, or merely in the permissive silence of the legislature, have been freely enjoyed. In some instances political parties have had recourse to primary elections, under such regulations and tests as the executive managers of the party might prescribe. In others, resort was had to the organization of precinct or district political clubs, with an enrolled membership; the members thus duly entered having alone the right to select delegates to the nominating conventions. But we will not now stop to consider whether political parties have heretofore enjoyed these privileges as of right, or merely under permission. We have referred to the matter only as illustrating the bold innovation of this legislation, and thus of an added necessity for a careful scrutiny and consideration of its terms. This much, however, we think will be freely conceded by advocate as well as by antagonist of the law: That, if the legislature takes unto itself the regulation and control of these internal affairs of political parties, it must do so without discrimination, and with equal consideration and benefit to all. With the wisdom or the policy of the law this court, of course, can have nothing to do; but, if the law be wise and beneficent, every organized political party must come under its cloak. If, upon the other hand, the law be unwise or inexpedient, none the less every political party must equally suffer the burden and bear the consequences. But here we are confronted with a provision in this law denying its rights and privileges to all political parties which did not cast at the next preceding election at least 3 per cent of the total vote. In other words, no matter how well organized a small political party may be, no matter how devoted its adherents may be to its tenets, they are denied a representation upon the primary ballot, cut off from all benefits of the law, prohibited from holding a nominating convention (because only under the provisions of this law can such a convention be held), and are thus absolutely debarred from the privileges and protections accorded to other political parties. This is not the case where the state, as matter of regulation when called upon to print ballots at public expense, restricts the names to be printed thereon to the parties polling a certain percentage of the votes. Even upon this question there has been a division in the courts; some holding it to be a mere matter of regulation, and not an interference with the right of suffrage, and others maintaining that it confers a special privilege upon the stronger of the political parties. But where such laws have been upheld the right of the voter freely to express his preference has always been preserved, as in this state, by blank spaces wherein he may write the names of the candidates of his choice. This law contains no such provision. Minor political parties are denied any right of representation upon the

ballot, and are in effect forbidden to hold political conventions under the protection of the law. It is no answer to this to say that they may still cause the names of their nominees to be placed upon the election ballot by petition. The objection is not that they may not in some way preserve this important right, but that they are denied the means to accomplish this result by the holding of a convention; that they are denied the right freely to assemble under the protection of the law,—a right preserved to them both by the Constitution of the United States and of the state of California,—while other political parties, no differently situated, saving that they are numerically stronger, are given this right, and protected by all of the machinery of the law in its exercise. Political conventions are, after all, but public assemblages of the people, having for their end the discussion of ways and means for the public good. By the declaration of rights of the Constitution of this state the people have the right to assemble freely to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances. Article 1, § 10. No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens (§ 21), and all laws of a general nature shall have a uniform operation (§ 11). How can it be said that a law which protects by legislation a certain number of citizens, forming one political party, and deprives a fewer number of citizens, forming another political party, of the same protection, is not violative of these provisions? Or how shall it be said that a man belonging to a party holding certain political principles may not participate in a primary election, when his neighbor, of different political faith, is accorded the right so to do? The case in this regard is identical in principle with the views expressed by Mr. Justice Garoutte in his concurring opinion in *Eaton v. Brown*, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250, where he says: "It is very apparent from the reading of the act that in both spirit and letter it was intended that only parties polling three per cent of the entire vote cast at the last general election should have a heading upon the ticket. Such being the fact, to my mind the law is clearly unconstitutional." Moreover, if the legislature may deny the protection of its laws to a political party which has cast less than 3 per cent of the votes, why may it not deny the same right to a party which has cast 49 per cent of the votes? This is not a mere matter of regulation, as in the case of the election ballot. It is the deprivation of the one party, and the conferring upon another, of certain important political privileges, and answer to it cannot be made by saying that the 3 per cent limit is reasonable, while a 49 per cent limitation would be unreasonable. It is a question of power. Either the legislature has or has not the constitutional power so to do. If it has the power, the question of reasonableness or un-

reasonableness is for the legislature alone, and a court would no more be justified in overthrowing the law because it believed a 49 per cent limitation to be unreasonable, than, in the absence of such power, it would be warranted in upholding a 3 per cent limitation because it might believe it to be reasonable. And upon this we think that, under the express limitations upon the power of the legislature in the sections of the Constitution above adverted to, the legislature has not such power; for the effect of its act here under consideration is not only to discriminate between political parties and the members thereof, but absolutely to work the disfranchisement of voters, or to compel them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise.

It is further contended against this law that in its present state it works an unwarranted invasion of the rights of political parties, and this contention merits more than a passing notice. No one can be so ignorant as not to appreciate the value—indeed, the necessity—of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution, which seeks to give expression and effect to the wisest and best ideas of its members. No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its Constitution. Says Judge Cooley, in discussing this general subject (Const. Lim. p. 174): "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of power; and, if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done. . . . The right of local self-government cannot be taken away, because all our Constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government. The bills of rights in the American Constitutions forbid that parties shall be deprived of property except by the law of the land, but, if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. . . . There is no difficulty in saying that any such act which, under pretense of exercising one power, is usurping another, is opposed to the Consti-

tution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves." As early as 1798 the Supreme Court of the United States, speaking through Mr. Justice Chase, in *Calder v. Bull*, 3 Dall. 380, 1 L. ed. 648, said: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution or fundamental law of the state. The people of the United States erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and, as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments,—that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." And in *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 665, 22 L. ed. 455, that same tribunal declared: "It must be conceded that there are such rights in every free government beyond the control of the state. . . . There are limitations on such power which grow out of the essential nature of all free governments,—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Active political parties—parties in opposition to the dominant political party—are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said, "Self-preservation is an inherent right of political parties as well as of individuals." *Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172. A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised in devising methods to check political corruption and

fraud; but the legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing or even permitting the opponents of an organized political party to name the delegates to the nominating convention of that party would not for a moment be countenanced. Yet that, in effect, is precisely what the act under consideration does permit. It provides that the primary elections of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations,—past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly, and not in violation of any law, but in strict accordance with the law, names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not,—whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members, and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men authorized by this law to represent it and place upon the general election ballot, as its candidates, those whom they might select,—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly announced in the declaration of rights that the enumeration therein contained shall not be construed to impair or deny other rights retained by the people. Art. 1, § 23. A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights.

For the foregoing reasons, the judgment of the trial court is reversed, with directions that it overrule the demurrer of defendants.

We concur: **Van Dyke, J.; McFarland, J.**

I dissent: **Beatty, Ch. J.**

Temple, J., concurring:

I concur in the judgment on the second ground discussed by Mr. Justice Henshaw, and for the following additional reasons: The act itself recognizes the necessity of political parties, and they are in fact the instrumentalities through which the people govern. A political party is an association of citizens who agree on certain lines of policy, and the purpose for which it exists is to impose that policy upon the government. This can only be done by electing to office those who are in favor of such policy. It is for this that conventions are held and candidates selected. To do this, it is absolutely necessary that the party shall be able to exclude from its conventions, and from controlling positions in the party, those who are

not in accord with its principles. It must have the power to prescribe its own tests. It is the test that determines what the party shall be. To deprive the party of this power is to destroy it. No one would contend that the legislature can prescribe what the test shall be. If it could do this, it could prescribe what parties shall exist. And then parties sometimes divide on great public questions. In such case the party retaining the old name would have the right, by proper tests, to exclude those formerly affiliated with it, but who now differ. Unless a party can do all these things, it has no security that the candidates put forth in its name represent its principles. And then the management and control of its organization may be taken out of its hands and given to its enemies. All this right of self-control the primary election law takes from the party organization. The party is destroyed, or may be, and the members practically denied the right of free suffrage. And then there may happen to be a new party which did not exist at the previous election. Why should it, or, indeed, other political parties polling less than 3 per cent of the votes, be denied the benefit of the protection of this law, if it be a protection?

Harrison, J.: I concur in the above opinion.

Garoutte, J., dissenting:

I dissent. In the Australian ballot law a declaration is found defining what constitutes a political party within the purview of the act, and then it is further declared that those parties are entitled to hold political conventions and nominate candidates for office. The vital element going to make up a political party under that act is that it shall have polled 3 per cent of the entire vote cast at the last election. The primary law does not attempt to define the phrase "political parties," but declares that only those political parties which polled 3 per cent of the total vote cast at the last election shall participate in primary elections. In other words, this is a declaration that only those political parties which are entitled to hold conventions and nominate candidates for office under the Australian ballot law are entitled to hold primary elections. It is thus apparent that the primary law refers to a great class of political parties. And, if the political parties declared and recognized by the Australian ballot law form a constitutional class, then the primary law in dealing with the same class of political parties is likewise constitutional. While the question has never been decided in this state, it has been decided in other states, and held that a classification of parties upon the basis of a certain percentage of the total vote cast at the last election is not violative of constitutional provisions. Indeed, it seems to me that the declaration of the state legislature found in the Australian ballot law as to what shall constitute a political party within the meaning of that act is constitutional legislation. For these reasons, I do not deem the 3 per

cent clause of the primary election law obnoxious to the Constitution of this state. It may be further suggested that, as the Australian ballot law does not recognize an organization as a party which failed to poll 3 per cent of the total vote cast at the last election, no substantial benefits could be derived by such a party in participating in primary elections, for the nominees of a convention composed of delegates selected at the primary election by such party would not be entitled to a place upon the ballot. It must be borne in mind always that the primary law in this regard is not dealing with voters as individuals, but with political parties as such. If the declaration found in the present Australian ballot law, defining what shall constitute a political party, had been in that law at the time *Eaton v. Brown*, 96

Cal. 371, 17 L. R. A. 697, 31 Pac. 250, was decided, I am not prepared to say that my views as there expressed would have been the same. It may be further suggested that under the present law, the ballot being entirely secret, and every voter being allowed to cast his vote for the delegates of any party represented upon the ballot, the result is that Democratic voters may elect delegates to Republican conventions, and Republican voters may elect delegates to Democratic conventions, and thereby absolutely own and control the conventions of opposing political parties. I am not prepared to say that the existence of these conditions clearly renders a law unconstitutional which permits it. But I am prepared to say that a law of that character presents a most anomalous state of affairs.

COLORADO SUPREME COURT.

DENVER & RIO GRANDE RAILROAD COMPANY, *Appt.*,

v.
Henry C. SPENCER *et al.*

(.....Colo.....)

1. The question of the negligence of a railroad company in placing a baggage truck between two tracks, in the space used for receiving and discharging passengers, of such width that as originally placed it would clear a train passing upon either side, but so constructed as to veer easily so that a moving train would come in contact with it and render it dangerous to passengers within the space, is for the jury, in an action to recover damages for the death of a man killed while awaiting the arrival of a relative on an incoming train, where the engine, baggage and smoking car cleared the truck, but the next car, though of the same width, struck and hurled it against deceased, inflicting the injuries from which he died.
2. Fatal injuries to a person at a railroad station awaiting the arrival of a relative, at the place provided by the company for that purpose, and while in the exercise of due care and caution, render the railroad company liable if caused by negligence of its employees.
3. The contributory negligence of a person killed through the negligence of railroad employees while awaiting the arrival of a relative on an incoming train, in the space between two tracks, used by the company for receiving and discharging passengers, is a question for the jury, where the situation did not suggest imminent danger.
4. A third person may testify as to a conversation between one fatally injured at a railway station and a relative alighting from an incoming train which purported to explain the decedent's presence at the station.
5. Four thousand dollars is excessive compensatory damages for the death of a man sixty-eight years old, whose net worth at the time of his death was little more than \$6,400, and whose annual income

arising from his personal exertions, after deducting personal expenses, was \$1,000, in an action by persons whose sole claim is for diminution of the estate in which they are entitled to share.

(May 21, 1900.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action to recover damages for the alleged negligent killing of plaintiff's father. *Reversed.*

The facts are stated in the opinion.

Messrs. Wolcott & Vaile and *Henry F. May*, for appellant:

There was clear negligence on the part of the deceased, without which no injury would have been sustained by him.

Even a passenger is bound to use some care; and a person who is not in that relation may not neglect the precautions that are ordinarily imposed, nor may he assume that the company has made its way safe.

Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108; *Denver & R. G. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269.

Deceased had no right to neglect precautions ordinarily imposed upon all persons not holding the relation of passenger to the carrier.

Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 372, 20 L. R. A. 729, 33 Pac. 108.

It cannot be said that leaving a truck in such a place is a negligent act because it may be expected that it will be thrown against a bystander, and at the same time be said that a man standing practically in contact with it, and having passed it twice within a very few moments preceding, was not in as good a position to see any danger that there was as the company or any of its servants.

He failed to exercise ordinary care, and assumed the risks from the position he took with reference to the standing truck and the approaching train.

Casey v. Canadian P. R. Co. 15 Ont. Rep.

NOTE.—As to duty of carrier to person going to station to see a relative off, see *Dowd v. Chicago, M. & St. P. R. Co.* (Wis.) 20 L. R. A. 527, and *note*.
51 L. R. A.

574; *Duverniet v. Morgan's L. & T. R. & S. S. Co.* 49 La. Ann. 484, 21 So. 644; *McGeehan v. Lehigh Valley R. Co.* 149 Pa. 188, 24 Atl. 205.

Pecuniary loss, not to the estate of the deceased person, but to those who had a reasonable expectation of pecuniary benefit, as of right or of duty, or from a recognized sense of obligation, from the continuance of the life, is the foundation of the action.

It is the injury to the survivors entitled to sue, and not the value of the life lost, that forms the basis of damages.

Louisville, N. A. & C. R. Co. v. Goody-koonitz, 119 Ind. 111, 21 N. E. 472; *Diebold v. Sharpe*, 19 Ind. App. 474, 49 N. E. 837.

Mr. N. Q. Tanquary, for appellees:

The correct test of the liability of plaintiff to the charge of contributory negligence was whether a prudent person in the same situation, and with the knowledge possessed by plaintiff, would have done what he did.

Texas & P. R. Co. v. Best, 66 Tex. 116, 18 S. W. 224.

An extensive and technical knowledge of what might constitute a source of danger under such circumstances is not required or expected of the ordinary prudent person.

Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787.

As a matter of law it cannot be said that negligence of the deceased directly contributed to his death, and whether it was true as a matter of fact was for the consideration of a jury.

Kansas P. R. Co. v. Twombly, 3 Colo. 125; *Denver, S. & P. R. Co. v. Wilson*, 12 Colo. 27, 20 Pac. 340; *Solly v. Clayton*, 12 Colo. 30, 20 Pac. 351; *Moffatt v. Tenney*, 17 Colo. 191, 30 Pac. 348; *Denver Tramway Co. v. Reid*, 22 Colo. 362, 45 Pac. 378.

Deceased had the right to approach the train to accomplish his purpose, and it was manifestly the duty of the defendant company to keep its platforms and approaches in a safe condition for the use of those who might seek, or have been invited, to do business with it.

McKone v. Michigan C. R. Co. 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Texas & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 187, 8 Am. Rep. 415; *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954; *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800, 2 So. 586.

The rule allows as compensatory damages the estimated accumulations of the deceased during the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health, and ability.

Hayes v. Williams, 17 Colo. 474, 30 Pac. 352; *Kansas P. R. Co. v. Lundin*, 3 Colo. 94.

Gabbert, J., delivered the opinion of the court:

At the station of Colorado Springs appellant **L. R. A.**

lant maintains several parallel tracks. At the time deceased received the injuries resulting in his death, one of these tracks, adjacent to the station proper, was occupied by a Rock Island train, which was "cut" to allow access to trains arriving on tracks beyond. Employees of appellant left a truck, used for handling baggage, between the track occupied by the Rock Island train and the one next beyond, so situate, it is claimed, that trains upon each of the tracks between which it was placed would clear it. When these tracks were each occupied by trains, the space between the sides of the cars would be 5 feet 8 inches in width. The width of the truck was such that, if placed equidistant between the two tracks, it would clear the trains upon each by 1 foot and 7 inches. The space between these tracks where the truck was placed was used by appellant to receive and discharge passengers. The deceased went upon this space for the purpose of meeting his daughter-in-law, whom he expected upon one of appellant's trains, which arrived over the track next to the truck, and next to the one upon which the Rock Island train was standing. He was moving up and down this space, in the near vicinity of the truck, when the expected train arrived. The engine, baggage, and smoking cars cleared the truck, but for some unexplainable cause, other than the inference that it must have been moved by someone, the next, though no wider than those that had passed, did not, but hurled it against deceased, inflicting injuries from which he shortly expired. He was seen to have passed and repassed this truck before the arrival of appellant's train. The truck was noticed by the engineer and fireman of the incoming train, who concluded that their train would clear it. The engineer also noticed people in the vicinity of the truck. It was so constructed that it could be easily veered at either end. Upon this state of facts, counsel for appellant contend that no negligence upon its part has been shown, and, even if there was, the accident would not have happened but for the negligence of the deceased.

The first question presented is, Was the placing of the truck between the tracks in the limited space provided, and in the immediate vicinity of where the trains of appellant received and discharged passengers, negligence? Although originally so placed that a moving train upon either track next to which it stood would clear it, yet its construction was such that it could be easily veered, when its position would be such that it would come in contact with a moving train. This would result in danger to those within that space, in line with the direction the truck would be impelled by contact with a moving train. From these facts and circumstances, the jury concluded that appellant was guilty of negligence. When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instruc-

tions, whether or not negligence has been established. *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148; 2 Thomp. Neg. 1236; *Colorado C. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; Shearm. & Redf. Neg. § 11; *Empson Packing Co. v. Vaughn* (Colo.) 59 Pac. 749. Under this rule, the evidence is clearly sufficient to support the conclusion of the jury that placing the truck between the tracks was negligence on the part of appellant.

The next question presented is whether or not deceased was guilty of negligence, but for which the accident would not have occurred. In this connection counsel for appellant make some suggestions relative to the comparative degrees of care which a carrier is required to exercise as between passengers and those who are not. We do not believe it is necessary to go into a discussion of this question. Deceased was lawfully at a place provided by appellant for the purpose for which he was there, at the proper time to carry out that purpose; and injuries received by him at this place through the negligence of its employees, while in the exercise of due care and caution upon his part, appellant is responsible for. *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *Pierce, Railroads*, 275; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954.

It is urged by counsel that, as deceased must have seen the truck, he should have comprehended the situation, realized the danger to which he was exposed, could have avoided it, and, having failed to do so, such failure was contributory negligence upon his part, which caused the accident. When, on the question of contributory negligence, the facts and circumstances are such that different minds may honestly draw different conclusions therefrom on this subject, it is within the province of the jury to determine that question. *Kansas P. R. Co. v. Tuomblly*, 3 Colo. 125; *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Denver Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378. While, on the other hand, if the undisputed facts are such that the inference of contributory negligence is the only conclusion which can be logically deduced, the question is one of law, for the court. For the purpose of ascertaining whether or not, on the established facts, deceased was so clearly guilty of negligence that this question is one of law alone, or whether, from the evidence, it was for the jury to determine, as a matter of fact, it is only necessary to refer briefly to the evidence, and the acts of the employees of appellant. If the presence of the truck, in the position it was, should have at once suggested to the mind of an ordinarily prudent person that it was liable to come in contact with the incoming train, then certainly it would have been the duty of the engineer and fireman, who were aware of its location, and who knew that persons were in its immediate vicinity, to have taken steps to prevent such a disaster, and their failure

to do so would have been wantonly reckless conduct upon their part. When this case was here before (25 Colo. 9, 52 Pac. 211), it was held, upon evidence which is substantially the same as now presented by the record in the case at bar, that an instruction to the effect that if the jury found from the evidence that deceased was guilty of contributory negligence, appellant was not responsible, unless it appeared that its servants and employees were guilty of reckless conduct, was erroneous, for the reason that the evidence did not justify any such an instruction; there being no evidence tending to prove reckless conduct on the part of such employees. The conclusion deducible from this holding is that the presence of the truck, in the situation it was, did not suggest imminent danger. If this danger was not suggested to the minds of railroad employees whose experience would cause them to anticipate dangers from sources which would not make a similar impression upon the minds of those not versed in the hazards of railroading, it certainly cannot be said, as a matter of law, that deceased should have detected danger which the employees of appellant did not. It is apparent, therefore, from the facts and circumstances, that whether or not the truck, situated as it was, should have suggested to deceased the danger to which he was exposed from that source, is a question upon which different intelligent and honest minds might draw different conclusions, and the question of contributory negligence was therefore properly left to the determination of the jury. The finding that he was not guilty of such negligence is fully supported by the evidence.

Errors are assigned and argued, based upon the giving and refusal of certain instructions. From the views expressed on the two questions of negligence, already considered, it is apparent that appellant cannot complain of either the instructions given or refused, and it becomes unnecessary to notice them in detail.

For the purpose of explaining the presence of the deceased at the place where he received the injury resulting in his death, evidence was admitted, over the objection of appellant, to prove that he had gone there for the purpose of meeting his daughter-in-law, who was expected to arrive from Denver. In the former opinion in this case it was held that a conversation between the deceased and his daughter-in-law, from which it appeared that he had arranged to meet her, was admissible as part of the *res gestæ*, to explain his purpose in being at the place where he was injured. That ruling is therefore the law of the case on this subject, and cannot be disturbed; but counsel for appellant contend that the declarations of third persons cannot be received for the purpose of proving this arrangement. From an examination of the evidence, it does not appear that the declarations of third persons were admitted. The witness who testified on this subject only purported to give what he remembered and understood was the conversation which took

place between the daughter-in-law and deceased with respect to her request that he should meet her at Colorado Springs on the arrival of a train from Denver, to which he assented.

The final question relates to the amount of damages assessed by the jury. The verdict was in the sum of \$4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory. It did not exist at common law. The damages which they are entitled to recover must be limited to those of a compensatory character,—in other words, to such pecuniary damages as they have sustained by reason of the death of their father. As aptly stated by the late Justice Elliott in *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; . . . but it must be borne in mind that the recovery allowable is in no sense a *solatium* for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law." At the time of his death his wife was living, and survived him about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury. Was this instruction followed? At the time of his death, deceased was upward of sixty-eight years of age. His expectancy of life was about nine and a half years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about \$1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of \$1,500 per annum as 51 L. R. A.

an employee of a bank, and about \$500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this cannot be considered, in estimating his annual savings. We mention this, however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was \$6,400, because it appears that his other investments were encumbered in such an amount that, after deducting interest, there was but little left in the way of income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded. It cannot be fairly assumed, however, or expected, that at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employee in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. *Diebold v. Sharpe*, 19 Ind. App. 474, 49 N. E. 837. Except for the statute, appellees could not maintain this action. Its provisions are beneficent, but limited. In no case under it can damages exceed the sum of \$5,000. Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention, the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximating the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the law recognizes as elements of damages in such cases.

For these reasons, the judgment of the District Court is reversed, and the cause remanded for a new trial.

Campbell, Ch. J., not participating.

GEORGIA SUPREME COURT

SOUTHERN RAILWAY COMPANY, *Plff.*
in Err.,

v.

ATLANTA RAILWAY & POWER COM-
 PANY.

SAME, *Plff. in Err.,*

v.

ATLANTA RAPID TRANSIT COMPANY.

(111 Ga. 679.)

- *1. Even if the provisions of Civil Code, § 2219, are applicable to the crossing by a street railroad of any other railroad, the phrase, "heretofore or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed and made valid by an act of the general assembly. A company having such a charter may properly be termed one "chartered by the legislature."
2. No new burden or servitude is imposed upon a public street or highway by constructing and operating therein a street railway for the transportation of passengers, the cars of which are propelled by electric power.
3. That a street-railway company has, under its charter, authority to use steam as well as electricity as a motive power, is a matter of no consequence in testing its right in a given instance to cross a railway on a street under a municipal grant restricting the company to the use of electric power, and where it is not seeking to employ steam power.
4. A railroad corporation which is permitted to construct its tracks across an existing city street or public road does so subject to the condition that it must submit to the increased inconvenience to it which may result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road.
5. A company owning and operating a street railway of the character above indicated may, under the permission of the proper municipal or county authorities, construct its lines across the track of a steam-railroad company, and use the same, without instituting condemnation proceedings, or being required to pay damages.

(August 7, 1900.)

WRITS of error to the Superior Court for Fulton County to review judgments in favor of defendants in actions brought to enjoin defendants from constructing railway tracks over those of complainant. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by Lewis, J.

NOTE.—As to right of street railway to cross railroad without compensation, see *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 29 L. R. A. 483, and note.

As to right to cross railroad at grade generally, see *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* (Conn.) 29 L. R. A. 367; and *Northern C. R. Co. v. Harrisburg & M. Electric R. Co.* (Pa.) 34 L. R. A. 572. 51 L. R. A.

Messrs. Dorsey, Brewster, & Howell and *Henry A. Alexander*, for plaintiff in error:

Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its tracks across the tracks of another railway company located in a public street of a city.

Georgia Midland & G. R. Co. v. Columbus Southern R. Co. 89 Ga. 205, 15 S. E. 305.

One railway company cannot lay and use its track across the track of another railway company, located in a public street of a city, whether the company seeking to cross be a steam or a street railroad, or whether its construction will constitute a new servitude upon the street or not.

Ibid.

Whether a street railroad be an additional servitude upon a street or not, if it inflicts damage upon property, the owner can recover.

Campbell v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078.

The rule that a street-car company is no additional servitude upon a street was formulated under very different circumstances from those of the present case.

When street-car companies, by process of consolidation, operate great systems of more than 100 miles in length, interlacing the streets of the entire city; when electricity, an agent as powerful as steam, has displaced the horse, and substituted a network of wires and poles blocking the channel of the street; when the cars follow one after the other in endless succession at intervals of two or three minutes, and dominate all other traffic on the street; and when the cars themselves are as large and heavy as the coaches formerly used on steam railroads,—the rule is an absurdity, and runs counter to common observation and common sense.

Floyd County v. Rome Street R. Co. 77 Ga. 614, 3 S. E. 3.

The question as to the right of a railroad company to compensation when its track is crossed by a street railway within a public street has been directly decided only in a few very recent cases.

Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008.

Messrs. Goodwin & Hallman, John L. Hopkins & Sons, Rosser & Carter, King & Spalding, and Brandon & Arkwright for defendants in error.

Lewis, J., delivered the opinion of the court:

The Southern Railway Company brought suit in the superior court of Fulton county against the Atlanta Railway & Power Company and the Atlanta Rapid-Transit Company, corporations owning and operating lines of street railway in Fulton county, and in the city of Atlanta. The petition, in substance, alleged that plaintiff was in posses-

sion of, owned, and operated two lines of railroad, among others, leading from the city of Atlanta in a southeasterly direction, one running to the town of Ft. Valley, in said state, and the other to the city of Brunswick, Georgia, and each ran through Fulton county, and crossed what is known as the "McDonough Public Road" at grade level on said public road at a place designated as "Henderson's Crossing," in the county of Fulton. In the transaction of its business it was obliged to run and does run across said McDonough public road upon the lines of its railway a great many passenger and freight trains every day, and this renders Henderson's crossing an exceedingly dangerous and hazardous one. It alleges that the Atlanta Railway & Power Company, owning and operating a system of street railways in the city of Atlanta and Fulton county, was preparing and intending to lay its tracks across the line of plaintiff's railroad at Henderson's crossing on the McDonough road; that it had prepared everything for this purpose, and it would be accomplished unless enjoined from so doing. To permit this, it was charged, would render the use of the public crossing a constant menace of danger to the traveling public, and would at the same time do petitioner an irreparable injury in retarding the work and business in which it was engaged; would cause irreparable and perpetual damage to petitioner, resulting in delay to its business, and in accidents to both persons and property while crossing at said point. It was charged that the Atlanta Railway & Power Company was operating its street railway and proposing to cross plaintiff's track by virtue of a certificate of the secretary of state issued on May 16, 1891, which certificate was affirmed by the legislature on August 31, 1891. Plaintiff denied the power and authority of the defendant, under its charter and under the law by which it is operating, to cross the track at a grade level without defendant's consent; alleged that the purpose to cross the track would be consummated unless it was restrained by the court; and prayed for an injunction restraining defendant from in any manner laying its track across plaintiff's lines of railroad at Henderson's crossing, in the county of Fulton. Upon this petition a temporary restraining order was granted by the court. An amendment was added to the petition to the effect that the Atlanta Railway & Power Company was chartered by the secretary of state, and not by the legislature, and that the general law of the state regulating the crossing by one railroad of the track of another, as embodied in Civil Code, § 2219, restricts the right of crossing the track of another railroad to those railroad companies which are chartered by the legislature, and that, therefore, defendant is forbidden by law from crossing the track of petitioner. The right of plaintiff to cross McDonough road constitutes an easement of inestimable value vested in petitioner, and as the owner of such easement, it has a right to operate its road on said

51 L. R. A.

crossing, free from any hindrance or molestation whatever, save such as is incident to the ordinary use of said road by the public. The petitioner then specifies the damages which would result to plaintiff by increased delay of its business, wear and tear of its machinery, and danger to life and property from the crossing of its road by defendant. Defendant filed an answer to the petition, and denied the facts set up therein as to Henderson's crossing being dangerous and hazardous, as alleged. So far as any danger is concerned, it is caused by plaintiff's trains and traffic crossing over a public highway which existed thirty-five or forty years prior to the building of its railroad. Defendant claims a right to cross the track under and by virtue of the provisions of its charter, granted in the first instance by the secretary of state on May 16, 1891, in compliance with the general law for the incorporation of railroads, approved September 27, 1881, and subsequently confirmed by an act (Ga. Laws 1890-91, vol. 1, p. 169), approved August 31, 1891. It denies that the language quoted in the petition from § 9 of the act of September 27, 1881 (Code 1882, §§ 1689 (a) *et seq.*), was in force on May 16, 1891, when it was first incorporated, or on August 31, 1891, when its charter was confirmed by the general assembly of Georgia. It denied that its crossing plaintiff's road will have the effect of adding to the dangerous condition of the crossing; alleges it will only have the effect of diverting the travel on said highway from private vehicles and persons traveling on foot and horseback to and upon its cars, and, as a matter of fact, the result will be to largely minimize the chances for accidents; and that the building of its street railway on said public road will not create any additional burden upon said railway, and none upon said public road. It has a legal right to cross plaintiff's tracks with its street railway at grade level along and upon said McDonough road at Henderson's crossing. Defendant prays that plaintiff be enjoined and restrained from interfering with it in the construction of its railway on said public road at Henderson's crossing, and that the temporary restraining order granted against the defendant be dissolved. The answer, as amended, also denies the material charges in the amended petition of the plaintiff. A like petition was filed by the Southern Railway Company against the Atlanta Rapid-Transit Company to enjoin it from crossing its road on a street in the city of Atlanta. It appears that this road procured a franchise from the city of Atlanta to construct and operate its line along Decatur street and across the tracks of plaintiff to the city limits. Both these street railways procured like franchises from proper authorities to operate their railroads in Atlanta, and beyond the limits of that city to Decatur. It was conceded that the issues in these two cases were practically the same; the only difference being that the Atlanta Rapid-Transit Company also had in its charter the power to use steam, but the city conferred upon it

only the power to use electricity, and it did not propose to use any other motive power in the operation of its road. After hearing the evidence for plaintiff and defendants, the court denied the injunction prayed for in each case, and dissolved the former restraining orders granted. To these judgments plaintiff excepts. The grounds of error alleged are as follows: (1) Under the Constitution and laws of Georgia private property cannot be taken or damaged unless just compensation has been first paid; and the right of petitioner to cross Henderson's crossing was a valuable property right subsisting in it, and was embraced within the term "property" as used in the Constitution; and the construction of the street-railroad tracks across the tracks of petitioner was a taking and damaging of petitioner's said property right. (2) Although defendant was thus preparing and threatening to take and damage petitioner's property, it had neither paid nor offered to pay, nor had it taken any steps to ascertain, the damages that petitioner would suffer by such crossing of its tracks. (3) The acts of the defendant in building its tracks across the tracks of petitioner without first paying just compensation for damages inflicted was an unlawful trespass upon petitioner's rights, and without authority of law. (4) For the acts complained of petitioner was remediless at law, and could receive adequate relief only in a court of equity. (5) The evidence and pleadings show that the defendant, the Atlanta Railway & Power Company, had been incorporated by act of the secretary of state, and under the law of Georgia only those railroad companies which were chartered by the legislature have the right to cross the tracks of another railroad company at grade. The same questions were raised in the case against the transit company, except the one last mentioned; and as to this company the point as to its charter power to use steam was insisted upon.

1. One point made by the petition in this case against the Atlanta Railway & Power Company is that this company, in the light of the history of its charter, has never been incorporated by the legislature of this state, but was incorporated by certificate from the secretary of state, and that, therefore, under Civil Code, § 2219, as the privilege of one railroad company crossing another is only given to such companies as are chartered by the legislature of this state, this defendant company has no right at all to cross plaintiff's road. We do not think, however, that a street railroad constructed on a public highway, with consent of the proper authorities having jurisdiction over such highways, needs any benefit from the provisions of Civil Code, § 2219. Being a public highway, it has, independently of that section, a right to cross the tracks of a railroad crossing the public road, just as any other vehicle or mode of transportation on such public road might cross the same, provided it duly obtains a license from the proper authority in charge of the street or road it proposes to

51 L. R. A.

use. But, even if the provisions of Civil Code, § 2219, are applicable to the crossing by a street railway of any other railroad, we are quite confident that the phrase, "heretofore or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed or made valid by an act of the general assembly. While this defendant company originally obtained its charter from the secretary of state, the same has since been confirmed by an act of the legislature of August 31, 1891 (Acts 1890-91, p. 169). It is therein declared: "That all charters theretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates." See *Almand v. Atlanta Consol. Street R. Co.* 108 Ga. 423, 34 S. E. 6 *et seq.*, where the charter powers of this defendant company were thoroughly discussed by this court, and where the act of August 31, 1891, above cited, was recognized by the court as confirming by direct act of the legislature all charters theretofore granted by the secretary of state.

2. The main contention in behalf of plaintiff in error in these cases is that the defendants have no right to cross its track even on these public highways without first making compensation for the damages which would result therefrom. It is obliged to be conceded that no such damages can be claimed unless the acts of the defendant complained of would amount to an invasion of some property right of the plaintiff resulting in its injury and damage. It appears from the record that many years before plaintiff's line of railway was constructed over the highways in question they had been in use for travel by the public. The only right the railway company acquired was necessarily simply an easement to cross these highways with its lines of railway, and to transport across the same its freight and passengers. It acquired no fee-simple title whatever to any portion of the road, but necessarily received its easement subject to the right of the public to continue to freely use the highway for travel. This, of course, does not imply that the government authorities having control of these highways cannot, as the public exigencies and convenience may require,—for instance, by an increase of population in cities or towns,—add to the facilities for travel over such roads. These authorities would have as much right to grant licenses and privileges to others to use vehicles and conveyances propelled by different kinds of power for the purpose of accommodating the public, and for the public benefit, as the plaintiff company would have to increase the number of cars and engines on its line of railway, and the frequency of trips across these highways, whenever this would be demanded by the increase in its business. If, for instance, in this case, it should happen that the present business of the plaintiff company requires twice as many cars and engines now as it did soon after its first con-

struction, can it be pretended that either the county or the municipal authorities would have a right to exact of it any pay for such further privileges before they could be exercised? Now, if these electric car companies impose no new burden or servitude upon the public streets or highways by constructing and operating thereon street railways for the transportation of passengers, the cars of which are propelled by electric power, it will necessarily follow that passing over a railway track crossing a public highway does not make them liable for any damages. Whether or not a company engaged in the operation of electric cars upon the streets of a city or the public roads of a country would thereby impose a new servitude upon such roads, and would, therefore, be liable to damages which others might sustain in consequence thereof, seems to be an open question in this court. In the case of *Floyd County v. Rome Street R. Co.* 77 Ga. 614, 3 S. E. 3, it was decided that a railroad operated by horses on a public highway is not an appropriation of that highway to a different use. It will be seen from the facts in that case that the county of Floyd had constructed a bridge which spans a river at the foot of Howard street, in Rome, Georgia, and placed it under the control and management of the authorities of the city of Rome. The Rome Street Railroad Company was empowered by its charter to lay out, construct, equip, use, and employ street railroads in the city of Rome and Floyd county, and was given power to cross the bridge in question. That bridge was afterwards washed away. The county constructed a new one, and then sought to enjoin the street-railroad company from running its track over the bridge without paying compensation therefor. The injunction applied for was refused, which refusal was affirmed by this court. On page 618, 77 Ga., and page 4, 3 S. E., Hall, J., delivering the opinion, said: "The laying of railroad tracks in a public highway or street does not subject it to a new use or servitude. Its use is 'not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes, which were then unpractised and unknown.'" It was further announced: "A railroad operated by horses on a public highway is not an appropriation of that highway to a different use;" and it was recognized that in some states the decisions go so far as to hold that the appropriation of a highway to the use of a railroad propelled by steam would not change the use to which it was originally dedicated, while in others the contrary was held as to steam railroads. It is true this decision had reference to street railroads operated only by horse power; but we cannot conceive how, if the cars are operated by electric power, they can produce any more burden or servitude than those operated by horse power. The latter certainly, with the horse and car combined, would take up more space on the street than the ordinary electric car; and the facilities for stopping and avoiding accidents are certainly not any

61 L. R. A.

greater than they would be when electric power is used. This question, however, has been passed upon by courts of last resort in other states, and we have failed to find a single case where it has ever been held that a street-car company, it matters not by what power its cars are propelled, did not have a right, after receiving a grant from proper municipal or governmental authorities, to use streets, and to pass over the lines of other railways that may cross such streets, without being liable in damages to such other railway companies. There is, however, abundant authority to sustain the contrary view. In *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604, it was held: "Since it is the settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street-railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. Hence it is not error to enjoin a steam-railway company from interfering with a street-railway company where the latter is proceeding to construct a proper crossing at its own expense." In that case it appeared that the steam-railway company sought to interfere with a street-railway company, which was operated by electricity, and to prevent it from proceeding to construct a crossing over the railway of the former. The street-railway company applied for an injunction, and the grant of the same was sustained by the supreme court of Indiana. It was further decided in that case that the same principle applies where the crossing is in a public highway not a street. See this same case reported in 151 Ind. 577, 46 N. E. 999, in which the principle was reaffirmed. In *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008, it was held: "The fact that the tracks of a railroad company are laid across city streets, and its cars permitted to pass over them, gives the company no exclusive use of the crossing, but only a use to be enjoyed in common with the public. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation. Permission to a street-railway company to lay its tracks in a public street is not a grant of an additional easement in the soil of the street, such road being merely a modification of the existing public use, adding thereto an additional mode of conveyance, and inflicting no damage upon the owner of the fee." It appears in that case that the street-railway company intended to lay its tracks and operate its cars by animal power only, although it had the right to use cable, electric, or other motive power. In *Elizabethtown, L. & B. S. R. Co. v. Ashland & C Street R. Co.*

96 Ky. 347, 26 S. W. 181, it was held: "When a railroad company has obtained the right to pass over a turnpike by the permission of those controlling the road, the right thus acquired is not exclusive of the rights of the public, or of such uses and purposes as those for which public highways and streets are established, among which uses are the establishment and operation of street railways. Therefore the railroad company has no such property rights in the crossing as entitle it to compensation from a street-railway company crossing its track at that point, the progress of the cars of the former not being unreasonably impeded or interfered with." It seems from that case that the charter of the street railway empowered it to use steam, horse, or other propelling power for the transportation of its passengers. Counsel for plaintiff in error seek to distinguish that case from the one at bar by reason of general and special legislation, and special grants to the street-railway company; but we fail to see from the record and report of that case that the street railway had any more special grant of power to use the streets and highways where it had its road in operation than the defendants in this case have under the law and the licenses granted them to use the street and highway in question. In *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 60 N. W. 830, it was held: "A railroad company which has by ordinance acquired a permanent easement in the streets of a city is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city." See the able opinion of Post, Ch. J., on page 746, 47 Neb., and page 831, 60 N. W., *et seq.*, and authorities he cites. The following is the conclusion of his opinion: "The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*." See the same principle enunciated in *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739, where it was held: "Streets are acquired, established, and maintained for the accommodation and convenience of the inhabitants and the general public, and may be used for the convenience of the public by the ordinary modes of conveyance operated upon such streets, the chief of which, in this case, was the street railway. Railroad companies have not the exclusive right to a public crossing, but are restricted by public convenience and necessity. In the case of *Kansas City, St. J. & C. B. R. Co. v. St. Joseph* 51 L. R. A.

Terminal R. Co. 97 Mo. 457, 3 L. R. A. 240, 10 S. W. 826, it appears that a railroad company obtained from the city the right to keep and maintain its tracks and switches upon certain land, and to construct such other tracks, switches, and turnouts upon the land and across a street, when opened, as it deemed necessary for the transaction of its business. It was there held that such reservation was not the grant of an exclusive privilege, but only equivalent to the usual permission to occupy the street with its tracks, and plaintiff was not entitled to compensation from the defendant railroad company laying its track along the street by permission of the city, and across plaintiff's track therein; nor can it enjoin defendant from so laying its track, when authorized by the city to do so. See also *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.* 149 Pa. 1, 24 Atl. 179. Several of the states whose decisions are directly in point, and which are cited above, have provisions in their Constitutions similar to ours, to the effect that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. The states referred to are Nebraska, Illinois, Missouri, Kentucky, and Texas. Authorities might be multiplied to sustain the principle herein announced, but we deem it entirely unnecessary.

3. It is contended, however, that one of these defendants in error, to wit, the Atlanta Rapid-Transit Company, has in its charter authority to use steam as a propelling power for its cars, and that the weight of authority is that steam railways constitute a burden and servitude upon a public street. A complete answer to this is that by the license or franchise granted by the city of Atlanta to this company it is authorized only to use electric power, and there is nothing in the record to indicate that it ever intends to use anything else. We do not mean to say that its use of steam instead of electricity as a propelling power would necessarily deprive it of the right to cross this track at the point in question without being liable in damages to the plaintiff railroad company. Whether or not a street or suburban railway constitutes a burden upon streets or highways in a city or country does not depend so much upon the motive powers used in propelling the cars as it does upon the character and nature of business it transacts. For instance, what is known as a "commercial railway," which carries not only passengers, but quantities of freight, from one portion of the state to the other, and even from one state to another, in traversing public highways of the country or streets of a city would necessarily constitute a greater burden and servitude upon such highways or streets than an ordinary car of a street or suburban railway, whether propelled by steam, cable, electricity, or otherwise, which has for its purpose simply the transportation of passengers from one point to the other on the streets of a city, or to adjacent places in the contiguous country. A marked difference between

the two systems is that the former often carries long trains of passenger and freight cars over its line, and is not intended at all for the accommodation of the public desiring to go from one portion of the city to the other, while the latter ordinarily uses one car, and facilitates the transportation of passengers desiring only to go short distances between different points in the city. Hence it is that the decision of this court in *Georgia Midland & G. R. Co. v. Columbus Southern R. Co.* 89 Ga. 205, 15 S. E. 305, and which was relied on by counsel for plaintiff in error, has no application whatever to the facts in the present case. It was there decided in the headnote: "Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its track across the track of another railway company located in a public street of a city." It will be seen from the facts in that case that it was a contest between two commercial railway companies, and the city of Columbus constituted a terminus of each of these lines of railway. It was complained in the case that the petitioner constructed its depot, roundhouses, etc., on the depot grounds. The lands for terminals of defendant, with its depot site, side tracks, etc., lay east of petitioner's property, and that it was entirely unnecessary for it, in order to make its proper connections, to construct a side track just north of petitioner's depot grounds at a point where was located the travel and entrance to petitioner's grounds, thus unnecessarily increasing damage, delay, hindrance, inconvenience, and risk of accidents to the plaintiff at a point where its traffic of every sort passed. It will thus be seen that there is no analogy whatever between that case and the present one, where the defendant roads, under grant of authority from proper sources, are running their lines along the streets and public highways for the benefit of the public itself. Neither has the case of *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078, any application whatever to the case we are now considering. It was there decided: "The construction and operation of a horse railway in the public streets of a city by the authority of the legislature and the consent of the city government, whether it be a new burden upon the streets or not, does not entitle a private individual to compensation therefor, unless the construction or operation of such railway works special damage to his property. . . . If noise, smoke, dust, cinders, or things of that sort be shown to have damaged the property, they should be considered in arriving at the amount of the recovery; but, if they amount merely to inconvenience or discomfort to its occupants, they are not an element of damages, and should not be so considered." It appears in that case that the railroad company had permission from the legislature and the city council to lay its track in the streets where it pleased. In this particular place it elected to lay its track near the sidewalk of plaintiff's residence, and it was con-

tended that the unceasing passage of cars so near the entire front of petitioner's property would effectually cut off all safe entrance to or exit from the front of said property to any kind of vehicle. The marked difference between that case and the present one is that the plaintiff there owned the absolute title to the abutting lot. We think the principle therein decided was correct. Under the provisions of the Constitution which requires compensation to be paid, not only for property taken in the exercise of eminent domain, but also for property damaged thereby, this necessarily implies that for a direct invasion of any legal right of property pertaining to its ownership and enjoyment which results in material damage to the property the owner must first be compensated, whether it has been seized or not. One of the rights pertaining to the ownership of a home, for instance, is free and comfortable ingress and egress thereto; and this right cannot be interfered with, even for the public good, to the extent of causing material damage to the market value of the property itself without compensation being paid in advance to the owner.

4, 5. But in the present case we fail to see that the defendants have invaded, or were seeking to invade, any legal right of plaintiff. As above indicated, when the plaintiff was permitted to construct its track across an existing street or public road, it did so subject to the condition that it must submit to the increased inconvenience to it which might result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street and road in the transportation of its freight and passengers. It may be that the crossing of defendants' tracks over this street and highway will cause inconvenience to the plaintiff, but, as we have above demonstrated, this use thereof by the defendants, instead of constituting any burden or servitude upon them, is intended for the convenience and benefit of the traveling public on these streets. The question as to whether or not their construction was necessary and important in order to accomplish such a purpose has been passed upon by tribunals constituted by law to decide such issues. There is nothing in the record to show any abuse whatever of the exercise of that power. When plaintiff, therefore, obtained its license to cross these highways, it necessarily took the same subject to any increased inconvenience which might arise by reason of the demands or wants of the public for greater facilities for traveling. *Cleveland v. Augusta*, 102 Ga. 233, 43 L. R. A. 638, 29 S. E. 584. We are at a loss, therefore, to see how any legal right of property of the plaintiff will be invaded, or in any wise affected, by the exercise of the rights and franchises which the street-railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon, and none

of its property has either been taken or threatened to be taken or damaged in contemplation of law. The companies, therefore, owning and operating street railways of the character above indicated, may, under the permission of proper municipal or county authorities, construct their lines across the track of the plaintiff, and use the same, without instituting condemnation proceedings, or being required to pay damages. The court did not err in denying the injunctions prayed for, or in dissolving the restraining orders which had previously been granted.

Judgment in each case affirmed.

All the Justices concur.

W. E. GRAY, *Plff. in Err.*,
v.

Mayor, etc., of GRIFFIN.

(111 Ga. 381.)

- *1. In erecting and maintaining a city prison a municipal corporation is exercising a purely governmental function, and is, therefore, not liable in damages to a person arrested and imprisoned therein by its police officers, for injuries sustained by him, while so confined, by reason of the improper construction or negligent maintenance of such prison.
2. A municipal corporation is not liable for the illegal arrest of a person by its police officers, nor for his consequent imprisonment.
3. Nor is a city liable in damages because its mayor required of a person charged with a violation of a city ordinance a larger bond for his appearance than the law authorized, even if the failure of such person to give bond and his consequent confinement were occasioned thereby.

(July 18, 1900.)

ERROR to the Superior Court for Spalding County to review a judgment in favor of defendant in an action brought to recover damages for injuries alleged to have resulted to plaintiff from wrongful confinement in defendant's guard house. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lloyd Cleveland and J. J. Flynt, for plaintiff in error:

The laws of our state and of the United States guarantee protection to every citizen while under arrest or in prison, and expressly provide that cruel and unusual punishments shall not be inflicted; nor shall any person be abused while under arrest or in prison.

Ga. Const. Code No. 5706; U. S. Const.; Ga. Code, No. 6021.

The charter of the city of Griffin author-

*Headnotes by FISH, J.

NOTE.—On the question of the liability of a city for injury to a prisoner confined in an unfit prison, see the conflicting cases reviewed in *note* to *Shields v. Durham* (N. C.) 86 L. R. A. 293.

51 L. R. A.

izes it to build and maintain a guard house and imprison therein parties violating ordinances of the city.

The authority thus granted was subject to the conditions and limitations placed therein by the Constitution of Georgia, and, construed in that light, could mean only that the mayor and council are authorized to construct a guard house for the detention of their prisoners; but it must be so built and maintained as to carry out the spirit and intent of the laws of the state, and that a prisoner incarcerated therein shall not suffer any cruel or unusual punishment; nor shall it be so constructed as to necessarily endanger his life or health.

Cooley, Const. Lim. 2d ed. p. 194; *Greenboro v. McGibbony*, 93 Ga. 672, 20 S. E. 37.

The act of which plaintiff complained is not the act of police officers for which the city is not liable, nor is it in its nature governmental, but it is a ministerial act of the municipality for which the city is liable; and for the improper, unskilful or negligent performance of ministerial duties the city is liable.

Collins v. Macon, 69 Ga. 544; 2 Dill. Mun. Corp. 968; *Gibson v. Huntington*, 38 W. Va. 177, 22 L. R. A. 561, 18 S. E. 447.

The laws of the state of Georgia impose upon municipal corporations building prisons a duty to so build and construct them that persons confined therein shall not on account of the structure be deprived of life or health.

It is a duty imposed either by express legislation or clear implication; an infraction of a public duty for which damages may be recovered.

Code No. 3807, subd. 2; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695; *Shields v. Durham*, 116 N. C. 394, 21 S. E. 402.

Mr. William H. Beck, for defendant in error:

A municipal corporation is not liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law.

1 Ga. Code, § 744; *Cook v. Macon*, 54 Ga. 468; *Singer Sewing Mach. Co. v. Barnett*, 76 Ga. 378; *Harris v. Atlanta*, 62 Ga. 290; *Hammond v. Richmond County*, 72 Ga. 188.

A municipal corporation is not liable for injuries sustained by one prisoner at the hands of another by reason of the carelessness of the city's officers and agents who had charge of the city prison.

Wilson v. Macon, 88 Ga. 455, 14 S. E. 710; *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173.

Neither is the defendant liable for the acts of the mayor in requiring the plaintiff to give a larger bond than required by law, as he acted beyond the scope of his power, for which the city is not liable.

Ready v. Tuscaloosa, 6 Ala. 327.

Municipal corporations are not liable for the failure to perform, or for the errors in performing, their legislative or judicial powers.

1 Ga. Code, § 748; *Eppe v. State*, 19 Ga. 102; *Shearm. & Redf. Neg. § 253*; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121.

12 S. E. 707; *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Nisbet v. Atlanta*, 97 Ga. 653, 25 S. E. 173; *Milledgeville v. Thomas*, 69 Ga. 535; *Mendall v. Wheeling*, 28 W. Va. 245, 57 Am. Rep. 665.

A municipal corporation is not liable for negligently maintaining its lockup or prison in a defective or unfit condition by reason of which a person confined therein is injured.

Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426; *Alford v. Richmond*, 3 Ohio N. P. 136; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121, 12 S. E. 707; *Pfefferle v. Lyon County Comrs.* 39 Kan. 432, 18 Pac. 506; *La Olef v. Concordia*, 41 Kan. 323, 21 Pac. 272; *Webster v. Hillsdale County*, 99 Mich. 259, 58 N. W. 317; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Doolittle v. Walpole*, 67 N. H. 554, 38 Atl. 19; *White v. Sullivan County Comrs.* 129 Ind. 306, 28 N. E. 846; *Morris v. Switzerland County Comrs.* 131 Ind. 285, 31 N. E. 77; *Greene County Comrs. v. Boswell*, 4 Ind. App. 133, 30 N. E. 534; *Lindley v. Polk County*, 84 Iowa, 308, 50 N. W. 975.

Mr. O. H. P. Slaton also for defendant in error.

Fish, J., delivered the opinion of the court:

Taking the allegations of the plaintiff's petition to be true, as we must do upon demurrer, he certainly has just and great cause to complain of the needless hardships and suffering which he endured while confined in the city guard house. But, however strongly the story of his sufferings may appeal to our sentiments of humanity, the law affords him no redress against the municipality. The general rule is well established that a municipal corporation is not liable in damages for injuries sustained by reason of the negligent or improper exercise of a purely governmental power. The preservation of the public peace, quiet, good order, etc., of a community is a governmental function. Where the legislative authority of a city passes ordinances for such purposes, it is clearly exercising a governmental power. When, for the purpose of enforcing such ordinances, the city erects and maintains a prison wherein to confine offenders, for the purpose of punishment, or those charged with offenses, for safe-keeping until they can be tried, it is exercising the same power. The enactment of such ordinances, and the provisions made for their enforcement, belong to the police power, which is purely governmental in character. In *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, this court held that as "the duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city, and the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such functions, and in the discharge

of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." In the opinion, Mr. Justice Atkinson said: "The principle of non-liability rests upon the broad ground that, in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties, and in the execution of such powers." In *Bartlett v. Columbus*, 101 Ga. 300, 44 L. R. A. 795, 28 S. E. 599, it was held that "a municipal corporation is not liable, in an action for false imprisonment, for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of a city ordinance; and this is true though said judgment may have been irregular, erroneous, or even void." In *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173, it was held that "a municipal corporation is not liable in damages for the death of one convicted in a corporation court and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with the proper medical attention and treatment." In the opinion Mr. Justice Lumpkin said: "Neither the law of master and servant, nor the doctrine of *respondet superior*, applies" in such a case, "because in such matters the municipal corporation is exercising governmental powers and discharging governmental duties, in the course of which it, of necessity, employs the services of the officer in question." In the case of *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121, 12 S. E. 707, the supreme court of West Virginia held that "a town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein . . . for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town." Brannon, J., in the opinion, said: "I think the duty and function of keeping a jail, and confining therein offenders against the municipal ordinances of a town, are plainly purely governmental in character." In *La Olef v. Concordia*, 41 Kan. 323, 21 Pac. 272, it was held that, "where a person is confined in a city prison upon a conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by such person by reason of the bad character of the prison, or the negligence of the officer in charge of the same." This decision was followed in *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426, where an administratrix sought to recover from a city damages for the death of her intestate husband, alleged to have been caused by his confinement and exposure in an unhealthy, un-

inhabitable, and filthy prison. In *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812, it was held that "a municipal corporation is not liable for negligently maintaining its lockup or prison in a defective and unfit condition, by reason of which a prisoner confined therein is injured." In *Blake v. Pontiac*, 49 Ill. App. 543, a case in which damages were sought for injuries alleged to have been sustained by reason of the confinement of the plaintiff in an improperly constructed and negligently maintained city prison, it was held that the municipal corporation was not liable, and that "the building of the calaboose, and the establishing of regulations for the detention of prisoners therein to answer to charges of violating the ordinances of the city, are clearly within the police power of municipal corporations, and are not in their nature corporate acts." So, in *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571, it was held that a demurrer to a declaration was properly sustained where it was alleged that complainant was negligently cared for while temporarily confined in a police station, as such negligence did not render the city liable, since in caring for persons under arrest the city discharged a public duty. The precise question under consideration was decided in another recent case, in New York, and the court held that where a person was arrested for violation of a village ordinance, and imprisoned in a place negligently permitted to become and remain so dilapidated that in consequence of the exposure he contracted a disease which caused his death, the village was not liable for the omission of its duty in the exercise of its governmental functions. *Eddy v. Ellicottville*, 35 App. Div. 256, 54 N. Y. Supp. 800.

In support of their contention as to the liability of the municipal corporation for the injuries sustained by the plaintiff while confined in the city guard house, his counsel cite *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, and *Shields v. Durham*, 116 N. C. 394, 21 S. E. 402, in each of which cases the allegations of the respective plaintiffs were of a similar character to those in the present case. In each of those cases, however, the court held that the municipal corporation sued was not liable in damages, as it had complied with the law of North Carolina in the construction of its prison and the furnishing of the necessary supplies, etc., therefore, and the plaintiff's injuries were sustained in consequence of the neglect of the jailer or attendants, of which notice had not been brought to the city before the injuries were received; and the court recognized and upheld the general rule, stated by Avery, J., in the *Asheville Case*, that when a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, unless some statute, expressly or by necessary implication, subjects the corporation to a pecuniary responsibility for such negligence. These cases are doubtless cited because they do recognize the principle which

obtains in North Carolina, which, as stated in the same opinion from which we have just quoted, is that towns and cities are liable in damages only for a failure to so construct their prisons, or to provide them with fuel, bedclothing, heating apparatus, attendants, and other things necessary, as to secure to the prisoners committed to them a reasonable degree of comfort and protect them from such bodily suffering as would injure their health. But this principle is derived by the supreme court of North Carolina from the constitutional and statutory law of that state; the case in which it was first involved and ruled being that of *Lewis v. Raleigh*, 77 N. C. 230, in which a municipal corporation was held liable in damages for the death of a person, the jury having found that his death was "accelerated by the noxious air of the guard house" of the city, in which he was confined. The decision of the court was expressly based upon the wise and humane provision of the Constitution of the state, which provided that "it shall be required by competent legislation that the structure and superintendence of penal institutions of the state, the county jails and city police prisons, secure the health and comfort of the prisoners," and upon certain provisions of the Code of that state with reference to furnishing necessary supplies to jailers, and the care to be taken by sheriffs and jail keepers of prisoners and the rooms in which they are confined. And in the opinion in *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, Avery, J., said that when the aldermen of Asheville, who were vested with authority to erect a city prison, "built the police guard house in the exercise of their power, the city became as fully amenable for its proper structure and superintendence, as the general assembly was required by the Constitution to make it answerable by competent legislation." But he further said: "The defendant, in the discharge of its judicial duties, could not have incurred any liability, in any view of the case, but for the express provisions of the Constitution and laws." For the sake of humanity, we can but regret that there are no such express provisions in the Constitution and laws of our own state in reference to municipal prisons. The only case that we have found in which a municipal corporation has been held liable in damages for injuries sustained by a person confined in its prison, in consequence of its unwholesome condition, where there was no express constitutional or statutory provision upon which to base the decision, is that of *Edwards v. Pocahontas*, 47 Fed. Rep. 268, in which District Judge Paul held "that a town which used a jail of its own was liable for injuries to the health of a prisoner caused by its filthy condition, since, under § 927 [of the Code of Virginia], and a special provision of its charter, it might have used a county jail, subject to inspection and control." In view of the decisions of this court in reference to the nonliability of a municipal corporation when exercising governmental functions, and the overwhelming weight

of outside authority in cases similar to the one we have under consideration, we are constrained to hold that the defendant is not liable to the plaintiff for any injuries which he may have sustained while confined in the city guard house, by reason of its improper construction and unwholesome condition, or by reason of the failure of the municipal authorities to provide the means by which he could have protected himself from the inclemency of the weather during his imprisonment.

2. We think that the municipal corporation was not liable for another reason. The petition alleges that the plaintiff "was without just cause arrested by the police officers of the city of Griffin without a warrant, and was placed in a certain place, called the 'guard house' of the said city;" that "he was not drunk or disorderly, and no reasonable cause can be assigned for such conduct on the part of the city government, and he was not guilty of any violation of law whatever." If he was arrested without just cause, was not drunk or disorderly, was not guilty of any violation of law whatever, and no reasonable cause can be assigned for the conduct of the police officers in arresting and imprisoning him, then, clearly, his arrest and consequent imprisonment were the result of the tortious acts of the police officers, and for such acts committed by its policemen a municipal corporation is not liable. Section 744 of the Political Code provides that "a municipal corporation is not liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." "A municipal corporation is not liable to an action for damages for the illegal arrest of a citizen by one of the police officers of the city." *Cook v. Macon*, 54 Ga. 468; *McElroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791. Nor for the consequent imprisonment of the person arrested. *Harris v. Atlanta*, 62 Ga. 290. In *Attaway v. Cartersville*, 68 Ga. 740, the plaintiff alleged that the marshal and a policeman of the city, "in executing the commands of the said mayor and aldermen, did arrest and imprison him for the space of ten days in the calaboose of the said city, without lawful warrant, and without the authority of law; that the said imprisonment was wanton, inhuman, and brutal, because of the size, ventilation, and filthy condition of the said calaboose;" and "that by reason of said unlawful imprisonment he became sick." In the court below there was a demurrer to the declaration, which was sustained; and this court affirmed the judgment upon the ground "that the city is not liable for the illegal acts of police officers," the court citing the three cases last above cited.

3. The defendant corporation was not liable for the act of the mayor in requiring the plaintiff to give a larger bond than the law authorized. In fixing the amount of the bond, the mayor acted in a judicial capacity, and for an error committed in the exercise of judicial authority a municipal corpora-

tion is not liable. Pol. Code, § 748; *Bartlett v. Columbus*, 101 Ga. 300, 44 L. R. A. 795, 28 S. E. 599.

Judgment affirmed.

All the Justices concur.

RACINE IRON COMPANY *et al.*, *Pliffs. in Err.*,
v.

R. L. McCOMMONS *et al.*

(111 Ga. 586.)

- *1. The "interstate commerce clause" of the Constitution of the United States does not operate to prevent a state from imposing, for the purpose of raising revenue, a license tax upon persons who, as traveling agents for principals residing in other states, make executory contracts for the sale of goods, and who, when the same are shipped into this state, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts had been made.
2. One upon whose property an execution against another, issued by a tax collector, is levied, may, under § 899 of the Political Code, interpose a claim, and consequently has no need of an injunction to prevent the threatened sale.

(August 7, 1900.)

ERROR to the Superior Court for Greene County to review a judgment in favor of defendants in a suit to enjoin proceedings for the collection of a tax. *Affirmed.*

The facts are stated in the opinion.

Mr. James Davison, for plaintiffs in error:

If a citizen of another state procures orders for a nonresident seller, for goods which the seller holds until ordered, the agent, though a peddler, is protected by the Constitution of the United States against the provisions of the Code requiring a license to peddle, and providing a penalty for failure to procure such license.

Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 233; *McClelland v. Marietta*, 96 Ga. 749, 22 S. E. 329; *McClellan v. Pettit*.

*Headnotes by LUMPKIN, P. J.

NOTE.—For business of agent of nonresident as interstate commerce, see also *Re Spain* (C. C. F. D. N. C.) 14 L. R. A. 97, and note; *Titusville v. Brennan* (Pa.) 14 L. R. A. 100, Reversed in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719; *Gunn v. White Sewing Mach. Co.* (Ark.) 18 L. R. A. 206; *State v. Phipps* (Kan.) 18 L. R. A. 657; *State v. Gorham* (N. C.) 25 L. R. A. 810; *Milan Mill. & Mfg. Co. v. Gorton* (Tenn.) 26 L. R. A. 135; *South Bend v. Martin* (Ind.) 29 L. R. A. 531; *Com. v. Myers* (Va.) 31 L. R. A. 379; *State v. Scott* (Tenn.) 36 L. R. A. 461; *Macnaughtan Co. v. McGirl* (Mont.) 38 L. R. A. 387; *Smith v. Jackson* (Tenn.) 47 L. R. A. 416; and *Adkins v. Richmond* (Va.) 47 L. R. A. 583.

grew, 44 La. Ann. 356, 10 So. 853; *Brennan v. Titusville*, 153 U. S. 290, 38 L. ed 720, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619; *Duncan v. State*, 105 Ga. 457, 30 S. E. 755.

If a nonresident sells goods or wares in this state, through an agent, by sample, and the orders are then filled by the shipment into the state, to the purchaser or for immediate delivery to the purchaser, the agent is protected from taxation. On the other hand, if the property becomes incorporated into the mass of property subject to taxation, before being sold, the agent is liable.

The irons sold by Pettigrew in this case never became subject to taxation, because they did not become a part of the mass of the property of Georgia.

That this tax is upon the occupation does not change the rule, for "when the burden of a tax falls on a thing which is the subject of taxation the tax is to be considered as laid on the thing, rather than on him who is charged with the duty of paying it."

25 Am. & Eng. Enc. Law, pp. 28, 29.

If these irons were shipped from the factory in Wisconsin for the sole purpose of filling orders and completing by delivery sales already made, they never became subject to the taxing power of this state.

11 Am. & Eng. Enc. Law, p. 549; *State v. Richards*, 32 W. Va. 348, 3 L. R. A. 705, 9 S. E. 245.

Mr. J. S. Reynolds also for plaintiffs in error.

Messrs. Park & Merritt for defendants in error.

Lumpkin, P. J., delivered the opinion of the court:

The Racine Iron Company, of Wisconsin, and G. H. Pettigrew, filed an equitable petition to enjoin the tax collector and the sheriff of Greene county from proceeding with an execution against Pettigrew, which had been issued by the collector, and by the sheriff levied on property alleged to be that of the company. The execution purports to have been issued for a "special tax for the year 1898." It does not contain a recital that the tax was due by Pettigrew as a peddler. The petition, however, raised no objection to the execution on this ground but expressly dealt with it as if it had embraced such a recital. Apparently, the tax sought to be collected was for the year 1899, for the facts disclosed at the hearing, about which, as will presently be seen, there was no dispute, plainly so indicated. The answer of the defendants alleges that the tax in question was for that year, and the petition distinctly avers that the "tax act of the general assembly of Georgia for 1898, so far as it applies to petitioners, or each of them, is repugnant to article 1, § 8, par. 3, of the Constitution of the United States, and, as to them, unconstitutional and void." This act is the one by which all state taxes for the \$1 L. R. A.

years 1899 and 1900 were imposed. It seems, therefore, that the appearance of the figures "1898" in the copy of the execution must be due to an error in transcribing. At any rate, it is certain that the petition squarely presents the question whether or not the paragraph of our tax act of 1898 which imposes a license tax upon certain classes of peddlers is, so far as it relates to the business carried on by Pettigrew for the iron company, violative of the interstate commerce clause of the Federal Constitution. Indeed, this is the main and controlling question in the case, and upon it counsel for both sides invoke a decision at our hands. The bill of exceptions alleges error in the refusal of the court to grant an interlocutory injunction upon the following agreed statement of facts: "G. H. Pettigrew sold in Greene county a lot of smoothing irons, taking the notes of the purchasers therefor. The irons sold were the property of the Racine Iron Company, of Wisconsin, and the defendant sold by sample, and subsequently had shipped from its factory in Wisconsin, his entire sales, in boxes, 12 in a box, and consigned to G. H. Pettigrew as their local agent, who then delivered them to the purchasers on the sales previously made. No sales were made in Greene county after April, 1899. G. H. Pettigrew both solicited the orders and delivered the goods. G. H. Pettigrew is a resident of Louisiana. Said irons were sold for \$7.75 each. Defendants in *fi. fa.* do not store goods in the state of Georgia, and have no warehouse or place of business in Georgia. R. L. Pettigrew, brother of G. H. Pettigrew, is the general agent of the Racine Iron Company for the South, and is a resident of Tennessee. The *fi. fa.* by the tax collector for \$100 was issued and levied as alleged in the petition for injunction." It will be noted that according to this statement of the facts Pettigrew sold smoothing irons, "taking the notes of the purchasers thereof," and that he "both solicited the orders and delivered the goods." It makes no difference whether he took from his customers promissory notes payable to the company, or written orders upon it, or both. In each instance the contract of sale was executory, and it required a delivery of the article bargained for to complete the sale. The form of the transaction is a matter of no consequence.

1. Our tax act of 1898 imposes for each of the years 1899 and 1900, "upon each peddler of clocks or smoothing irons," a specific occupation tax of "\$100 in each county of the state in which such peddler may do business." Acts 1898, p. 26. A stern sense of duty, not inclination, constrains us to enter upon a discussion of the question whether or not Pettigrew can, by virtue of the above-mentioned clause of the Constitution of the United States, escape the payment of the tax imposed upon him by this act, and for which the execution in controversy was issued. In endeavoring to find a solution of this question, we have diligently sought for such aid as could be derived from authorita-

tive utterances of the Supreme Court of the United States. The result of our researches in this direction will be developed as we progress.

In *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, the doctrine was announced that "the term 'import,' as used in that clause of the Constitution which says that 'no state shall levy any imposts or duties on imports or exports,' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. Hence a uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid." To the same effect, see *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387. "A discriminating tax upon nonresident traders trading in the limits" of a state other than that in which they reside cannot, however, lawfully be imposed. *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449. Such a tax was, in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, held to be unconstitutional. In *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, the question was presented whether or not a sewing machine agent, who had been sent by a Connecticut corporation "into Sumner county [Tenn.] to sell machines there," was subject to a license tax imposed by a statute of that state upon "all peddlers of sewing machines and selling by sample." It appeared that while the corporation manufactured its machines at Bridgeport, in the state of its residence, it "had an agency at Nashville," Tenn., from which latter place its agent was sent into the county above mentioned. "The supreme court of Tennessee decided that the law of that state imposing" that tax in question was intended to apply to "all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture;" and it was accordingly held by the Federal Supreme Court, upon a review of the judgment of the state court upholding the validity of the statute, "that the law, so construed, is [was] not in violation of the Constitution of the United States."

Then came the now familiar, though at the time somewhat startling, decision in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. Robbins, a citizen of Ohio, "was engaged at the city of Memphis, in the state of Tennessee, in soliciting the sales of goods for" a Cincinnati firm, "and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a 'drummer.'" He failed to pay a license tax imposed by statute upon persons of his calling, and a criminal prosecution was instituted against him on the charge of doing business without a license, which the statute "made a misdemeanor, punishable by a fine of not less than five nor more than fifty dollars." His conviction followed as a matter of course, and the same

was sustained by the state supreme court upon the ground that the statute in question was not unconstitutional. In reviewing its judgment, Mr. Justice Bradley, speaking for a majority of the members of the Federal Supreme Bench, said that the inquiry presented was "whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein." He further remarked, in the course of his opinion, that while the conclusion to the contrary reached by a majority of the court might, to some extent, operate to interfere "with the right of the state to tax business pursuits and callings carried on within its limits," yet this interference would be very limited in its operation, and would "only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce." Indeed, all that was decided in that case was that a state has no power to impose an occupation tax upon a commercial drummer, who, in behalf of a nonresident principal, undertakes to do no more than exhibit a line of samples, and solicit orders for goods which are at the time within the jurisdiction of another state. To this extent, and no further, did the court go in *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655 (decided at the same term). On the same line are the cases of *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1, and *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256. In neither was the doctrine announced in the *Robbins Case* in any wise extended or applied to a different state of facts.

Next came a similar decision in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829. Brennan, at the time the restraining hand of the law was placed upon him, was engaged in a "house to house" canvass in pursuit of customers for pictures and picture frames. He merely exhibited his samples and solicited orders. Such orders as were procured he immediately forwarded to a nonresident principal, who shipped the goods "to the purchasers" direct "by railroad freight and express." In some instances Brennan did collect "the price of said goods," but, so far as appears, he did not undertake to himself make delivery of any of the articles for which he received orders. Commenting upon this feature of the case, Mr. Justice Gray, in *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, said (pp. 319, 320, 156 U. S., p. 437, 39 L. ed., p. 80, 5 Inters. Com. Rep., and p. 374, 15 Sup. Ct. Rep.): "In *Brennan's Case* it was expressly agreed by the parties that the goods offered by him for sale in Pennsylvania were afterwards sent by their owner in the other state directly to the purchasers." An exhaustive and painstaking review of all previous decisions having any direct

bearing upon the case then in hand was entered upon by the learned justice, and the conclusion was announced that it was distinguishable from every one of its predecessors, save only the case of *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, which was "approved and followed." The importance of getting a firm and intelligent grasp upon the facts on which the decision in *Emert's Case* was rested is, therefore, apparent, especially in view of the fact that, so far as we have been able to ascertain, it presents the latest enunciation on the subject which the Federal Supreme Court has vouchsafed. It is a circumstance also worthy of comment that this decision was rendered without a dissent on the part of any of the justices. The precise ruling made was as follows: "A statute of a state by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents or products of the state and those of other states, is not, as to peddlers of goods previously sent to them by manufacturers in other states, repugnant to the grant by the Constitution to Congress of the power to regulate commerce among the several states." In conformity to what seems to have become quite a common custom in this class of cases, Emert went to trial upon an agreed statement of facts. We gather therefrom that while, possibly, he started out innocently enough as a mere soliciting agent, carrying with him on his travels a sewing machine belonging to a nonresident principal, with the intention of doing no more with it than exhibiting it as a sample, he eventually forsook his original calling for that of an itinerant vender, who not only solicits trade, but actually sells. At all events, it was admitted that upon a specified day "he offered for sale to various persons at different places" a sewing machine which he carried along with him in a wagon, and that he did on the same day "find a purchaser for said machine, and did sell and deliver the same to" him. In dealing with the facts thus presented, Mr. Justice Gray, speaking in behalf of all the members of the court, said (p. 311, 156 U. S., p. 434, 39 L. ed., p. 77, 5 Inters. Com. Rep. and p. 370, 15 Sup. Ct. Rep.): "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another, and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. 51 L. R. A.

Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state." It was pointed out, in this immediate connection, that "the statute in question [was] not part of the revenue law," but was one looking solely to regulation, and designed, apparently, "to protect the citizens of the state against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place, and from door to door." That is to say, the statute was one passed by virtue of the police power residing in the state, and not in the exercise of its rights by taxation to raise revenue for its support.

This brings us to a consideration of the question whether or not there are in the case now before us any distinguishing features which can properly be said to differentiate it from that last cited. The two cases are not, upon their facts, identical. Pettigrew, the agent whose anomalous vocation is the cause of our present distress, first solicited orders for goods which at the time were in the hands of his nonresident principal. Then such orders as were in this manner procured were duly forwarded to be filled by the latter. Not a single order was, however, filled separately, but goods sufficient in quantity to fill the orders of a number of customers were shipped in bulk, consigned to Pettigrew himself; and on receipt of each shipment he broke the original packages in which the goods were sent, and proceeded to distribute the contents among such customers as were entitled thereto. From either a legal or a moral standpoint, it would, therefore, seem that Pettigrew belonged to a class of itinerants requiring as much police supervision as that of which Emert was a member. And, if this be true, why would it not inevitably follow that the reasons assigned by Mr. Justice Gray for upholding the police regulation which Emert called into question could very fairly be said to apply equally as well to Pettigrew and his calling, if the statute now under consideration was one designed to protect the citizens of this state against fraud and imposition? As such is not the nature of this statute, we will not indulge in further conjecture on the line just suggested, but will discuss the question actually before us, which is: Can the statute be upheld, as against Pettigrew and his principal, upon the ground that this state has not, in thus undertaking to exercise its inherent power of taxation, invaded the sacred precincts guarded by the interstate commerce clause of the Federal Constitution? The purpose of the general tax act for 1899-1900 was not simply to impose taxes, but to actually raise revenue for the support of the state government; and, looking to that end, penalties were prescribed for nonpayment of the license taxes therein laid, regardless of the citizenship of the persons thereby affected. In support of the proposition that this was "an exercise, not of the police power, but of the taxing power," of

the state, we need only cite *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 688, 14 Sup. Ct. Rep. 829. Giving to the doctrine which was first announced in the *Robbins Case* the widest possible scope which can legitimately be claimed for it, we fail to see how it controls the case in hand. On principle it is certainly true that a citizen of one state, who is engaged in interstate commercial dealings, can lawfully accomplish through the means of an agent neither more nor less than he himself would have a right to do in person. It is now well settled that no tax can be laid upon the exercise by a manufacturer of his privilege of visiting a state other than that of his residence with a view to creating a demand for his goods by exhibiting a sample thereof, and securing orders therefor; i. e., seeking a market for his goods, and taking advantage of it, when found, by entering into purely executory contracts of bargain and sale to be performed in the state of his residence by making actual delivery there to a common carrier authorized to receive them in behalf of the persons who agree to buy. But what if he enters into a contract whereby he binds himself to make delivery to a customer in person within the state of the latter's residence? What if the parties expressly agree that the sale itself, as distinguished from the mere executory contract made in contemplation thereof, shall be of a wholly internal and domestic nature, having no interstate commerce feature about it? A customer has, of course, a constitutional right, not only to agree to buy, but through his carrier agent to actually buy, goods the situs of which is to continue at the home of the manufacturer until the sale is consummated there; and upon the exercise by the customer of this privilege no restriction could be lawfully imposed by the state in which he resided. *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercrook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. Suppose, however, the customer does not choose to exercise this right, but, on the contrary, declines to even agree to purchase save upon the express stipulation that the goods shall be brought into the state by the manufacturer, and then, and not until then, really sold. In that event, the customer would be in no wise concerned as to the methods employed by the manufacturer in order to meet his obligation to thus effect a change in the situs of the goods before calling upon the former to actually purchase the same; and if the manufacturer, as a matter of personal convenience to himself, should enter into an independent contract of carriage with a common carrier, whereby it acted as his agent in bringing the goods to the point agreed on as that where the sale should take place, this surely could not have the effect of introducing an interstate commerce feature into the transaction. In *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, it was held that "coal mined in Pennsylvania, and sent by water to New Orleans, to be sold in open

market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the state of Louisiana, and is subject to taxation under general laws of that state, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port." This decision was based upon the doctrine announced in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, to the effect that goods shipped from one state into another for the purpose of sale become immediately subject to taxation by the latter state, notwithstanding they belong to a nonresident importer engaged in interstate commerce. See also in this connection, *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475. The theory upon which it is held that an occupation tax sometimes operates as an unwarranted interference with interstate commerce when laid upon a nonresident merchant or manufacturer is that "a license tax required for the sale of goods is, in effect, a tax upon the goods themselves." *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347. Or, as was said in *Howe Mach. Co. v. Gage*, 100 U. S. 678, 25 L. ed. 755, "a tax for a license to sell goods is, in effect, a tax on the goods authorized to be sold." When applied to a commercial drummer, who merely "sells goods by sample," the goods being at the time in the hands of a nonresident principal, there is much force in the argument that, as the state in which the drummer solicits orders has no jurisdiction over the goods themselves, and cannot impose any direct tax upon them before they are shipped within its borders, the state has no power to lay an indirect tax upon them by resorting to the expedient of requiring the drummer to pay a license fee for the privilege of pursuing a calling which is a legitimate, and oftentimes necessary, incident to commercial dealings between residents of different states. But the argument necessarily loses its force when, as in the present case, the goods, before delivery to the customer, are shipped into the state with a view to consummating the executory contract of sale. We see no reason why, as soon as the shipment is complete, and the goods turned over to an agent of the shipper, they may not be immediately subjected to a direct tax, irrespective of the fact that a resident customer had previously been found who was willing to accept and pay for the goods when a proper tender of them was made to him. It would follow, as a matter of course, that, if a direct tax could be laid on the goods while yet in the possession of the shipper or his agent, the state could, by imposing a tax upon the privilege of consummating the sale of the goods, reach them indirectly. The following extract, taken from the opinion delivered by Mr. Justice Field in *Welton's Case*, seems to bear us out in the conclusion just stated: "The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its lim-

its is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer, but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." It is true that in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 463, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, the reviewing court took occasion to present the *quære* "whether the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates." But this doubt was suggested with reference to the right of a state, in the exercise of its police powers, to forbid common carriers from bringing "intoxicating liquors into the state from any other state" without first complying with certain prescribed regulations. We are also aware that it was subsequently held, in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, that "a statute of a state prohibiting the sale of any intoxicating liquors, except" for medicinal and other like purposes, was, "as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void." However, this decision was put upon the ground that, in undertaking to entirely prohibit such sales, the state exceeded its police powers, and encroached upon the exclusive right vested in Congress to regulate interstate commerce. That Congress may itself impose restrictions upon, or entirely prohibit, interstate traffic in injurious commodities, was recognized in *Rahrer's Case*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. The decision in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, is authority for the proposition that a state has the power to prohibit the sale "of oleomargarine artificially colored so as to cause it to look like yellow butter," and purposely so made in imitation of pure butter with a view to deceiving the public, notwithstanding such imitation butter is manufactured in and brought from a sister state. But when, in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, the question arose whether oleomargarine could "be wholly excluded from importation into a state from another state where it was manufactured" upon the idea that it was an injurious commodity, the court reiterated its ruling made in *Leisy v. Hardin*, cited above,

51 L. R. A.

and held that an importer had a right to sell this commodity in original packages, whether the same were "suitable for retail trade or not," and irrespective of the question whether a consumer or a wholesale dealer became the purchaser.

In referring to these several adjudications concerning the limits within which a state may properly exercise its police powers, we are not, as we have already indicated, to be understood as entertaining the opinion that any one of them has any bearing whatever upon the case at bar. As matter of fact, we think directly to the contrary; and, as evidencing the correctness of our conclusion that the Supreme Court of the United States has never departed from the doctrine that the taxing power of a state is coextensive with its jurisdiction over property of a non-resident brought within its borders, we confidently cite *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599, wherein it was held that a state could lawfully impose a revenue tax upon transient railway cars, notwithstanding "the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce," and paid only casual visits to the state in the course of extended peregrinations covering this entire country. Our real purpose in calling attention to what that court has said in regard to the right of an importer to sell his goods in the original packages in which they were shipped is (1) to point out that he is not exempt from taxation upon such goods, and (2) to present the argument that, even were this otherwise, Pettigrew could rightly claim no immunity from taxation, for the reason that he did not attempt to dispose of goods in the original packages in which they were shipped to him, but in every instance broke such packages, and peddled the contents thereof among his customers. We use the term "peddled" advisedly. From a purely legal standpoint, at least, he was a peddler; for, in view of the definition which our Code gives to one of his vocation, it can matter little whether an itinerant trader carries along with him a "pack, and makes immediate delivery of his wares to customers," or merely "sells by sample," and waits a day, a week, or longer, before freighting himself with goods, and undertaking to fill the orders he had previously procured by his house to house canvass. In this connection, see *Wrought Iron Range Co. v. Johnson*, 84 Ga. 758, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 233. In none of the decisions of this court wherein the subject herein dealt with has been under discussion do we find anything which militates against the views we have above expressed. We will therefore present but a brief review of them. In the case just cited a foreign corporation and its traveling agent, Lee, joined in an equitable petition to enjoin the enforcement against them of certain executions levied upon their property. The controlling question presented was whether or not Lee was liable for the payment of a license tax im-

posed upon peddlers. He did no more than exhibit a sample and take orders for goods, and accordingly, in deference to previous rulings announced by the Federal judiciary which were authoritative, this court held that Lee's calling was exempt from a license tax. It is perhaps inferable from the facts appearing in that case that, after he forwarded to the company at St. Louis such orders as he procured, it there filled the same, and then shipped the goods to other agents in Georgia for delivery to the purchasers, the goods sometimes being stored in warehouses located in this state until such delivery could be made. But no question was raised as to the right of these agents to thus make delivery, nor could Lee's right to pursue his inoffensive "interstate commerce" calling without paying a license fee be in any wise affected by what they did or failed to do. For aught that was disclosed, they complied with the law as to taking out licenses. If not, the executions should have been directed against them, not against Lee or the company itself, it not being a "peddler," within the meaning of the statute under consideration. Had Lee been criminally prosecuted on the charge of confederating with other agents of the company with a view to evading the laws of this state and enabling them to carry on the business in which they were engaged without paying a license tax, it may be taken for granted that this court would not have confined itself to the inquiry whether or not his vocation was one upon which a license tax could lawfully be imposed. See *Duncan v. State*, 105 Ga. 457, 30 S. E. 755. What has just been said also applies to *McClelland's Case*, 96 Ga. 749, 22 S. E. 329. It there appeared that it was sometimes the practice of the company which he represented, when it had several purchasers at one point, to send the goods to one customer, and notify "the others to call on that one for them, allowing him fifteen cents per package for delivery." McClelland was a traveling salesman, and did not himself attempt to deliver the goods for which he solicited orders. He was prosecuted on the charge of failing to take out a license, and therefore the only question presented was whether or not he should have done so. In the case of *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249, it was held that "a specific tax levied under a statute of this state upon persons engaged in the conduct of a particular business is not violative of paragraph 3, § 8, art. 1, of the Constitution of the United States, as being an interference on the part of the state with commerce between the several states, where the property employed in such business has been brought into this state, and has itself become subject to taxation therein." In support of this ruling the writer ventured to suggest (pp. 122, 123, 97 Ga. p. 501, 35 L. R. A., and p. 252, 25 S. E.) that as the property itself was within the state's jurisdiction, and subject to a direct tax, "upon principle the business of selling it is [was] alike taxable in that jurisdiction." It appeared

in the case of *Walton v. Augusta*, 104 Ga. 757, 30 S. E. 964, that the plaintiffs were "persons engaged on their own account in a 'commercial street brokerage business,' in the course of which they take [took] orders for goods to be filled by nonresident dealers," who were regular "correspondents," and with whom the plaintiffs had large commercial dealings; and, upon the authority of *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 38 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, we held that they were not exempt from a municipal tax imposed upon the class of brokers to which they belonged. In *Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619, there was "evidence fairly warranting a finding that goods manufactured in another state were shipped in large quantities to a warehouse located in this state, and at that point divided and distributed among a number of customers, who, after such shipment, had purchased different articles of these goods from a person going from house to house in a given city in this state, exhibiting samples and taking orders, which were then filled from such warehouse or distributing point." It was accordingly held that "the sales so made did not in any sense constitute interstate commerce, and the person so selling became liable to a license tax as a canvasser." Precisely the same doctrine was also applied in *Duncan's Case*, 105 Ga. 457, 30 S. E. 755, and it was further ruled that: "When one person travels through the country as an itinerant, exhibiting samples of goods and taking orders for goods of like character, and another follows in his wake, delivering the goods thus sold, both should be regarded as peddlers when it appears that the business was thus conducted in pursuance of a scheme to evade the law of this state requiring peddlers to register and pay taxes." The question herein dealt with was incidentally involved in *Chrystal v. Macon*, 108 Ga. 27, 33 S. E. 810, but, as it was not necessary in that case to pass upon this precise point, no ruling thereon was made. There it appeared that the Chicago Portrait Company was conducting in this state, through agents, its business of taking orders for portraits and selling picture frames. Some of these agents solicited orders, which were forwarded to the company to be filled; while others, after shipment to them here of the portraits ordered, delivered the same to customers and made collections. To each customer was given the privilege of "selecting and purchasing from" the company's agents in this state "a suitable frame for every portrait from a stock of frames shipped to Georgia for this purpose," but no customer obligated himself to purchase a frame, or was called upon to do so, until delivery of the portrait ordered by him was made. We therefore held that, in so far as the "sale of the frames" was concerned, this was "a Georgia business, pure and simple," with "no interstate feature." On the argument here counsel for the plaintiffs in error relied mainly on the decision of the supreme court of Louisiana in the case of *McClelland*

v. Pettigrew, 44 La. Ann. 356, 10 So. 853, the facts of which were somewhat similar to those of the case at bar, wherein that court held that where goods belonging to a nonresident are not within the state at the time his agent solicits orders therefor, and are subsequently shipped direct to such agent merely for the purpose of filling the orders procured by him, "it is immaterial whether the sale is perfected by delivery" in that state. We cannot, however, regard this decision as even persuasive authority, for it was based wholly on what we conceive to be an entire misconception of the rulings of the Supreme Court of the United States in *Howe Mach. Co. v. Gage*, 100 U. S. 678, 25 L. ed. 755, and *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, and no argument whatever was advanced to show that it is sound upon principle. We do not think it is. On the contrary, it appears very plain to us that, when a traveling salesman so far departs from the vocation ordinarily pursued by a commercial traveler as to actually vend the goods for which he solicits orders, he ceases to be a mere "drummer" in the sense in which that term is used by Mr. Justice Bradley in *Robbins' Case*. We so hold upon principle, for not until further light on the subject is shed by the Federal Supreme Court can we hope to better reflect its views

than by assuming, as we do, that its decisions were intended to be construed with reference to the controlling facts upon which the same were based.

2. The ruling announced in the preceding division of this opinion disposes of the case in so far as *Pettigrew*, "the uncommercial traveler" of the Racine Iron Company, is concerned. Of course, property belonging to that company is not subject to levy and sale under an execution issued against its agent, it not being itself liable for the payment of his license tax. *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 233; *Bohannon v. Wrought Iron Range Co.* 111 Ga. 860, 36 S. E. 907. But it by no means follows that there was any occasion for granting the extraordinary equitable relief which the company sought to obtain. It cannot justly complain of the proceedings taken or threatened to be instituted against *Pettigrew* because of his failure to comply with the laws of this state. Assuming that the property levied on really belongs, not to him, but to his principal, it should have interposed a claim. Having, under § 899 of the Political Code, a clear statutory right to do so, it had no need whatever for an injunction.

Judgment affirmed.

All the Justices concur.

IOWA SUPREME COURT.

William O. SCHMIDT, Admr., etc., of Claus Behrens, Deceased,
v.

NORTHERN LIFE ASSOCIATION, Appt.

(.....Iowa.....)

1. Children of a beneficiary who murders the insured cannot, because she thus forfeits her rights to the insurance, claim it as her heirs, under a certificate payable to her, her heirs, or legal representatives.
2. The murder of the insured by the beneficiary forfeits the rights not only of the beneficiary, but of her assignee.
3. Liability on a benefit certificate is not defeated because the beneficiary's rights are forfeited by causing the death of the insured, but the certificate may be enforced by the latter's administrator for the benefit of his estate on the ground of a resulting trust created in favor of the estate by the forfeiture of the rights of the beneficiary named.

(October 6, 1900.)

A PPEAL by defendant from a judgment of the District Court for Scott County ordered for plaintiff on the pleadings in an action

NOTE.—As to effect of killing of insured by insane beneficiary, see *Holden v. Ancient Order, U. W. (Ill.)* 31 L. R. A. 67.

For killing of insured by assignee of policy, see *New York L. Ins. Co. v. Davis (Va.)* 44 L. R. A. 305.

51 L. R. A.

tion brought to enforce the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carney & Holt, for appellant:

The plaintiff in this case sues upon and under a special contract made with the company, payable to a designated beneficiary. In such case the insurance association cannot be liable to any person except the one designated in the contract.

Niblack, Ben. Soc. ed. 1894, p. 673, § 347.

The fact that the beneficiary has voluntarily become incapacitated by her own act does not relieve or aid the plaintiff.

Schoep v. Bankers Alliance Ins. Co. 104 Iowa, 354, 73 N. W. 825.

The wrongful doer cannot recover any benefit or insurance for his wrongful act.

New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, *sub nom. Mutual L. Ins. Co. v. Armstrong*, 29 L. ed. 997, 6 Sup. Ct. Rep. 877.

The suit or action must be brought by the real party in interest.

Code, § 3459; *Montague v. Reineger*, 11 Iowa, 503; *Dennison v. Soper*, 33 Iowa, 183; *Northwestern College v. Schwagler*, 37 Iowa, 579; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

The proceeds of a policy of life insurance which is payable to another than the insured do not constitute assets of his estate, and cannot be disposed of by him by will.

McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217.

If Christina Behrens had no right to the fund, then her assignee, Mr. Volmer, can have none.

Riggs v. Palmer, 115 N. Y. 506, 5 L. R. A. 340, 22 N. E. 188.

The charter and by-laws, respecting the designation of the person to whom the beneficiary fund shall be made payable, were a part of the contract with the defendant, which the intestate entered into when he became a member; and, as their provisions have not been complied with, the defendant is not liable.

Order of Mutual Companions v. Griest, 76 Cal. 494, 18 Pac. 652.

The moment the breath has left the body of the insured the interest is fixed irrevocably as to beneficiary.

Niblack, Ben. Soc. p. 340; *May*, Ins. 3d ed. par. 390.

The killing of the insured by the beneficiary prevents a recovery by such beneficiary, as it is contrary to public policy.

2 *Joyce*, Ins. pars. 833, 836; *Schreiner v. High Court of Illinois C. O. of F.* 35 Ill. App. 576; *Prince of Wales, etc. Asso. v. Palmer*, 25 Beav. 605; *Bolland v. Disney*, 3 Russ. Ch. 351.

Messrs. Davison & Lane also for appellant.

Messrs. Ely & Bush and *Henry Vollmer*, for appellee and interveners:

The contract in suit was made by Claus Behrens for the benefit of others, and under our Code and the decisions of this court, he or his administrator may sue thereon without joining the person for whose benefit the contract is made.

Smith v. Continental Ins. Co. 108 Iowa, 382, 79 N. W. 127; *Stevens v. Citizens' Ins. Co.* 69 Iowa, 658, 29 N. W. 769; *New York L. Ins. Co. v. Bonner*, 11 Neb. 172, 7 N. W. 745; *Burns v. Grand Lodge, A. O. U. W.* 153 Mass. 173, 28 N. E. 443.

Having entered into the contract with the insured, the defendant cannot now say that he is not entitled to sue upon and enforce it.

The beneficiary named in the certificate was forbidden by public policy to receive the benefit fund by reason of having unlawfully caused the death of insured, from the time of the act which afterwards caused such death, and, for that reason, no interest ever vested in her, and, the objects of defendant association, as governed by the laws of this state, being to furnish the benefits contracted for to the family or personal representative of its deceased members, such insurance would become due and payable to the administrator of the deceased's estate for the benefit of the persons to whose benefit it would inure under the laws.

Supreme Council A. L. of H. v. Perry, 140 Mass. 589, 5 N. E. 636; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 681; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L. R. A. 305, 32 S. E. 475.
51 L. R. A.

In case of an illegal designation of beneficiary, or the failure of beneficiary by the death or inability of the beneficiary named to take the insurance, the insurance reverts to the estate of the insured, providing the estate can legally be a beneficiary, or can distribute the insurance funds among those who are authorized to become beneficiaries.

Fuller v. Linzee, 135 Mass. 468; *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 710; *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495; *Bacon*, Ben. Soc. 2d ed. ¶ 243a; *Newman v. Covenant Mut. Ins. Asso.* 76 Iowa, 61, 1 L. R. A. 659, 40 N. W. 87; *Cleaver v. Mutual Reserve Fund Life Asso.* [1892] 1 Q. B. 147.

In construing policies or certificate of insurance the controlling element is the intention of the parties as shown by the entire contract.

Re Conrad, 89 Iowa, 399, 56 N. W. 535; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 233, 32 L. R. A. 473, 63 N. W. 157; *Meyer v. Fidelity & C. Co.* 96 Iowa, 385, 65 N. W. 328; *Collins v. Merchants' & B. Mut. Ins. Co.* 95 Iowa, 543, 64 N. W. 602.

Where no designation of a beneficiary is made by insured, or where the beneficiary named in the benefit certificate fails by reason of prior death, or any other cause, and there is no provision in the contract reverting the fund to the association in such case, the insurance becomes payable in accordance with the objects of the association as governed by the statutes authorizing the organization, by articles of incorporation, or by by-laws, to the classes designated in the objects of the association.

Newman v. Covenant Mut. Ins. Asso. 76 Iowa, 60, 1 L. R. A. 659, 40 N. W. 87; *Bishop v. Grand Lodge E. O. of Mut. Aid.* 112 N. Y. 627, 20 N. E. 562; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 681; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Fuller v. Linzee*, 135 Mass. 468; *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495; *Bacon*, Ben. Soc. 2d ed. par. 243a.

Civil courts may not add to the penalties or forfeitures established by law by depriving a person of property on account solely of crimes committed by him.

Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Milkkin*, 6 Ohio C. C. 357; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 32 Atl. 637; 36 Am. Law Reg. & Rev. N. S. 225; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540.

For the court to deny a recovery upon such a policy is to permit to the insurance company an unearned profit, and to deprive the insured, whose labor and earnings have gone into the policy, of any benefit.

Public policy is a two-edged sword, which, while it prevents reaping benefit from crime, at the same time should prevent the retention of payments without the giving of the promised consideration.

New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, sub nom. *Mutual L. Ins. Co.*

v. Armstrong, 29 L. ed. 997, 6 Sup. Ct. Rep. 877.

If the court should hold that at the time of his death Mrs. Behrens was incapable, by reason of her alleged crime, of becoming the beneficiary, there would be a failure of beneficiary, and under the by-laws and constitution, as alleged, the insurance would be payable to the heirs of Claus Behrens, namely Hulda Bendt and Paula Behrens, and this intervener, being the assignee of Hulda Bendt, would be entitled to recover from the defendant.

Deemer, J., delivered the opinion of the court:

The defendant is a mutual benefit society organized under the laws of this state. On the 10th day of July, 1897, it issued a certificate of insurance on the life of Claus Behrens, payable to Christina Maria Behrens, her heirs or legal representatives, under which the beneficiary was entitled to share in the funds of the association to the amount of \$2,000. After the issuance of the certificate the beneficiary caused the death of the insured (her husband), by administering to him a lethal dose of poison. See *State v. Behrens*, 109 Iowa, 58, 79 N. W. 387. Notice and seasonable proofs of the death of the insured were made to the association: but, as it failed to pay the amount promised in its certificate, plaintiff, as the administrator of the estate of Claus Behrens, deceased, commenced this action, claiming that, as the beneficiary took the life of the assured, she could not recover, and that she held the legal title to the proceeds of the certificate in trust for the benefit of the estate of deceased. Henry Vollmer, who received an assignment of the certificate from the beneficiary after the death of the insured, intervened in the action, and asked that the amount due on the certificate be paid to him. Defendant answered this petition, pleading the facts above recited as a defense to his (intervener's) claim, and made a motion for judgment on the pleadings. This motion was sustained, and Vollmer also appeals. Christina Behrens, the beneficiary, has two children,—Hulda Bendt and Paula Behrens. The former also filed a petition of intervention, in which she made claim to one fourth of the proceeds of the certificate (one half of her interest having been assigned to Henry Vollmer), as an heir of the beneficiary named in the certificate. To this the defendant demurred, and its demurrer was sustained. From that ruling Hulda Bendt appeals. In his reply to the answer to his petition of intervention, Vollmer set forth the assignment made to him by Hulda Bendt, and asked judgment thereon for one fourth of the amount of the proceeds of the certificate. The motion filed by defendant for judgment on the pleadings, tendering the issues between Vollmer and the defendant, was grounded, among other things, on the proposition that his claim to one fourth of the proceeds in virtue of the assignment from Hulda Bendt was not properly pleadable in a reply.

51 L. R. A.

Aside from the issues tendered by the petitions of intervention, the question presented may be stated in this wise: Where a certificate in a mutual benefit society is made payable to a third party, as beneficiary, who afterwards feloniously causes the death of the insured, can the administrator of the insured recover the benefits provided in the certificate? Before going to that question, it is well to consider the intervener's appeals. The certificate provides that on satisfactory proof of death, and it appearing that the member was in good standing and had complied with the conditions of the policy, the association agreed that Christina Behrens, her heirs or legal representatives, should be entitled to share in the beneficiary fund to the extent of \$2,000. The certificate was made nonassignable, except by consent of defendant's board of directors. It is clear that until the death of the beneficiary, her heirs have no claims, as such, against the defendant. The amount is payable to Christina Behrens, her heirs or legal representatives. So long as she is alive she has no heirs, and her children have no claim to the insurance simply because she caused the death of the insured, and thus forfeited her right to take under the certificate. Civil death, growing out of a sentence of imprisonment for life, is not generally recognized in this country. *Avery v. Everett*, 110 N. Y. 317, 1 L. R. A. 264, 18 N. E. 148; *Baltimore v. Chester*, 53 Vt. 316, 38 Am. Rep. 677; *Frazer v. Fulcher*, 17 Ohio, 260; *Platner v. Sherwood*, 6 Johns. Ch. 118; *Cannon v. Windsor*, 1 Houst. (Del.) 143; *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435; *Kenyon v. Saunders*, 18 R. I. 590, 26 L. R. A. 232, 30 Atl. 470; *Willingham v. King*, 23 Fla. 478, 2 So. 851; *Davis v. Laning*, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846. The children of the beneficiary had no right of action against the defendant, and, having no right, there was nothing for them to assign to another. If the beneficiary named in the certificate could not recover, because of her act in taking the life of the insured, her assignee, who simply stands in her shoes, cannot. That Christina Behrens, who took the life of the insured, cannot recover on the policy, is conceded. It would be a reproach to our system of jurisprudence if one could recover insurance money payable on the death of the insured, whose life he had feloniously taken. Certainly one who sets fire to his own building cannot recover the insurance thereon, and we know of no reason why the maxim *Nullus commodum capere potest de injuria sua propria* should not apply. Indeed, the unbroken voice of authority is to the effect that a beneficiary in an insurance policy who murders the insured forfeits his rights thereunder. *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, sub nom. *Mutual L. Ins. Co. v. Armstrong*, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Prince of Wales etc. Asso. Co. v. Palmer*, 25 Beav. 605; *Schreiner v. High Court of Illinois C. O. of F.* 35 Ill. App. 576. See also, as somewhat in point, *Moore v. Woolsey*, 4 El. & Bl. 243; *Names v. Dwelling House Ins.*

Co. 95 Iowa, 642, 64 N. W. 628; *Amicable Soc. v. Bolland*, 4 Bligh, N. R. 194; *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N. W. 581; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 302; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541. The only exception to this wholesome rule seems to be found in cases relating to the descent of property, where the statutes make no exceptions, as in *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 32 Atl. 637; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794. But see, in this same connection, *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 22 N. E. 188. We are of opinion that the maxim cited applies to the case at bar, that contracts must be made and interpreted in the light of public policy, and that it is contrary to the good order of society, and an encouragement to crime, to allow a beneficiary who murders the assured to receive the benefits of the insurance. Any other rule would furnish the strongest temptation to crime, and give to the party interested the most potent incentive to bring about the death of the insured, that he might profit thereby. The public has an interest in such matters over and beyond the individuals or societies involved, and courts are not bound to enforce or hold valid any contract which offends public morals, violates the law, or contravenes public policy. Had the certificate contained a provision to the effect that benefits would be paid in the event the beneficiary took the life of the insured, it would clearly be opposed to public policy, and would not be enforced. If recovery were permitted by the beneficiary or her assignee in this action, it would be giving the same effect to the certificate as if such a clause was included in the contract. Neither of the interveners, Bendt or Vollmer, is entitled to recover.

2. We come now to the case made by the administrator, and the more important and controlling question hitherto stated. Public policy, as we have seen, forbids an action on behalf of the beneficiary or her assignee. But what becomes of the benefit promised to be paid on the death of the assured? Is the company absolved from all liability because of the murder of the assured, or must it pay the amount promised to someone, and, if so, to whom? Neither the beneficiary nor her children nor her assignee can recover, because of the wrong perpetrated by her; but does her wrong absolve the association from its liability? We think not. There is no provision in the certificate that it should be forfeited, in the event the insured was murdered, and no condition of any kind against murder. The agreement was to the effect that in case of the death of the assured the beneficiary should be entitled to a share in the beneficiary fund to the amount of \$2,000. The application, which was made a part of the certificate, contained this statement: "I direct that all benefits to which I may be entitled from the association be paid to Christina Behrens, related to me as 51 L. R. A.

my wife, subject to such future disposal of benefits as I may hereafter direct." It is also provided that the certificate, if issued, should designate as beneficiary either one of the insured's family or relatives, or his legal representatives, heirs, or legatees. This was in accordance with the statute in force at the time, which provided that "no corporation or association organized or operating, under this act, shall issue any certificate of membership, or policy, unless the beneficiary under said certificate shall be the husband, wife, relative, or legal representative, heir, or legatee of such insured member." Acts 21st Gen. Assen. chap. 65, § 7. The object of such insurance is to provide a benefit for the persons named. In ordinary life insurance contracts, the assured has no property in the policy. The contract is between the company or association, on the one part, and the beneficiary, on the other, and from the day of its issue it is the property of the beneficiary. By the decided weight of authority, however, the beneficiary named in a certificate issued by a mutual benefit society has no property therein. All that he has during the lifetime of the assured is a mere expectancy, depending on the will and act of the member. After the death of the member the beneficiary has a property interest, but not before. *Masonic Mut. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Brown v. Grand Lodge A. O. U. W.* 80 Iowa, 287, 45 N. W. 884; *Hirsch v. Clark*, 81 Iowa, 200, 9 L. R. A. 841, 47 N. W. 78. Certificates of insurance in mutual benefit societies are contracts between the society and the member whose life is insured. During the life of the assured he has the power of appointment, or the right to designate to whom the benefits shall be paid. It has been held that, if he designates one outside the class prescribed by the statute, this does not render the policy void, but the insurance in such case becomes payable to those who would have been entitled to it in the absence of any designation. *Shea v. Massachusetts Ren. Asso.* 160 Mass. 289, 35 N. E. 855; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Burns v. Grand Lodge, A. O. U. W.* 153 Mass. 173, 26 N. E. 443; *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102, 18 Atl. 675. The naming of a beneficiary, though not a bequest, partakes of its nature. *Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898; *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208. In *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628, it is expressly held that where the assured makes a designation of beneficiary, unlawful because of statutory inhibition, the administrator of his estate is entitled to recover on the certificate for the benefit of the persons who would have been entitled to the insurance in the absence of any designation; and in *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 681, the beneficiary died before the death of the assured, and it was held that the fund lapsed into the estate of the person who cre-

ated the trust, and at his death became a part of his estate. The court followed the trust-fund doctrine, and said, among other things: "The question is not governed so much by the principle of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. The cases which hold the insurance money to be a trust fund which reverts to the estate of the assured in case of the death of all the named beneficiaries during the lifetime of the assured give different reasons for the results arrived at. Some place it upon the ground that the person to whom the fund would otherwise go has no insurable interest in the life of the assured, while others place it upon the doctrine of failure of trust by the death of the beneficiary. In the case now under consideration, should the plaintiff in error [administrator of one of the deceased beneficiaries] succeed, he would receive the insurance money, while he manifestly had no insurable interest in the life of Mr. Helwig. . . . The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action, so strongly urged by counsel for plaintiff in error. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. . . . On principle, therefore, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig [the assured], and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all the parties interested, and that the result is just and equitable. While there may have been a vested interest, it was an interest not in possession, but in expectancy, liable to be devested by the death of the beneficiary before the death of the assured. . . . We therefore hold, both upon principle and a construction of the statute, that upon the death of the wife and daughter . . . the policy reverted to Mr. Helwig [the assured], and at his death became a part of his estate." In *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 710, the insurance was payable to a trustee, for the benefit of the wife of the assured. The wife died before the husband, who was the assured, and it was held that there was a resulting trust in favor of the assured's estate. See also *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495. Commenting on this last case, Mr. Bacon, in his work on Benefit Societies, 2d ed., par. 243a, says: "Conceding the rule to be that, if the person designated as beneficiary die in the lifetime of the member, a lapse of the designation results, it has been held that under the rules of the society the benefit generally will not revert to the society, but a resulting trust accrues for the benefit of either those designated by the laws of the organization to receive in case of failure of designation, or for those entitled to take as heirs of the member under the statutes of distribution." We are not entirely without precedent in our own cases, in *Newman v. Covenant Mut. Ins. Co.* 76 Iowa, 61,

1 L. R. A. 659, 40 N. W. 87, the certificate was to be made payable to devisees named in the will of the assured. He failed to make the designation, and his administrator brought suit against the society. We held that the company was not released, and said: "Surely the defendant ought not to seek to avoid its obligation by the alleged failure of a beneficiary. . . . If he made no last will and testament, the right to the avails of the life insurance would descend to his heirs, the same as any other property or chose in action." Defendant obligated itself to pay on the death of the assured, and it ought not to be held that the act of the beneficiary forfeited all claim under the policy. The wife cannot recover, because it is contrary to public policy to allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy. We have seen that when there has been no designation, or an illegal designation, or a designation of a person as beneficiary who dies before the death of the assured, the association holds the money in trust for the benefit of the estate of the assured. Following this doctrine to its logical conclusion, it seems to us that, when the beneficiary named is prohibited from taking because of her own wrong, a trust arises, that will be enforced in a proper case. This trust is created in favor of the husband's estate, and takes effect by reason of the crime of the wife, which destroys the trust in her favor. In so far as she is concerned, the trust is destroyed by her crime, and in consequence a resulting trust in favor of the husband's estate is allowed. If we treat the designation of a beneficiary as akin to a bequest, the same result follows; for a lapsed legacy descends to the heirs of the testator. Moreover, the fund was created or collected by the defendant for the benefit of the persons or classes named in the statute. True, it is to pay this fund to such person or persons of this class as may be designated by the assured; but, if no one is selected, it is nevertheless a trust fund to be paid to the estate of the assured, for the benefit of one of the classes or persons named. No one will doubt the proposition that whenever property is produced by payments made by one, that are to be held in trust for another, and that trust fails or is satisfied, a resulting trust arises in favor of the party making the payments, or his estate. The celebrated case of *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, growing out of the *Maybrick Case*, is much like the one at bar; and it was there held that notwithstanding Mrs. Maybrick, who murdered her husband, was named as beneficiary in his certificate of insurance, and could not recover from the insurance company, still the insurance money formed a part of her husband's estate, and could be recovered by his administrator. That decision meets with our approval, and we have no hesitation in following it. See also *Re Conrad*, 89 Iowa, 399, 56 N. W. 535, wherein it was held, in a case where the beneficiary died before the assured, that the fund should

be disposed of according to the laws of descent. When Mrs. Behrens caused the death of her husband, all her rights under the policy ceased, and the trust in her favor was by that act annulled, but the obligation of the company to pay the promised benefit was not canceled. Absolution from payment to Mrs. Behrens was brought about by her own conduct, which prevented her from recovering because of public policy. But the interest in the benefits to which the assured was entitled from the association was not destroyed. We have no occasion to determine whether or not Mrs. Behrens can take anything through the administrator, as that

question is not before us. It will be time enough to consider it when it is properly presented. None of the cases relied on by appellant are in point. The question here decided was not raised in *Schoep v. Bankers' Alliance Ins. Co.* 104 Iowa, 354, 73 N. W. 825. *McClure v. Johnson*, 56 Iowa, 620, 10 N. W. 217, involved no such question as is here presented.

Ordinarily the proceeds of a policy of insurance payable to another than the assured do not constitute assets of his estate, and cannot be disposed of by will.

The judgment of the District Court is correct, and it is affirmed.

NORTH CAROLINA SUPREME COURT.

T. B. LENOIR, Exr., etc., of W. W. Lenoir,
v.

LINVILLE IMPROVEMENT COMPANY.

Thomas F. PARKER et al., Interveners,
Appts.

(126 N. C. 922.)

1. A finding by a referee and court, made without excluding any evidence, to the effect that there is no evidence tending to prove an allegation, cannot be reviewed on appeal, as that would be to pass upon the weight of the evidence.
2. The right of officers of a corporation to their salaries is terminated, although their term of office has not expired, by the appointment of a receiver for the company on account of its insolvency, since the appointment of the receiver operates as a dissolution of any contract between the parties for such services by the sovereign power of the state.

(June 9, 1900.)

NOTE.—Effect of appointment of receiver or assignee for creditors of a corporation on compensation of officers, agents, or employees for unexpired term of employment.

The American decisions are uniform so far as the question of the effect of an assignment upon the right to compensation for unexpired term of employment is concerned, and there is practically no conflict in the decisions in case of the appointment of a receiver.

Thus, in *Potts v. Rose Valley Mills*, 167 Pa. 310, 81 Atl. 655, it was held that the treasurer of a corporation was entitled to recover for the unexpired term for which he was elected, pending which the corporation made an assignment for the benefit of creditors, if there were duties performed during such period, or if there were none to perform but he was ready to perform and carry out his contract.

And one employed as general agent of a corporation under a contract for a specified time at a designated salary is entitled to an allowance of his claim for the difference between his salary under a contract entered into with another, after the making of a voluntary assignment by the corporation, and that which he would have received under his contract with it, under Ill. assignment act, § 10, giving a creditor whose

APPEAL by interveners from a judgment of the Superior Court for Mitchell County confirming the report of a referee disallowing the claims of interveners for salary alleged to be due them by the defendant corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Davidson & Jones and Busbee & Busbee for appellants.

Mr. E. J. Justice, for appellee:

As interveners have no claims against the corporation except for salaries, they cannot recover anything as creditors in this action.

Lenoir v. Linville Improvement Co. 117 N. C. 471, 23 S. E. 442; *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Fraun v. Crystal R. Co.* 89 Mo. 407, 14 S. W. 557; *Dermott v. Jones*, 2 Wall. 1, sub nom. *Ingle v. Jones*, 17 L. ed. 782.

Mr. D. W. Robinson also for appellee.

Douglas, J., delivered the opinion of the court:

This is an appeal by the petitioners, Par-

claim is not due, but is to become due, a right to share in the assets of the estate in insolvency. *Parker v. Hull*, 48 Ill. App. 471. It is said that the mere act of assignment did not relieve the corporation from the duty of paying its debts and liabilities, and no more was the assignee relieved thereby.

The position taken in *LENOIR v. LINVILLE IMPROVEMENT CO.*, that those whose terms of employment have not expired on the appointment of a receiver cannot recover for the unexpired portions thereof, seems to find support in nearly all the American decisions.

Thus, in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, it was held that the dissolution of an insurance company and the appointment of a receiver at the suit of the attorney general at the instance of the superintendent of the insurance department of the state, and the restraining of the doing of further business by injunction order, cannot be considered a breach by the voluntary act of the corporation of the contract of a general agent whose term of employment extended beyond the time of such dissolution, which will entitle him to claim anything therefor from the assets of the company, even if the conditions giving rise to such action on the part of the state may have been caused by the acts of the officer, since, having made

ker and Kelsey, claiming, respectively, as president and secretary of the company, the balance of their salaries coming due while the company was in the hands of the receiver. The following is the report of Referee Burwell:

"This cause having been referred to me, I proceeded, on June 29, 1898, at Linville, N. C., to hear evidence upon the matters submitted to me for determination. There were present at such hearing Messrs. Davidson & Jones, attorneys for Thomas F. Parker and Harlan P. Kelsey, petitioners, and E. J. Justice, attorney for the defendant. I send herewith the testimony of the several witnesses who were examined before me, it having been taken down by a stenographer. When the cause was called for hearing before me, counsel suggested that the following issues had been agreed upon as covering

the matters in dispute: (1) Is the Linville Improvement Company indebted to the plaintiff Thomas F. Parker upon his claim filed in this case? If so, in what amount? (2) Is the Linville Improvement Company indebted to the plaintiff Harlan P. Kelsey upon his claim filed in this case? If so, in what amount? From the testimony introduced before me by the petitioners and defendant, I find the following facts: (1) On August 21, 1893, an order was made appointing a receiver of the defendant corporation, and this order prescribed the duties of such receiver as follows: 'To take into his hands all the property and effects of the Linville Improvement Company, both real and personal, together with all choses in action, debts, claims, and demands of every kind; to collect all debts due the company; to keep in proper repair the houses and other prop-

his contract with knowledge of the statutory conditions making such dissolution possible, such conditions were a part of the agreement, and the result was within the contemplation of the parties, and he took the risk of such act or neglect on the part of the officers as would tend, under the law, to produce a dissolution. It is considered, also, that the act was the independent act of the state for the reason that the making of the certificate by the insurance superintendent which would set the law in motion was a matter lying within his sole discretion, and he could act or not as he chose, so that the dissolution was not a necessary consequence of the existence of grounds therefor. And further, the subject-matter was that of skilled personal services rendered by one and received by the other, for which substituted service would not answer. The contract in its own nature was dependent upon the continued life of both parties, and with the natural death of one or the corporate death of the other the contract inevitably ends.

The principle that there is no breach where dissolution is not the voluntary act of the corporation was subsequently applied in *Eddy v. Co-operative Dress Assn.* 3 N. Y. Civ. Proc. Rep. 422, in the case of the practical dissolution of the corporation by the appointment of a receiver in a judgment creditor's action to secure the sequestration of the corporate property, holding that there was no breach of contract entitling the general manager of a corporation to an allowance of his claim for the difference between the salary secured with another house and what he would have received under his contract for the unexpired term thereof, out of the funds in the hands of such receiver to the detriment of creditors.

So, also, the claim of the treasurer and manager of a corporation for services claimed to have been rendered in the continuance of the business after the annulment of the charter by proclamation of the governor for nonpayment of taxes, and partly after the subsequent appointment of a receiver, will not be allowed, since the dissolution of the corporation by proclamation terminated the relation of the parties. *Louchheim v. Clawson Printing & Weighing Co.* 12 Pa. Super. Ct. 55. And even if it be considered that such dissolution was not due to an arbitrary act of *vis major* because resulting from the company's default in making such payments, yet the court deemed that the possibility of such result was within the contemplation of the parties when the office was accepted, where at that time he was a stockholder and director of the corporation and 51 L. R. A.

in a position to know that such default had already occurred.

The president of an insurance company, the exercise of whose office was suspended by the appointment of receivers at the instance of insurance commissioners, so that he did not render all the services for which his salary was to be paid, is entitled to an allowance of only a reasonable sum for salary, and not to the amount stipulated in his contract, although by the injunction order the existence of the corporation was continued until the final closing up of its business. *Com. v. Eagle F. Ins. Co.* 14 Allen, 344. This would seem to be simply an allowance for services actually rendered and otherwise in accord with the preceding cases.

In *Re Croton Ins. Co.* 3 Barb. Ch. 642, which came before the chancellor on application by the receiver for leave to pay the officers of the company their salaries in full, he was permitted to allow them the amount due for salary "up to the time of his appointment only," as debts to be paid ratably with other creditors. The main contention seems to have been as to their right to a preference over other creditors, and as to whether the requested leave to pay their salaries in full referred only to the question of priority or was intended to cover salaries for their unexpired terms subsequent to the receiver's appointment does not appear, except the possible inference from the language quoted, nor is it shown at whose instance the receiver was appointed.

The case of *People v. Globe Mut. L. Ins. Co.* was distinguished in *Timin Glass Co. v. Stoehr*, 54 Ohio St. 157, 43 N. E. 279, on the ground that the dissolution which was there held to have terminated the contract was brought about by an action by the state, whereas the dissolution in this case was the voluntary act of the stockholders; however it did not involve the effect upon the right to compensation for the unexpired term of employment by reason of the breach of the contract by dissolution and appointment of a receiver, but the effect of such appointment upon an agent's right of action for damages upon the breach of his contract of employment which had accrued prior thereto by his discharge before the expiration of his term.

In *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378, the rule adopted in the preceding decisions is departed from, and it is held that employees of a corporation whose terms of employment had not expired on the adjudication of the corporation's insolvency and appointment of a receiver are entitled to damages for the breach of their contracts of

erty; to pay all taxes lawfully assessed against the said company, and to defend and prosecute all suits at law or in equity touching or concerning the said company, and for this purpose to employ counsel at a compensation to be fixed and allowed by the court; to sell and dispose of, for cash, all the property of a personal nature, and especially such as is liable to deterioration, at either public or private sale, and at such times and places as he may elect to sell and dispose of the houses, lands, and tenements of said company, in such quantities, and at such times and places, and upon such terms, as he may deem best, and, upon confirmation of the said sale or sales by the court, to execute deeds conveying such to the purchaser or purchasers.' (2) That, pursuant to this order, J. F. Spainhour was duly qualified as receiver, and immediately thereafter took charge of

employment, under a statute providing that creditors shall be paid in proportion to the amount of their debts, although they are not entitled to the amount of their salaries under their contracts. In measuring their damages their condition of health and their liberty and opportunity to obtain other employment must be considered. The court says that it sees no ground for distinguishing between cases where the breach of contract precedes the adjudication of insolvency, and cases where the breach follows in consequence of that adjudication. The insolvency, suspension of business and receivership do not extinguish the corporation's life. The chancellor "may" declare the charter to be forfeited and void, and "may" direct a division of the surplus assets among the stockholders; but cases may arise, and do arise, where he should not, and does not, exercise that power because the assets are sufficient to pay the creditors and justify the discharge of the receiver so that the company may resume its business. And consequently the rule that when a master dies a contract with his servant is terminated is not potent in this consideration. This case is not necessarily in conflict with the other decisions, because, although the suspension of its business may have resulted from the act of a third person, and not the voluntary act of the corporation, yet there was no dissolution of the corporation, or death, and, as remarked, the circumstances might be such as to permit it to resume business.

The English decisions are practically uniform in allowing salaries for unexpired terms of employment, and seem to have made practically no distinction between voluntary and involuntary dissolution.

Thus, in *Yelland's Case*, L. R. 4 Eq. 350, the manager of a branch bank under a contract for five years, during the continuance of whose term the bank was wound up, who continued to serve for a short time thereafter until notified by the liquidator that his services were no longer required, was permitted to recover compensation for the balance of his term. The only question discussed in the opinion, however, is the manner of computing the sum to which he would be entitled, the court saying that the present value of an annuity equal to his annual salary, terminating at the date of the expiration of his contract term, should be ascertained, and from this amount a deduction should be made for his liberty of obtaining a fresh appointment, and regard should be had to the liberty reserved to him by the agreement of acting as agent for other companies.

And the appointment of a receiver and man-

the property and effects of defendant corporation according to the terms of the order appointing him receiver. (3) That at the time of said appointment of a receiver the petitioner Thomas F. Parker was president, and Harlan P. Kelsey was secretary of defendant corporation. (4) The charter of the defendant corporation provided that there should be a president and a secretary and a treasurer, who should be elected annually, and should hold their offices, respectively, for one year, or until their successors should be chosen. The charter provided that the treasurer should be elected by the board of directors, and should hold his office for one year, or until his successor should be elected or inducted into office, unless he should be removed by the board of directors, and that he should give bond with good and sufficient surety for the safe-keeping of all

ager of a corporation at the instance of debenture holders or mortgagees is a discharge of one employed by the corporation as manager of its works, under a contract requiring six months' notice of the termination of his employment, which, however, does not give him a right of action for damages as for wrongful dismissal without such notice, where he was continued in his employment at the same salary by the receiver for more than six months, so that he sustained no damage. He would otherwise have been entitled to six months' pay as his highest damages, subject to reduction. *Reid v. Explosives Co.* L. R. 19 Q. B. Div. 264, 56 L. J. Q. B. N. S. 388, 57 L. T. N. S. 439, 35 Week. Rep. 509.

The decision in *Yelland's Case* was followed in *Re London & C. Co.* L. R. 7 Eq. 550, 38 L. J. Ch. N. S. 562, 20 L. T. N. S. 774, a limited trading company, wherein, on the voluntary winding up of the company before the expiration of a colonial agent's term of employment under a contract for a specified salary and certain commissions, the court allowed the agent his full salary for the unexpired portion of his term. A claim was also made for commissions for such unexpired term, but does not seem to have been allowed, no mention thereof being made in the opinion of the chancellor.

Likewise, one employed as managing director of a corporation for a designated territory under a contract for an indefinite period, with a provision that in case he is discharged for any other cause than gross misconduct the directors shall pay him as compensation for his loss of office a sum equal to three years' salary at the rate in force at the time of such termination of his engagement, is entitled to prove his claim for such amount when the company is ordered to be wound up, without any deduction for his liberty to obtain a fresh appointment. *Re London & S. Bank.* L. R. 9 Eq. 149, 18 Week. Rep. 273. While this is more in the nature of liquidated damages, yet it might be considered in a sense as fixing under the contract the unexpired term of employment on discharge.

So, a shareholder in a corporation, who was appointed managing director for a term of ten years at a specified annual salary, may, on the winding up of the company before the expiration of his term, prove his claim for damages for breach of his contract of employment in competition with other creditors. *Re Dale.* L. R. 43 Ch. Div. 253, 59 L. J. Ch. N. S. 180, 62 L. T. N. S. 215. The main question in the case, however, was as to whether his claim was a sum due to him in his character as a member of the company within an act providing that no

moneys that might come into his hands, and for the faithful discharge of all the duties of his office. (5) The by-laws of the corporation provided that the salaries or other compensation of all offices should be fixed by the directors, and might be changed or discontinued at the end of any month. (6) Thomas F. Parker was duly elected president on July 20, 1893, and immediately thereafter, at a meeting of the directors, he was elected treasurer, and as such treasurer he gave bond in the sum of \$20,000. (7) At that time (July 20, 1893) Harlan P. Kelsey was duly elected secretary of defendant corporation, and was duly inducted into that office. (8) At a meeting of the directors on July 20, 1893, the compensation of these offices, to wit, president and secretary, was fixed as follows: President, \$100 per month; secretary, \$25 per month. The secretary and treasurer were both *ex officio* members of the board of directors that so fixed their compensation. (9) It was always the custom of the defendant company to pay the actual expenses of the directors of the company in attending meetings when-

ever they made any charge for so doing. (10) That the receiver paid to each of these petitioners the amount due them on account of salary up to September 1, 1893, the date of his qualification as receiver and his taking charge of the property and effects of the company. (11) That, after the appointment of the receiver and his entering upon the duties of his office, the petitioner Harlan P. Kelsey was not called upon or required to perform any service whatever for the company, and did not in fact perform any service on its account, except attendance at meetings of the stockholders. (12) That the petitioner Thomas F. Parker, after the appointment of receiver and his qualification, continued to act as president of the corporation as to all matters that seemed to require his attention, and interested himself in the affairs of the company, and in the efforts made by himself and others to extricate the corporation from its financial difficulties. He was recognized as the president of the company at the meeting of the corporation held in 1894, and he aided and assisted the receiver in his care of the affairs of the com-

pany due to any member of the company in his character as member shall be deemed the debt of the company payable to such member in case of competition between himself and any other creditor not a member.

One employed for a term of years as agent of an insurance company at a designated annual salary and a specified per cent commission upon the profits of each year is not entitled to recover for the prospective value of such commissions on a voluntary winding up of the company and appointment of liquidators before the expiration of his term of employment. *Re English & S. Marine Ins. Co. L. R. 5 Ch. 537, 39 L. J. Ch. N. S. 685, 23 L. T. N. S. 685, 18 Week. Rep. 1122.* The estimated value of his salary for the remainder of his term of employment, however, appears by the state of facts to have been allowed by the master of the rolls, but no appeal was taken from the decision as to that item.

But commercial travelers employed by a corporation for a designated term to be paid in commissions at a certain per cent on sales are entitled to recover the estimated value of the commissions for the unexpired terms of their contract on the voluntary winding up of the company and appointment of liquidators before the expiration of such terms of employment. *Re Patent Floor Cloth Co. 41 L. J. Ch. N. S. 476, 26 L. T. N. S. 467, distinguishing Re English & S. Marine Ins. Co. on the ground that that was a case in which two things had been stipulated for,—salary and commission; and that, if the master who had agreed to pay him salary chose to leave off business, the servant could not prescribe to his master that he must carry on business whether he liked it or not.*

One appointed secretary of a joint-stock company at a yearly salary, and who acted as such for about a year and eleven months, is entitled, on the winding up of the company, to his salary for the one year and damages for not being employed during the second year, but not to a year's additional salary in lieu of notice of discharge, on the theory that his employment being a yearly one he could not be discharged without receiving a year's notice or salary in lieu thereof. *Cope's Case, 20 L. J. Ch. N. S. 28, 1 Sim. N. S. 54.* The vice chancellor actually allowed him his salary for the full two 51 L. R. A.

years, considering such allowance reasonable, inasmuch as he had served for nearly the whole of the second year, and the measure of his damages for nonemployment for the whole year would be eleven months, and perhaps something more for the inconvenience of looking out for other employment.

An employee of a corporation under an agreement that he shall serve until his services shall be determined by three months' notice is entitled to prove his claim for three months' salary in lieu of such notice of discharge, on the termination of his employment by the liquidator of the company, appointed on the making of a compulsory winding-up order, where his services were continued after such appointment while the company was in the hands of the liquidator, since such continued employment must be considered to go on under the old contract, entitling him to such notice. *Re English Joint Stock Bank, L. R. 3 Eq. 341, 15 L. T. N. S. 528, Distinguishing, on the ground of the continuance of the company, the decision in Re General Rolling Stock Co. L. R. 1 Eq. 346, 35 Beav. 207, 12 Jur. N. S. 44, in which a similar allowance was contended for, but wherein it was held that the winding-up order was notice to all the world, and that the applicant was entitled to prove his salary on the footing of having had notice of discharge on the day the order was made.* This case might seem to indicate that if there had been no continuance of the company's business no allowance would have been made; but in *Yelland's Case, L. R. 4 Eq. 350*, which seems to have arisen out of the winding up of the same corporation, the allowance for the unexpired portion of a definite term of employment was made without any such suggestion, so that it would seem to rest here on the indefiniteness of the term and the other facts of the particular claim.

The doctrine of the American decisions that no recovery can be had as for the breach of such contracts upon the dissolution of the corporation seems to be contrary to the general rule laid down by some text writers, that, while the necessary effect of dissolution is to put an end to the contracts of the corporation involving a continuing duty or liability on its part, the other party is entitled to just compensation.

J. E. W.

pany. No evidence was introduced before me as to the value of such services as he rendered in this behalf. (13) Thomas F. Parker attended a meeting of the corporation, and at such meeting was recognized as the president of the company, and he expended of his own means in attending such meeting the sum of seventeen and 95/100 dollars. (14) There was no contract or agreement as to compensation between the corporation and petitioners, or either of them, except such contract or agreement as is contained in the action of the stockholders and directors above set forth electing them to be officers of the company, and fixing their salaries, and inducting them into their offices. From these facts, so found by me, I conclude that the petitioners are not entitled to prove in this action the claims against the corporation set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation except for such salaries, they cannot recover anything as creditors in this action. I disallow Mr. Parker's claim (\$17.95) for expenses, because it is a claim originating entirely after this bill was filed. I therefore answer both issues, 'No.' In arriving at my conclusions of fact, stated above, I have considered all the evidence relied upon by the claimants, notwithstanding the objections of defendant, and have sustained all objections made by the claimants, and excluded all evidence objected to by them."

We do not feel at liberty to review the referee's finding of fact as presented to us in the first and second exceptions. Where a fact is found without any evidence tending to prove it, the finding is reviewable by us; but where, without the exclusion of any evidence whatever, the referee and court find that there was no evidence tending to prove an allegation, how can we review the finding without passing upon the weight of the evidence? If we were to say that the court was in error in saying that there was no evidence, and that there was evidence tending to support the allegation, we could not say that the evidence was sufficient to prove the allegation, as that would be passing upon its weight. Therefore the third exception of the petitioners is all that is properly before us, and it is as follows: "(3) For that the referee erred in his conclusions of law as follows: That the petitioners are not entitled to prove in this action the claims against the corporation set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation for such salaries, they cannot recover anything as creditors in this action." The court below confirmed the report of the referee in all respects.

We frankly admit that this case has given us much trouble, and to it we have given careful consideration. The authorities on the exact point are not numerous, but they 51 L. R. A.

are conflicting, and from courts of the highest respectability. In *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 373, in an able opinion by the chancellor, it was held that claims for damages arising from breaches of contract for services, occasioned by the insolvency of the defendant corporation, were entitled to be paid *pro rata* out of the funds in the hands of the receiver. After calling attention to the fact that, upon the dissolution of a corporation, all its surplus assets, existing after the payment of debts, are returned to its stockholders, the court says: "It could hardly have been the intention of the lawmakers to distribute the surplus of assets, or, in other words, return capital, to the stockholders of the company (that is, to those who deliberately ventured for gain, and pledged their capital for the security of those who were induced to deal with them), and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. . . . I see no reason under this law for distinguishing between cases where the breach of contract precedes the adjudication of insolvency and cases where the breach follows in consequence of that adjudication. The insolvency, suspension of business, and receivership do not extinguish the corporation's life. The chancellor 'may' declare the charter to be forfeited and void, and 'may' direct a division of the surplus assets among the stockholders; but cases may arise, and do arise, where he should not, and does not, exercise that power, because the assets are sufficient to pay creditors, and justify the discharge of the receiver, so that the company may resume its business. Consequently the rule that when a master dies the contract with his servant is terminated is not potent in this consideration." This is the New Jersey rule, and there is much to commend it. But we think that the average ends of justice would be better and more generally subserved by following the New York rule, as laid down in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, where the court says, on page 178: "There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken, at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service, the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears, it would have done so if let alone. But it was not permitted to perform. The state, by the injunction order operating alike upon the com-

pany and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent, he was bound to show both ability and readiness to perform on his part. . . . He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. . . . So that, from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation." Again, in distinguishing a different class of cases, the court says, on page 180: "In all of them the companies stopped payment before any intervention of the law, and this, being done by open and public notice, amounted to a voluntary refusal of performance, and therefore a breach of contract, established before the winding-up orders were made and the liquidators appointed. When the court interfered, it found broken contracts, and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken." The court further distinguishes a certain class of cases where property rights survive the death of the parties. We have quoted at length from this opinion because it expresses so clearly our own view of the law. It is cited and followed by the circuit court of the United States in *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680. This rule applies in the case at bar. The petitioners were elected to their respective offices for the

purpose of having the ordinary duties of those offices properly performed. Salaries were assigned to them for the proper performance of those duties, and were paid for the full time that they were performed. The company never refused to perform its part of the contract, nor were the claimants in a condition to perform their part after the appointment of a receiver. It is true they do not appear to have been enjoined from doing so, but that was the practical effect of the order appointing the receiver. He was directed to take control of all the property of the company, and to assume entire management of its affairs. This left nothing for the petitioners to do, as any interference with the duties of the receiver would have been a contempt of court. It makes no difference whether their relations with the company were severed or not. It is probable that if the receiver had been discharged, and the company permitted to resume the management of its own affairs, during the continuance of their terms, or perhaps even if before the election of their successors, they would at once have resumed their offices, with all their duties, powers, and emoluments. But it is certain that during the continuance of the receivership they neither did nor could perform such duties, and that their inability to do so did not arise from any adverse action on the part of the company. As they did not perform those duties, they did not earn the salary attached to their performance, and they cannot recover from the defendant for a breach of contract where the defendant has been guilty of no breach. If the receivership had been only partial, extending only to particular property, and leaving the defendant corporation still in the general, and even partial, management of its affairs, the case would be different. If the petitioners rendered any service to the receiver, we do not see why they should not be paid, but they cannot recover in the shape of salaries for offices that were practically in abeyance. When this case was here before (reported in 117 N. C. 471, 23 S. E. 442), all that this court decided was that the petitioners had a right to be heard upon the facts as well as the law. They have now been heard, and, upon the facts as found by the referee, they cannot recover, in our view of the law.

The judgment below is affirmed.

MISSOURI SUPREME COURT.

STATE of Missouri *ex rel.* STAR PUBLISHING COMPANY, Formerly Sayings Company,

v.
ASSOCIATED PRESS.

(.....Mo.....)

1. A demand and refusal of a proper contract to supply news to a newspaper is

a necessary condition precedent to any writ of mandamus to compel a press association to enter into such a contract.

2. An allegation that a newspaper is ready to enter into "a proper contract" with a press association is too vague and indefinite to base thereon the judgment of a court for the making of such a contract.

3. A court will not by mandamus compel a press association to enter into

NOTE.—The above case is sharply in conflict with the Illinois decision in the case of *Inter-Si L. R. A.*

Ocean Pub. Co. v. Associated Press (Ill.) 48 L. R. A. 568.

a contract for the supplying of news to a newspaper, since a court cannot compel the making of a contract because the element of the specific act to be performed is lacking, and for the further reason that a contract of this kind would necessarily involve and require for a long time the exercise of judgment, continuous supervision, special experience, and business discretion.

4. A by-law of a press association providing for the admission of new members upon the sanction of a majority of the board of directors, even if it could be deemed to have been passed for the benefit of an applicant for membership, cannot be enforced by the courts for his benefit, where it does not fix the compensation to be paid or the other terms of the contract.
5. A right of eminent domain possessed by a press association under its original charter for the purpose of establishing telegraph and telephone lines, but which has never been exercised, and has been abdicated by an amendment to the charter, is of no effect in determining the right of the government to regulate the business.
5. A press association which has no exclusive or peculiar facilities for the gathering of news, but which has numerous competitors in the business, and which has been granted no special or exclusive right or privilege by the state, cannot be compelled to enter into a contract with, or to furnish news to, a newspaper which it has refused to serve in a town where it supplies news to other newspapers.
7. The furnishing of news by a press association to newspapers is not within the scope of Rev. Stat. 1899, § 8965, prohibiting trusts or combinations to regulate or fix the price of manufactures, commodities, "or any article or thing whatsoever."

(October Term, 1900.)

APPPLICATION for a writ of mandamus to compel defendant to furnish relator with news collected by it for publication. *Denied.*

The facts are stated in the opinion.

Mr. Nathan Frank, for relator:

The Associated Press is like any other corporation in charge of a public utility.

When private property is affected with a public interest, it ceases to be *juris privati*.

It is clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.

When one devotes his property to a public use in which the public has an interest he, in fact, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest thus granted.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 165, 24 L. ed. 97.

This definition of the character of property which may be deemed affected by a public use has been time and time again confirmed.

Companies conducting grain elevators:

Stewart v. Great Northern R. Co. 65 Minn. 517, 33 L. R. A. 427, 68 N. W. 208; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. 51 L. R. A.

E. 670, 682; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Street railways:

Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L. R. A. 384, 19 N. E. 63; *Sternberg v. State*, 36 Neb. 307, 19 L. R. A. 570, 54 N. W. 553; *Parker v. Metropolitan R. Co.* 109 Mass. 506.

Public warehouses:

Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146.

Supplying customers with telephones or sending messages by telephone:

Hookett v. State, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178; *Central U. Teleph. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, and note.

All classes of common carriers:

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386, 10 Atl. 113.

Telegraph companies and corporations:

Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692.

Grist-mills:

Burlington v. Beasley, 94 U. S. 310, 24 L. ed. 161; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *State v. Edcards*, 86 Me. 105, 25 L. R. A. 504, 29 Atl. 947.

Hacks:

Lindsay v. Anniston, 104 Ala. 261, 27 L. R. A. 436, 16 So. 545; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644.

Canals:

Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937.

Public wharves:

Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; *Barrington v. Commercial Dock Co.* 15 Wash. 175, 33 L. R. A. 116, 45 Pac. 748.

Hotels:

Bostick v. State, 47 Ark. 126, 14 S. W. 476.

Theaters and other public places of amusement:

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245.

Corporations supplying the public with gas:

State ex rel. Atty. Gen. v. Columbus Gas-light & Coke Co. 34 Ohio St. 572, 32 Am. Rep. 390.

Companies supplying the public with water:

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 582, 17 Pac. 487; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 198, 31 L. R. A. 828, 43 Pac. 1028; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.

Boards of trade engaged in the business

of collecting and furnishing to the public reports and quotations of market prices:

New York & O. Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855.

Legislation enacted for the regulation of those engaged in business affected by a public use, intended to promote the public welfare, has been almost universally sustained.

32 Am. Law Rev. 501; 31 Am. Law Rev. 685; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 101 Mo. 192, 8 L. R. A. 801, 13 S. W. 822; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 42 L. R. A. 113, 46 S. W. 981.

The Associated Press is not a virtual monopoly only, but the real, genuine article.

Minnesota Tribune Co. v. Associated Press, 27 C. C. A. 542, 55 U. S. App. 136, 83 Fed. Rep. 350.

The Associated Press has taken the whole matter of the collection, distribution and publication of news into its hands. It has brought the leading newspapers of the country under its control. It is possible for it to establish a censorship over public intelligence; it dictates to a newspaper from whom the newspaper shall buy its news, and it is claimed that this can be done as a mutual co-operative association.

The fact that the price paid by the members of the Associated Press to the Associated Press is called an "assessment" does not change the nature of the transaction.

Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. Rep. 439; *State ex rel. Beach v. Citizens' Ben. Asso.* 6 Mo. App. 163.

The remedy sought here is the proper one. *People ex rel. Postal Telegr. Cable Co. v. Hudson River Teleph. Co.* 19 Abb. N. C. 466; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *State ex rel. Mattoon v. Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292.

The contract of the respondent with the St. Louis Post-Dispatch and other St. Louis papers is void as against public policy.

State ex rel. American U. Telegr. Co. v. Bell Teleph. Co. 36 Ohio St. 296, 38 Am. Rep. 583, and note; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 660, 15 L. R. A. 598, 19 S. W. 274; *New York & O. Grain & Stock Exchange v. Chicago Bd. of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Friedman v. Gold & Stock Telegr. Co.* 32 Hun, 4; *Smith v. Gold & Stock Telegr. Co.* 42 Hun, 454.

Mr. F. N. Judson, with Messrs. Boyle, Priest, & Lehmann and R. E. Ball, for respondent:

By-law 7 was not enacted for the benefit of the relator, and it does not in any view create a contract between the relator and respondent.

The courts will not by mandamus compel the making of a contract, nor will they by 51 L. R. A.

mandamus or otherwise specifically enforce a contract whose performance requires long time, continuous supervision, special experience, and business discretion.

14 Am. & Eng. Enc. Law, p. 104; *Tapping, Mandamus*, 65; *State ex rel. Bohannon v. Howard County Ct.* 39 Mo. 375; *Iron Age Pub. Co. v. Western U. Telegr. Co.* 83 Ala. 498, 3 So. 449; *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503.

If newsgathering is a public employment, then, *a fortiori*, the publication of a newspaper is so.

The entire usage of English-speaking peoples with newspapers has been with them as institutions which should be free.

In the gathering and transmission of its news the Associated Press exercises no public franchises whatever.

The gathering of news is a personal service, and the transmission of it is through public instrumentalities, with respect to which the Associated Press neither has nor claims any peculiar rights or privileges.

The report of current events, made by the members of the Associated Press and by its employees, being the product of individual labor unaided by public powers or special privileges, is private property.

Venable v. Wabash Western R. Co. 112 Mo. 103, 18 L. R. A. 68, 20 S. W. 493; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546; *Dunlap's Cable News Co. v. Stone*, 39 N. Y. S. R. 237, 15 N. Y. Supp. 2; *Matthews v. Associated Press*, 61 Hun, 199, 15 N. Y. Supp. 887, 136 N. Y. 333, 32 N. E. 981.

The Associated Press is but an association of publishers who have combined their efforts and facilities to gather news for themselves as efficiently and economically as possible. It has and can have no monopoly of the news itself, and has neither monopoly nor special facility for the transmission of news.

Other agencies for newsgathering do in fact exist and are in successful operation at this time.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 190; *Hamilton-Brown Shoe Co. v. Sawey*, 131 Mo. 212, 32 S. W. 1106; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. Rep. 310; *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. Rep. 724; *Re Phelan*, 4 Inters. Com. Rep. 788, 62 Fed. Rep. 803; *United States v. Elliott*, 5 Inters. Com. Rep. 148, 64 Fed. Rep. 27; *Herriman v. Meneses*, 115 Cal. 16, 35 L. R. A. 318, 46 Pac. 730, 44 Pac. 660; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; 18 Am. & Eng. Enc. Law, p. 746; *Tiedeman, Pol. Power*, § 2.

The Associated Press, while authorized by its original charter to conduct a telegraph and telephone business, never in fact exercised such authority, and therefore had not the right of eminent domain.

Since this suit was begun it has amended its charter, and relinquished all right to do a telegraph or telephone business.

Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546; *People ex rel. Robinson v. Pittsburgh R. Co.* 53 Cal. 694; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; *Louisville Transfer Co. v. American Dist. Teleph. Co.* (Ky.) 24 Alb. L. J. 283.

The purpose of the Associated Press is simply to facilitate and cheapen the gathering of news by its members. It does not assume to regulate in any wise the dealings of its members with the public, and does not in any manner restrict or hinder competition between them.

Fawcett v. Missouri P. R. Co. 84 Mo. 679, 54 Am. Rep. 105; *Hamilton-Brown Shoe Co. v. Sawcy*, 131 Mo. 212, 32 S. W. 1106; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

The business of the Associated Press is the rendition of personal service; but if it is to be considered as commerce, it is interstate and international, and therefore within the exclusive power of Congress to regulate.

The inaction of Congress respecting any branch of commerce is tantamount to a declaration that such commerce shall be free.

If the anti-trust statute of the United States is held to be applicable, then the remedies prescribed by it are exclusive of all others.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Intern. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Intern. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Beach, Monopolies*, 713; *Greer v. Stoller*, 77 Fed. Rep. 1; *Blindell v. Hagan*, 54 Fed. Rep. 41; *Pidcock v. Harrington*, 64 Fed. Rep. 821.

The citizens of the United States have a paramount right to communicate with each other by all the modes known to modern civilization, with respect to any and all matters of common interest.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745.

Sherwood, J., delivered the opinion of the court:

The object of this original proceeding is to compel respondent, the Associated Press, to furnish to the Star Publishing Company for publication in its newspaper, "The Star," the budget of news collected daily by respondent, and also its Saturday night news reports.

Relator avers tender of a sum above that for which other papers of St. Louis are served by respondent with such news, and also avers demand made on respondent for furnishing to it its Sunday morning reports as per contract, and for such daily news reports, and its refusal to furnish the same.

Relator also alleges: "That the relator herein now is and has been for a long time past, to wit, for the period of six months, 51 L. R. A.

ready and willing to enter into a proper contract with the said Associated Press to receive and pay the reasonable charges of the said Associated Press, not only for its Saturday night news reports, but also for its daily news reports, and to comply with all the terms and conditions which the said Associated Press imposes upon its other publishers of daily English newspapers in the city of St. Louis receiving such news reports."

But there is no averment that relator demanded of respondent to enter with it into such "proper contract," nor that respondent refused to enter into such a contract, nor in what such a contract would consist, although the mandate of the alternative writ commands: "That you do serve this relator, the Sayings Company, at the city of St. Louis, state of Missouri, with your regular afternoon news reports, and with your regular Saturday night news reports, the same being the reports which you serve at said city to the Pulitzer Publishing Company under your subsisting contract with the said company, upon the payment to you by said relator of the same just and reasonable charges for said news reports which you receive from said Pulitzer Publishing Company, and upon compliance with such reasonable agreement in that behalf as you shall make with this relator, and with such reasonable by-laws, rules, and regulations as you have made or shall have made in that behalf, and that you continue so to furnish this relator with your said daily afternoon news reports and your Saturday night news reports so long as this relator shall comply with the contract made between you and it in that behalf."

The substance of the issues presented by the pleadings of the parties to this litigation has been very well condensed by counsel for respondent, and we adopt such condensation.

Relator asserts:

1. That it has a contract with the Associated Press for the Sunday morning news.
2. That the gathering of general news for publication in a daily newspaper is a public employment which must be exercised by those who engage in it for all publishers of dailies who may desire it, upon equal terms and without discrimination.
3. That the Associated Press has by its charter assumed this public employment, and so is bound to exercise it on behalf of the relator, upon tender of compensation equal to that paid by other publishers similarly situated and receiving a similar service.
4. That the Associated Press has broken down all competitors and secured a monopoly of the business of newsgathering, in consequence of which it is not practicable to publish a daily newspaper without the aid of its service.
5. That the Associated Press has been granted telegraph and telephone franchises by the states of Illinois and Missouri, and also possesses the power of eminent domain.
6. That the by-law of the Associated

Press, which makes the consent of existing members a condition of admitting new members in any locality is in violation of the anti-trust laws of Missouri, Illinois, and the United States.

The respondent, on the other hand, asserts:

1. That it never made any contract with the relator.

2. That the gathering of news, whether for daily newspapers or for other publications, is a purely private business requiring for its conduct no public franchises or privileges.

3. That while the Associated Press is in form a corporation for pecuniary profit, in its substance it is but a voluntary association of publishers of newspapers who have combined their energies for the sake of greater efficiency and economy in newsgathering.

4. That it has not and cannot possibly monopolize the business of newsgathering, and that in fact there are now other general newsgathering agencies in successful operation in the United States.

5. That it does not own or operate telegraph or telephone lines, and has no means for the transmission of news except such as are open to everybody on like terms.

6. That it has never exercised, and does not possess, the power of eminent domain.

7. That it is not a trust in any sense, nor is there anything unlawful in its methods or aims, since that which the combination accomplishes among its members has exclusive reference to a matter of internal economy, and leaves the members unaffected and unrestrained in so far as concerns their relations to the general public.

8. That its business is national and international in its scope and character, and so is protected against state interference by various provisions of the Federal Constitution which are cited.

1. It is fundamental in the law of mandamus, that it is indispensable to granting the writ, that a prior express and specific demand be made of respondent of that which relator seeks, and that a refusal of such demand occur before relator has any standing in court, or his application for the writ contains any ground for relief (Tapping, *Mandamus*, 282; 2 *Spelling*, *Extraordinary Relief*, § 1381); and it should also be shown that defendant has it in his power to perform the act. *Moses*, *Mandamus*, 204; *High*, *Extr. Legal Rem.* 3d ed. § 13; 14 *Am. & Eng. Enc. Law*, 1st ed. p. 106.

Mandamus is never granted in anticipated omission of a duty. An actual omission of duty must have occurred before application for the writ is made. *High*, *Extr. Legal Rem.* 3d ed. § 12. Here there is no averment that relator ever attempted to enter into "a proper contract" with respondent, saying nothing as to what those words mean.

Not only must the petition for the alternative writ contain such specific allegations as to prior demand, met by a refusal, but the judgment, if for relator, must be equally specific, both as to the rights of the plaintiff, 51 *L. R. A.*

and the obligation imposed on the defendant. *Price v. Riverside Land & Irrigating Co.* 56 *Cal.* 431. If the petition for the writ be defective as aforesaid, the defect is a fatal one. *Ibid.* If defendant is not in default about agreeing to make an undefined contract with plaintiff, then this court has no basis on which it can act, and therefore can enter no valid judgment on this point. *Ibid.* Again, the allegations of a "reasonable agreement" or "proper contract" in the alternative writ are too vague and indefinite to base the judgment of a court upon. What is a "proper contract?" or what a "reasonable agreement?"

2. But in addition to the points above, courts will not by mandamus compel the making of a contract, because, in such case, the element of the specific act to be performed must be wholly lacking. *People ex rel. National Cigar Co. v. Dulaney*, 96 *Ill.* 503. Nor has a court any authority to compel the performance of executory contracts. *Ibid.* See also *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 *U. S.* 867, 28 *L. ed.* 291, 4 *Sup. Ct. Rep.* 185; *Express Cases*, 117 *U. S.* 1, *sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 *L. ed.* 791, 6 *Sup. Ct. Rep.* 542, 628; *Wisconsin, M. & P. R. Co. v. Jacobson*, 170 *U. S.* 287, 45 *L. ed.* 194, 21 *Sup. Ct. Rep.* 115.

Besides, a contract of the kind in contemplation, must necessarily involve and require for a long time the exercise of judgment, continuous supervision, special experience, and business discretion. *Ibid.*; 14 *Am. & Eng. Enc. Law*, p. 104; *People ex rel. National Cigar Co. v. Dulaney*, 96 *Ill.* 503; *High*, *Extr. Legal Rem.* 3d ed. §§ 25, 28; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 *Ala.* 498, 3 *So.* 449.

The case last cited strongly bears on, and affords apt illustration of, the principle now under discussion, as well perhaps as others involved in this case. The Iron Age Company had contracted with the New York Associated Press, whereby it asserted the exclusive right to receive and to publish at Birmingham, Alabama, the daily news reports of the New York association. The Iron Age Company complained of a breach of this contract for that the Western Union Company gave those reports to two other daily papers in Birmingham. On this basis of fact, the Iron Age Company prayed injunction for specific performance. But this relief was denied, the court saying: "We have seen that the duty involves the exercise of special skill, judgment, and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration," and that the court could not "superintend the continuous performance of these duties."

3. The same line of remark and of authorities would be applicable to by-law 7 had it been enacted for the benefit of relator, which is clearly not the case. Under that by-law relator asserts that it is entitled to the service of news for its Sunday edition under an existing contract with the United Press. But that by-law, which respects the

admission of members, only allows the admission of new members upon the affirmative sanction of a majority of the board of directors. This sanction has not been obtained, nor is it asserted that it has. But had the by-law been enacted for relator's express benefit, it lacks a great deal of being a contract in its favor. It fixes no compensation to be paid, nor any other terms which go to make up a contract between the respondent and its members. Price is as essential as any other of the terms of a contract, and, without this agreed upon, no contract exists. *Kelly v. Thuey*, 143 Mo. loc. cit. 435, 45 S. W. 300. And, as before stated, mandamus does not lie to compel parties to contract with one another; it would be wholly foreign to the nature and attributes of such a writ which issues only for the enforcement of a clear and specific legal right, which right has been omitted to be granted by one whose duty it was to grant it. Until the party whose duty it was to grant such right makes default, mandamus does not lie.

4. In so far as relates to respondent being possessed by its original charter of a right to conduct a telegraph and telephone business, it never exercised that authority and therefore did not acquire the right of eminent domain; that right lay dormant. But, whether exercised or not, the charter having been so altered by amendment as to eliminate those rights, the case stands here as if such rights had never been existent. If, as all the authorities concede, a corporation may abdicate all the rights conferred upon it, and go out of business altogether, then no difficulty can occur in its abdicating a portion of those rights. What is true of the integer of rights must needs also be true of each of its component fractions; the greater includes the less.

5. These remarks bring up for discussion the main issue in this cause, in which the doctrine announced in the *Munn Case*, 94 U. S. 113, 24 L. ed. 77, is relied on by relator. That case has never received the entire sanction of the legal profession, nor, indeed, the entire concurrence of all the members of the two courts which announced the decision. Two dissents were entered at the time the majority opinion was delivered, Mr. Justice Field writing the minority opinion, marked by his accustomed ability, and concurred in by Mr. Justice Strong. And there were two dissents also entered in the state supreme court, 69 Ill. 80. Since then there have been various limitations to the doctrine suggested by various judges, who concurred in the original opinion, and subsequently pointed out what they understood the opinion to mean, and what they meant by their concurrence. And in subsequent cases there have been dissents which have gone in direct opposition to the ruling in that case. Thus, in *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, Brewer, Field, and Brown, JJ., dissented; while in *Brass v. North Dakota ex rel. Stocser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, 51 L. R. A.

Brewer, Field, Jackson, and White, JJ., dissented.

Munn's Case in brief was this: The Constitution of Illinois, adopted in 1870, contained a provision which converted every warehouse in which grain or other property was stored for a compensation, into a public warehouse. Thereupon the legislature of the state of Illinois, in 1871, passed an act concerning warehouses in cities having a population not less than 100,000 inhabitants. This act fixed a maximum charge for the storage and handling of grain, and made it a crime to fail to take out license to do business as a public warehouseman. *Munn* and *Scott*, a private and unincorporated firm owning a private warehouse and refusing to take out a license, were prosecuted, found guilty, and fined, and, on appeal taken, the judgment was affirmed in the state supreme court, 69 Ill. 80, and afterwards in the Supreme Court of the United States. The act in question was held not obnoxious to any provision of the Constitution of the United States, and particularly to the 14th Amendment to that instrument, providing that no state shall "deprive any person of life, liberty, or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws."

The authorities cited in the opinion of the latter court (and we say it with due deference), scarcely warrant the conclusion reached. Thus, *Hale*, as quoted, in his treatise *De Portibus Maris* [chap. 6] says: "A man for his own private advantage, may, in a port town, set up a wharf or crane, and may take what rates he and his customers can agree for crannage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the King, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for crannage, wharfage, pesage, etc.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected by the public interest." In the first part of the quotation distinct and express recognition is given to the fact that private wharves were in abundant existence in *Hale's* time, and were, if remaining private, unrestricted in their charges. In sharp antithesis to the case of the owner of a private wharf, stands that of one, be he King or subject, who has in operation a public wharf. The reason of this is that "in England it hath always been holden, that the King is lord of the whole shore," (1 Bl.

Com. 264), and being thus lord (and as Judge Cooley suggests) the title to the soil under the navigable water in England being invested in the Crown, therefore, such wharves can only be erected by express or implied license, and by making use of the public property in the soil. In such circumstances, then, the result naturally followed that such wharf was "affected with a public interest" since it was public property, used either directly or indirectly by public permission, and of course, subject to such terms as the sovereign might impose. And the same rule would hold where the owner makes a dedication of his otherwise private wharf to the public use. In either case of erection by public permission or as a dedication, compensation for wharfage is limited to reasonable charges. Thus, the wharfinger occupies the same position, precisely, as does one who sets out a street in a new building on his own land. *Heitz v. St. Louis*, 110 Mo. loc. cit. 625, 19 S. W. 735, and cases cited.

If the first part of the quotation heretofore made does not recognize that there are such things as private wharfs uncontrolled and uncontrollable in their charges, then the words used by Hale as aforesaid, fail of their purpose and are devoid of meaning.

Allnut v. Inglis, 12 East, 527, decides nothing to the contrary of the doctrine asserted by Hale, for that was a case where the London Dock Company built warehouses in which wines were deposited upon payment of such rent as the warehousemen and the depositors agreed upon. Afterwards, however, the London Dock Company obtained from the government a certificate, whereby, under the general warehousing act, the importers could lawfully lodge and secure their wines, without paying the duties on them in the first instance; and this right was exclusive in the dock company, and upon this it was held that in consequence of accepting the benefit arising from the certificate, such a monopoly and public interest attached upon the property of that company as compelled it to charge only reasonable rates for receiving wines into its warehouse, Lord Ellenborough remarking: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly, . . . he must, as an equivalent, perform the duty attached to it on reasonable terms."

In short, it is the privilege conferred either directly or indirectly, or the dedication to the public use, which gives origin to the duty toward the public to demand only reasonable compensation for services rendered. And this is all, it would seem, that is meant by Hale when he speaks of "the wharf, crane," etc., being "affected with a public interest."

But for the acceptance of the exclusive privileges-conferring certificate, there was no question, and there could be none, that the London Dock Company could have continued

on the even tenor of its way making such bargains for rent of its warehouses with its patrons as could be agreed upon, and no extent or magnitude of such business could have "affected with a public interest" the warehouse of the London Dock Company.

And it is not inappropriate to say just here that *Allnut v. Inglis*, though quoted from on the basis and theory of being parallel to the *Munn Case*, lacks such parallelism in this important and controlling feature and particular, to wit, that in the former the London Dock Company of its own free will, accepted the warehousing act, and having done so, took its burdens along with its benefits, while *Munn* and *Scott* were forced by the organic law, and *in invitum*, had their private elevator turned into a public one, without a single benefit received or a single privilege granted. Is it within the bounds or range of possibility for a distinction to be more plainly apparent than between these two cases? Had the all-omnipotent Parliament of England forced the London Dock Company to accept the warehousing act, then this would have brought the *Allnut-Inglis Case* on the same plane and under the same rule as the *Munn Case* announces, but had Parliament done so, it would have been incontinently regarded as a high-handed invasion of common right.

In the *License Cases*, 5 How. 504, 12 L. ed. 256, the only point decided was that various regulations for the sale of intoxicating liquors, and requiring licenses to issue, enacted by certain states, were not repugnant to the Federal Constitution. As to the case of *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441, cited and quoted in *Munn's Case* to show that an ordinance regulating the weight and price of bread was valid, it suffices to say that the only point in judgment there was whether that portion of the ordinance was valid which regulated the weight of bread; and it was adjudged valid in that particular. The baker in that case had failed to conform to the ordinance in regard to the weight of his loaves. On this ground alone was he prosecuted, to wit, that he had sold bread of less weight than that ordained by the ordinance. There was no question raised, and he raised none in the trial court about the price, and so the remark made in 3 Ala. 137, was wholly *obiter*. Even a casual reading of that case shows the correctness of this statement. See *Buffalo v. Collins Baking Co.* 39 App. Div. 432, 57 N. Y. Supp. 347, 24 Misc. 745, 53 N. Y. Supp. 968; *Bolt v. Stennett*, 8 T. R. 606, illustrates the same principle announced in *Allnut v. Inglis*, 12 East, 527, for there the crane was set up by its owners on a public quay (by an express or implied license of the government), and being so set up the public had a right to resort there and make use of it in loading and unloading their vessels; and, this being the case, compensation for such services could not be demanded beyond a reasonable sum.

In the principal opinion reference is made to the cases of public ferries, innkeepers, common carriers, hackney-coachmen, etc.;

but in all of these instances those persons who engaged in such occupations, or in building, owning, or operating such properties, did so on the grounds and bases of some special privilege granted by the sovereign power, or of some open and unambiguous dedication to the public use, which grant or which dedication took with them the necessity of submission to the terms on which the grant or dedications were made. Thus, an inn at common law was *publici juris*, and innkeepers were compellable, where they had room, to receive all guests and their horses, and every man had a right to put up at such common inns, and they were devoted to the service of the community. *Robinson v. Walter*, 3 Bulstr. 269; *Rea v. Collins*, Palmer, 367, and 2 Rolle, Rep. 345. For this reason, they were granted protection by the law; had a lien on the baggage and horses of their guests; were liable if their guests' goods were stolen; and were liable to suit for refusing to receive a guest, he tendering a reasonable price for the same, and also liable to indictment for such refusal. 5 Bacon, Abr. title *Inns and Keepers*, 232.

But although a livery-stable keeper does a very extensive business, yet he enjoys none of the privileges of an innkeeper, and contracts with his patrons on his own terms, and is not bound in law to receive coaches or horses, because he stands on the foot of private contract only, and is not under obligation by law to receive the horses, etc., of guests, as are innkeepers. *Francis v. Wyatt*, 3 Burr. 1498. Thus ferries were both private and public at common law; the former where a person conveyed only himself and family across a stream of water; the other where the owner could only operate it under a license, deemed a franchise, of the King, and where the ferry was treated as part and parcel of the public highway; and for so operating such ferry, the owner was permitted to take such rates of toll as the law allowed. *New York v. Starin*, 106 N. Y. 1, 12 N. E. 631, and cases cited. Thus, with respect to mills, the lords of the manor having erected mills on their respective domains for the public advantage, fettered their gift with the condition that those resident within their manors were to grind at their mills, and upon this exclusive right to compel the public to grind at their mills, arose the right of the lord of the manor to regulate tolls taken at such public mills. Woolrych, *Waters*, chap. 6; *Hia v. Gardiner*, 2 Bulstr. 195; 15 Viner, Abr. 398, 399; Cooley, Const. Lim. 8th ed. 735, 736. In this country, mills being at an early day operated by water, they became affected by a public use by reason of the fact that in order to establish them it became necessary to exercise the power of eminent domain in flooding the lands of others, and thus the owner of the mill, having accepted governmental aid in establishing his mill, had to submit to governmental control as to his charges for grinding. And when steam mills came into use, it was an easy transition for the legislature to regu-

51 L. R. A.

late their tolls without inquiring the reason or making any distinction between mills of the latter and of the former kind. The same view holds as to the right to fix the fees of hackmen exercising, as they do, a public employment in the public streets, and engaged in an occupation affording special opportunities for impositions and frauds, and therefore requiring close supervision, they are granted privileges of occupying certain public stands denied to others, and their charges to the public are regulated, which is only a condition imposed in return for privileges granted, privileges otherwise liable to abuse. And a like rule holds as to a common carrier,—one who holds himself out to the public as ready and willing to carry, for hire, certain classes of goods. Doing this, he thereby exercises, so it is said, “a kind of public office,” and grants the public such an interest in his business as authorizes each individual to demand the carriage of his goods upon tender of a reasonable, or a legally regulated, compensation. And as a result of his general assumption to the public, he is given a lien on the goods of his patrons, both for transportation and for advances made on them to the other carriers, and made responsible for their safe carriage except in certain cases. Not so, however, with a mere private carrier, and no instance is on record where any legislation, even during the rigors of the common law, or the regime of an all prevailing Parliament has ever been attempted as to the regulation of his charges. Nor can any instance be found where any lodging-house keeper, however extensive his business or numerous his patrons has ever been deemed to have his “property affected with a public interest,” or had his rates for board supervised or fixed by law. After discussing the cases of the common carrier, innkeeper, etc., the learned Chief Justice says: “Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment, and exercises ‘a sort of public office,’ these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very ‘gateway of commerce,’ and take toll from all who pass. Their business most certainly ‘tends to a common charge, and is become a thing of public interest and use.’ Every bushel of grain for its passage ‘pays a toll, which is a common charge,’ and, therefore, according to Lord Hale, every such warehouseman ‘ought to be under public regulation, viz., that he . . . take but reasonable toll.’ Certainly, if any business can be clothed ‘with a public interest, and cease to be *juris privati* only,’ this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.” The answer to the remarks thus made has already been given, and they may be further answered by saying that the cases of the common carrier, the innkeeper, etc., are exceptional to the general rule—

declaring that business relations of one man with another cannot be made compulsory.

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley, *Torts*, 278. Commenting on the same topic, it is said by another author: "Business relations must be voluntary in order to be consistent with civil liberty. An attempt of the state to compel one man to enter into business relations with another can only be justified by some public reason or necessity. In an ordinary private business relation, the state cannot constitutionally interfere, whatever reason may be assigned for one's refusal to have dealings with another. It is no concern of the state, or of the individual, what those reasons are. It is his constitutional right to refuse to have business relations with a particular individual, with or without reason. But there are cases in which it has long been held to be within the scope of legislative authority to interfere with, and compel, the formation of these business relations. The common law of England, and of this country, has for centuries justified this power of control over common carriers and innkeepers. No man is compelled to become a common carrier or innkeeper; but, if he holds himself out to the world as such, he is obliged to enter into business relations with all, under impartial and reasonable regulations. The common carrier must carry for all, within his regular line of business, and the innkeeper must provide accommodations for all who come to him, as long as he has room for them. These two cases have for so long a time been recognized as exceptions to the general rule, in respect to the voluntary character of business relations, that the reasons for them are rarely, if ever, demanded, and certainly not questioned. But a determination of the constitutional reasons for these exceptions, if there are any, will help to discover the limitations of legislative power in respect to other kinds of business." Tiedeman, *Pol. Power*, § 92.

So that it is only on the basis of the exercise of the police power and that exercise based on certain exceptional conditions that a person engaged in some quasi public business and enjoying some privilege or immunity incident to such business, or where he has dedicated his property to a public use, that he can be brought under governmental control in relation to such property or business and its regulation. As aptly remarked by Mr. Justice Field, in his dissenting opinion, "One may go, in like manner, through the whole round of regulations authorized by legislation, state or municipal, under what is known the police power, and in no instance will he find the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, 51 L. R. A.

or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the state, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases. Jurists and writers on public law find authority for the exercise of this police power of the state and the numerous regulations which it prescribes in the doctrine already stated, that everyone must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. 'The police power of the state,' says the supreme court of Vermont, 'extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the state. According to the maxim, *Sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others.' *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625. 'We think it a settled principle growing out of the nature of well-ordered civil society,' says the supreme court of Massachusetts, 'that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.' *Com. v. Alger*, 7 Cush. 84."

As pointed out in the opinion just quoted from, Chancellor Kent, when treating of the protecting care which the Constitution throws over private property, says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general directions, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. 2 Kent, Com. 340."

Having made the quotations just above, Mr. Justice Field proceeds to say: "The

citations show what I have already stated to be the case, that the regulations which the state, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of the owner in connection with it. There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control at its discretion the property and business of the citizen and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. "That government," says Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 2 Pet. 657, 7 L. ed. 553. The decision of the court in this case gives unrestrained license to legislative will."

Judge Cooley in commenting on "the police power of the states," says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each other uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." *Const. Lim.* 6th ed. 704.

"The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society. . . . The maxim, *Sic utere tuo ut alienum non laedas*, is that which lies at the foundation of the power." *Id.* 710. Further on the eminent author quotes from and discusses the *Munn Case*, and in doing so, says: "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him 51 L. R. A.

at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges which only the state can confer upon him, the case is clear enough." *Id.* 736. He then proceeds to state: "In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc.; of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, etc. 2. Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases." *Id.* 738.

But it is quite observable that *Munn's Case* does not fall within any of the categories which are mentioned in the list just quoted, although that case was necessarily under criticism in the very definition of instances where legislation would be constitutional. Elsewhere, Judge Cooley touches on the same subject by saying: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them." *Id.* 744, 745.

And in treating in this connection, of the regulation of business charges and the power of the state in this regard, he makes these observations: "In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed, that a general power in the state to regulate prices was inconsistent with constitutional liberty." *Id.* 734.

Similar observations respecting the regulation of prices of labor, manufactures, and commodities by the different states before the American Revolution, and of the abandonment of such regulations after our independence was achieved, and Federal and state constitutions were framed and adopted, are to be found in an interesting and in-

structive address delivered before the State Bar Association two years ago by Hon. G. A. Finkelnburg, in which, after speaking of such regulations and their discontinuance when more rational ideas of the personal rights of individual citizens began to prevail, he says: "In other words, it was assumed to be a part of the natural and civil liberty guaranteed by American institutions to form business relations and to make contracts free from state interference, and this was thought to include the right of everyone to ask for his wares or services whatever price he was able to get and others were willing to pay." 32 Am. L. Rev. 503.

Of course, isolated cases, sporadic instances, perhaps, may be found of statutes making regulations of the sort, but they are extremely scarce; and it is to the last degree doubtful whether such an enactment is yet to be found lingering obsoletely on the statute books of any of our states. Certainly it is not enforced.

The supreme court of Illinois, in *Munn's Case*, when speaking of the power to "make needful rules and regulations respecting the use and enjoyment of property," speaks of familiar instances in which the exercise of it in the state has been unquestioned, and among them, "in delegating power to municipal bodies to regulate charges of hackmen and draymen and the weight and price of bread." Whereupon Judge Cooley says: "Regulating the weight of bread is common, and necessary to prevent imposition; but regulating the price of bread we should suppose would now meet with such resistance anywhere as would require a distinct determination upon its constitutional rightfulness. How the baker can have the price of that which he sells prescribed for him, and not the merchant or the day laborer, is not apparent. Indeed, to admit the power seems to render necessary the recognition of the principle that there is and can be no limit to legislative interference, but such as legislative discretion from time to time may prescribe." Const. Lim. 736. And if the extensive nature and magnitude of the business is to authorize legislative interference with the rates or prices charged, and thus "affect with a public interest" the property employed in such business, as is the evident theory which bore with great weight on the mind of the court of ultimate resort, then in addition to numerous instances suggested by Judge Cooley and by Justices Field and Brewer where legislative interference would logically follow the rule adverted to, may be mentioned the case of the farmers of this country, whose labors on many million fields supply not only their own native land, but a large portion of the civilized world with corn, wheat, pork, and beef. Surely the products of these farms on which they labor, if not the farms themselves, are "affected with a public interest," for, in the language of the Federal Supreme Court: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at

large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . . He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84.

If the property of these farmers is not "used in a manner to make it of public consequence and affect the community (indeed the world) at large," if they do not "devote their property to a use in which the public has an interest" (a very great interest), and thereby "in effect grant to the public an interest in that use," it is difficult to conceive of a case where "property does (not) become clothed with a public interest," and if thus "clothed," then, according to the rule laid down, the right of the legislature of each state to regulate and to settle the price of each bushel of wheat and of corn, and of each pound of beef and pork, cannot, for a moment, be gainsaid or denied. Their business is certainly of "public consequence," as, but for the labors of the farmers, the elevators of this country, and the mills, and indeed all manufactories would stand still, and all commerce with foreign nations cease, to say nothing of other and greater calamities incident to a cessation of farming operations, and, in consequence, a cessation of a food supply.

Contrasted with such a business, which is truly a "virtual monopoly," all other human occupations fall into insignificance. Assuredly, then, the business of farming is necessarily a devotion of property to a use in which the public has an interest," and its pursuit in effect grants to the public an interest in that use, and, this being the case, submission to public control as to rates, *a fortiori*, follows. But he would indeed be regarded as a bold innovator, if not a madman, who, keeping within the lines marked out in *Munn's Case* and following the premises there laid down to their logical conclusion, should offer a bill establishing the maximum rates at which wheat, pork, etc., could be sold, or merchandises or wares of the shoemaker or the potter or the blacksmith. Certainly all of these products of labor do "become clothed with a public interest," because "used in a manner to make them of public consequence and affect the community at large." It is not easy to see how they could be used in any other manner.

In the state supreme court, in defense of the decision as to regulation of prices, the case of regulating interest on money is instanced. But at common law taking any interest on money was called usury, was a crime, punishable by ecclesiastical censures during life, being regarded by canon law a mortal sin, and if after death one were found an usurer while living all his chattels were forfeited to the King and his lands escheated to the lord of the fee. 1 Hawk. P. C. chap. 82. Afterwards Parliament made it lawful

to take a limited rate of interest, but it is said that this was not on the theory of legislation arbitrarily fixing the price for the use of property, but of granting a privilege which the common law denied. Judge Cooley is of opinion that usury laws are not sustainable on principle. *Principles of Const. Law*, 3d ed. 260.

It was asserted in the state supreme court that so long as one retains title and possession of his property he is not deprived of his property within the meaning of the 14th Amendment. The "destruction must be, for all substantial purposes, total." This doctrine was echoed by the higher court. The latter court seems to regard it as a matter of regret that the word "deprive," used in the above amendment, was not therein "defined." Apart from the fact that the same word had long before been employed in the constitutions of the several states, in fact or in substance (2 Story, *Const.* § 1940), and the word itself, in article 5 of the original Constitution, and in article 5 of the amendments thereto, and apart from the fact that it is not customary in framing an organic law to define the words used in composing it, the standards of our language, as well as judicial decisions, may be consulted. Turning to those standards, we find that the word "deprive" conveys the idea of either taking away that which one has or withholding that which one may have." *Crabb's Synonyms*. Other standards of our language define the word "deprive:" "To take something from; to keep from acquiring, using, or enjoying something." *Standard Dict.* "Deprive: To take away, end, injure, or destroy." *Century Dict.* And the synonyms of injure, are: "To do harm to; inflict damage or detriment upon; impair or deteriorate in any way." *Ibid.*

Turning to judicial decisions we find that in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, it was held that the flooding of a man's land by constructing a dam across a river, under authority of a state law, was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded in order to meet the demands of the Constitution, and that it was not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the constitutional provision; that consequential injury was in many cases a sufficient basis on which to invoke the protection of the fundamental law, and that serious interruption of the common and necessary use of property is such as will be equivalent, under the Constitution, to a taking. This court reached a similar conclusion under the Constitution of 1865, "that no private property ought to be taken or applied to public use without just compensation," where the city built a dike out into the river several hundred feet, thus filling up with mud the channel at that point, thereby cutting off the plaintiff, a riparian owner, from his customary access to the stream where his landing was. *Myers v. St. Louis*, 82 Mo. 369. 51 L. R. A.

It is familiar law that the fee of land will pass by deed which grants the rents, issues, and profits of the land mentioned (3 Washb. *Real Prop.* 5th ed. 406), and the same method of description holds good in a devise. *Schouler, Wills*, 2d ed. § 503. And so of a devise of the income of land. *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; *Parker v. Plummer*, Cro. Eliz. 190. This was so in the days of Lord Coke, who, when treating of this rule of description, said: "For what is land but the profits thereof? Co. Litt. 4 h. So that, it results that 'to deprive one of the use of his land is depriving him of his land.'" *Sutherland, J.*, in *People v. Kerr*, 37 Barb. 399. Such deprivation may be partial or total, but, in either case, compensation, under constitutional guaranties, is an inseparable incident. Of course, cases of mere incidental injury are not included in these remarks.

These observations, drawn and deduced from the authorities cited, find ample and felicitous illustration in the case of *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147. In that case the railroad corporation, claiming to act under legislative authority, removed a natural barrier situated south of E's land, which theretofore had completely protected E's meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal the waters of the river in times of floods and freshets sometimes flowed on to E's land, carrying sand, gravel, and stones thereon. Held, that this was a taking of E's property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation. In discussing the points presented by the record, Judge Jeremiah Smith delivered an opinion which, for close analysis and exhaustive research, is seldom equaled. Among other things he said: "The vital issue, then, is whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. . . . The constitutional prohibition which exists in most, or all, of the states has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if read: 'No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable.' To constitute a 'taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' 'an absolute or total conversion of the entire property,' 'a taking the property altogether.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its

legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer v. People*, 13 N. Y. 378, 433; 1 Bl. Com. 138; 2 Austin, Jurisp. 3d ed. 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes' *pro tanto* the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin, Jurisp. 3d ed. 836; Wells, J., in *Walker v. Old Colony & N. R. Co.* 103 Mass. 10, 14, 4 Am. Rep. 509, 511. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without *ipso facto* taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,' although the owner may still have left to him valuable rights in the article, of a more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimited right; now he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using 100 acres of land to a limited right of using the same land may work a far greater injury to A than to take from him the title in fee simple to 1 acre, leaving him the unrestricted right of using the remaining 99 acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former? If, on the other hand, the land itself be regarded as 'property,' the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights which are worth protecting, not merely empty titles or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporal substance and entity' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in *Wynehamer v. People*, 13 N. Y. 378, 396. . . . The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it, al-

though the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip 4 rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part 'is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the *quantum* of interest may vary, but the principle is the same.' See 6 Am. L. Rev. 197, 198; Lawrence, J., in *Nevins v. Peoria*, 41 Ill. 502, 511," 89 Am. Dec. 392.

A ruling in which, in similar circumstances, a like result was reached, has occurred in England. *Lawrence v. Great Northern R. Co.* 20 L. J. Q. B. N. S. 293, 4 Eng. L. & Eq. 265, cited in Angell, Watercourses, 7th ed. § 331a. "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48.

As the right to the use of property is all that makes it valuable, and there may be a partial deprivation of such use equally demanding compensation as would a total deprivation, then it must also follow that a legislative and compulsory diminution of "the price of the use of property" (to phrase it as does the learned Chief Justice) must be equally as obnoxious to constitutional prohibitions as a similar diminution or deprivation of the use itself. It would seem nothing could be more logically clear than this.

Both in the state supreme court and in that of the nation it was ruled that the fixing of a reasonable compensation for the use of property was wholly a legislative, and not a judicial, question; that is, a maximum in rates beyond which the owner could not go; and that the only redress against these arbitrary legislative edicts was: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." According to this, if the owner of a water mill should have the stream which turns it diverted by legislative authority, so as to injure or ruin his business, so long as he is left in peaceful possession and his title is untouched, he has not, according to the state supreme court, had his constitutional rights invaded, and according to the Federal Supreme Court, if the stream has been only partially diverted, and he has water enough left him to grind one bushel a day, where he ground forty before, he is not entitled to compensation for his loss, nor to due process of law to ascertain it; the question has simply resolved itself into one of legislative expediency. This position as to regulating rates by law was not, however, long maintained; it was abandoned in subsequent cases holding that "the element of reasonableness . . . is eminently a question for judicial investigation,

requiring due process of law for its determination." *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. To the like effect are *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 849, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, and other cases. But the court has never yet ventured to fix what rates would be reasonable, though "judicial protection," is certainly more preferable than "resort to the polls."

This change in position would appear quite a modification of the original doctrine. The case of *People v. Budd*, 117 N. Y. 1, 15 L. R. A. 559, 22 N. E. 670, 682, was a case of a "floating elevator," but the same doctrine was announced as in *Munn's Case*, where the elevators were stationary. Mr. Justice Peckham, with whom concurred another member of the court, delivered a most exhaustive and instructive dissenting opinion, in which are reviewed a great array of authorities all bearing on the subject under discussion, and all opposed to *Munn's Case*. When the cause reached the final tribunal, Mr. Justice Brewer, in dissenting, said with great force and aptness (*rem acu tetigit*) [143 U. S. 549, 552, 36 L. ed. 257, 139, 4 Inters. Com. Rep. 56, 57, 12 Sup. Ct. Rep. 478, 479]: "The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property;" and in the course of his dissent, in discussing the doctrine above referred to, took occasion to very pertinently say: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not, with equal reason, regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream." In concluding his opinion, in which Mr. Justice Field and Mr. Justice Brown concurred, the learned Justice expressed the hope: "I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property or the performance of his personal services will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is, in fact, devoted to a public use."

In his dissenting opinion in *Budd's Case*, 117 N. Y. 55, Mr. Justice Peckham noticed the fact that in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, Mr.

Justice Miller, speaking for the court in regard to *Munn's Case*, and what was there decided, said: "And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services." But this states a very different doctrine and very different facts to those announced in the case to which it refers, because *Munn* was not "engaged in a public business," nor did the "public have a right to require his service."

In *Brass v. North Dakota ex rel. Stoeser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, the defendant owned a small elevator located on his own land; capacity 30,000 bushels. His exclusive business was buying and selling grain, although occasionally he accommodated his neighbors with the temporary use of his bins, when those bins were temporarily empty; but yet it was held that under the rule in *Munn's Case* he was bound to accommodate all comers, notwithstanding the "admitted fact that if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed." To this ruling, Brewer, Field, Jackson, and White, JJ., dissented.

Returning to the views of Lord Hale as heretofore quoted, it is not thought, as already stated, that those views give countenance to what is asserted of them in the principal case; nor does Judge Cooley approve of the construction placed upon them by the court, as above pointed out. But granting that Hale's views are as extreme as represented, or that certain deductions are warranted therefrom, yet it must not be forgotten that he wrote at a time when paternalism was in flower, and its veritable exponent, chapter 4 of 5th Elizabeth, was in full force. "That statute assumed to regulate the existence and determine the number of the artisans in the whole country. It provided how long one should work as an apprentice; how many there should be in proportion to journeymen; where they should live; under what circumstances move to another neighborhood; how many hours they should labor, and for how long a time a journeyman should be employed; and, finally, it provided that wages should be assessed for the year by the justices of the peace, who were also directed to settle all disputes between masters and apprentices. By an act of 1 James I. chap. 6, the above act was extended by giving to the justices power to fix the wages, not only of journeymen and apprentices, but of all kinds of laborers and workmen. During this time also, there were statutes making it a felony to export wool from England, and the exporter of sheep, rams, or lambs was liable to

imprisonment, the forfeiture of all his property, and to have his left hand cut off for the first offense and for the second offense to be adjudged a felon and to suffer death accordingly. See 8 Eliz. chap. 3; 12 and 14 Chas. II. chap. 18. Provisions were extant forbidding exportation of hides, raw or tanned leather, and many other things, and all for the supposed benefit of the Kingdom or the various interests in whose favor the legislation was enacted. Smith's *Wealth of Nations*, by McCulloch, pp. 292 *et seq.* Laws were then in force which regulated down to the minutest detail the manner of life, and the texture of dress and the costliness thereof, and the variety of dishes upon the tables of the people; special laws determined how much land of an estate should be plowed and how much left in pasture; how much was to surround a laborer's cottage; how many sheep should be supported on a farm. England in the Eighteenth Century, Lecky, vol. 6, pp. 231 *et seq.*

That Hale's views were colored by the state of the then existent statutory law, no one can doubt who has any knowledge of the nature of the human mind. Besides, when Hale wrote, the country where he wrote was under the dominion of a practically omnipotent Parliament, unfettered and unhampered by the prohibitions of a written constitution. In the opinion under comment it is said: "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, . . . so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibition of the constitutions." 94 U. S. *loc. cit.* 124, 24 L. ed. 83.

Now if by this statement it is meant to be intimated, as seems to be the case from subsequent observations, that a state legislature is possessed of substantially the same powers as the Parliament of Great Britain, the intimation is unfounded in, and unsupported by, recognized authority. Discussing the essential difference between the powers of the British Parliament and those of a state legislature, Judge Cooley says: "It is natural, also, . . . to concede without reflection that whatever the legislature of the country from which we derive our laws can do may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American states are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty,

they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative." Cooley, *Const. Lim.* 102.

Touching this matter, it is said by the author of the *Institutes*: "The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds. . . . It can, in short, do everything that is not naturally impossible. . . . True it is, that what the Parliament doth, no authority upon earth can undo. . . . 4 Inst. 36; 1 Bl. Com. 161. The strong language in which the complete jurisdiction of Parliament is here described is certainly inapplicable to any authority in the American states, unless it be to the people of the states when met in their primary capacity for the formation of their fundamental law," etc. Cooley, *Const. Lim.* 103. Parliament "is at once a legislature and a constitutional convention." 1 De Tocqueville's *Democracy in America*, chap. 6, p. 103; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. *loc. cit.* 516, 12 Am. Rep. 147.

Munn's Case has met with many criticisms of an adverse character in addition to those above noted. Speaking of the doctrine it establishes, Tiedeman, in reviewing that case, remarks: "I say this rule has been laid down for the first time, although the Chief Justice refers to it as a long-established rule, and refers to Lord Hale as his authority. A careful study of Hale's writings will disclose the fact that to no case does he refer in which the business does not, under the law, constitute a privilege more or less of a legal monopoly. There is nothing in his writings to justify the application of his rule or his reasoning to a business which is a virtual monopoly, but is not made so by law." Tiedeman, *Pol. Power*, pp. 230, 231. Vol. 16 Am. L. Reg. N. S. 526, published the opinion, as well as a very copious note, citing many authorities, which concludes thus: "No other court has ever held that a legislature could fix the rate at which a private person performing a service in which he has no other monopoly than that which the possession of superior means for conducting his business gives to him, and no aid from the public, should be compensated for the service. No such case is cited in the opinion. Therefore none need be cited *contra*." And criticism has not been confined to this side of the Atlantic; even in the land from whence our common law is derived, Mr. Bryce, a lawyer and statesman of distinguished ability and author of the great work, "The American Commonwealth," in reviewing the case, "thinks that the decision was perhaps more the effect of public opinion in its action upon the court than of a strict adherence to legal principles; and while, as he says, not presuming to question its correctness, he yet adds that it evidently represents a different view of the sacredness of private rights and of the powers of the legislature from that entertained by Chief Justice Mar-

shall and his associates." See 1 Bryce, *American Commonwealth*, 2 vol. ed. p. 267.

Much was said in the opinion in question, about a "virtual monopoly." These words were, it is true, used by Lord Ellenborough in *Allsutt v. Inglis*, 12 East, 527, but those words must be construed with reference to the facts then presented. It was a clear case of a legal monopoly; for there the "London Dock Co." was mentioned by name in the warehousing act, and was the only company in whose warehouses wines could be stored, without prior payment of excise duties.

There can be no such thing as a legal monopoly unless based upon a license or privilege allowed by the King, etc. (4 Bl. Com. 159. To same point, are *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 606, 607, 9 L. ed. 773, 847, per Story, J.; *Richmond v. Dubuque & S. City R. Co.* 26 Iowa, 191, 201, 202, Affirmed, 19 Wall. 584, 22 L. ed. 173; *Re Greene*, 52 Fed. Rep. 104; and necessarily, the party to whom the license is granted takes it on such conditions as the license-granting power may see fit to impose.

6. It has been thought best to consider at large the doctrine announced in the case relied on, as well as opposing views, in order to endeavor to discover whether *Munn's Case*, granting it correctly decided, has any application to the case at bar. Following a familiar rule, the general words employed in that opinion should be restricted to the particular facts of that case, and should not be extended to other cases which could not have been in the mind of the court at the time (*Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, per Marshall, Ch. J.; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154); nor has that court so extended them to any case of similar sort to the one before us.

The controlling element which gave origin to the opinion relied on seems to have been that of a monopoly. But of course, that element can have no place in the present instance, because respondent has been granted no special or exclusive right or privilege by the state, nor has it received any benefits from that quarter. Nor has the respondent acquired any additional right by reason of its incorporation, to that it possessed before. Everyone is at liberty to gather news; and the fact that one has greater facilities or finances for gathering and transmitting news, or that the business has grown into one of great magnitude, widespread in its ramifications, or that mere incorporation has been granted a company organized for the purpose of gathering news, does not, and cannot of itself, give the state the right to regulate what before incorporation was but a natural right. Tiedeman, Pol. Power, § 93, p. 234. Were the rule otherwise than as just stated, the effect would be to deprive a person of a right to pursue any lawful calling, or to contract where and with whomsoever and at what price he will. The right 51 L. R. A.

thus to contract cannot be interfered with; it is part and parcel of personal liberty, and therefore under the protection of sec. 30, art. 2 of our state Constitution and of the 14th Amendment of the Constitution of the United States, as heretofore quoted. *Cooley*, Const. Lim. 944, 945; *Cooley*, Torts, 278; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, and cases cited; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781, and cases cited. To like effect, see *Allgeyer v. Louisiana*, 165 U. S. 589, 591, 41 L. ed. 835, 836, 17 Sup. Ct. Rep. 427; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 180, 21 Sup. Ct. Rep. 128-130.

If relator's position as to its right to compel respondent to turn over to it the results of its labors and researches after news is correct, then, by the same token, any citizen could compel any newspaper to admit him as a subscriber; or, as news is a synonym of information, intelligence, and knowledge, then a lawyer profoundly versed in his profession could be compelled to yield his treasures of erudition to some less fortunate member of the bar, of the type described by Swift:

"Who knows of law nor text nor margent,
Calls Singleton his brother sargeant."
And even if the business of respondent can justly be deemed a monopoly, then relator's efforts should be directed toward the destruction of that monopoly, and not towards obtaining the mandate of this court compelling relator's admission into that "real genuine article," as counsel are pleased to designate it.

Conceding respondent's business to be in truth a monopoly would furnish an all-sufficient reason and answer for denying the relief relator asks; because the addition of one more monopolist to a monopolistic organization would not lessen its monopolistic features or abate its vicious tendencies. But there is nothing here on which a monopoly can attach. The business is one of mere personal service; an occupation. Unless there is "property" to be "affected with a public interest," there is no basis laid for the fact or the charge of a monopoly. See, on this point, *Morris v. Colman*, 18 Ves. Jr. 437 (per Chancellor Eldon); *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 609 (per Lord Esher); *Express Cases*, 117 U. S. 1, 21, 24, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 800, 801, 6 Sup. Ct. Rep. 542, 628; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 89, 91, 35 L. ed. 97, 101, 102, 11 Sup. Ct. Rep. 490.

Nor is there any more property in "news"—to wit, "information," "intelligence," "knowledge"—than there is in "the viewless winds," until the "guinea stamp" of a copyright is impressed upon its external similitude, thus giving it one of the elements of property, to wit, governmental protection for a limited period. That there is no monopoly, even in fact, in the business in which respondent is engaged, is shown in the clearest possible manner by this record.

Other newsgathering agencies have the same facilities over the wires of the Western Union Telegraph as has the Associated Press; the terms of the telegraph company are uniform as to all organizations, and such other agencies are at work in their occupation, and, it would seem, with great success. Hundreds of daily newspapers in every quarter of the Union, leaders in point of circulation in their respective localities, look for their news supplies to some other agency than that of respondent. Some publishers accustomed to receive reports from respondent have discontinued their business relations with it, and gone to some rival or competing organization. The New York Sun, repeatedly urged to join the respondent, has continuously declined. And the relator company notwithstanding the allegations of its petition, that its paper could not be published with a profit without the aid of the Associated Press, Mr. Lowenstein, the Star's business manager, gives it as his opinion under oath, that "the Star prints a better budget of news than any of its rivals."

For the purpose of obtaining its supplies of news, the Star is affiliated with the New York Sun or Laffan News Bureau, and concerning the efficiency of that service Mr. Laffan, testifying, says: "It has no equal at all, from our point of view." And answering the question whether "as a matter of fact is it better than the Associated Press?" answered: "Of course it is; everybody knows that." And Mr. M. E. Stone, general manager of the Associated Press, says that the Scripps-McRae service is an excellent one.

If these statements are to be taken as true, and so they will be regarded for the purpose of this case, relator has no standing in court, because Lord Ellenborough, in the *Allnutt-Ingalls Case*, 12 East, 627, after commenting on the fact that the London Dock Company's warehouses were the only places where wines of importers could be bonded, went on to say: "If the Crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly." 12 East, *loc. cit.* 540. And because, further, a court, in circumstances as above related, will not award a discretionary writ as now here prayed, for the mere purpose of determining an empty and barren technical right in behalf of a petitioner. It will "let well enough alone."

Subsidiary to considerations heretofore mentioned may be suggested others tending in the same direction. In *Matthews v. Associated Press*, 61 Hun, 199, 15 N. Y. Supp. 887, defendant, a corporation organized under the act "to incorporate the Associated Press of the State of New York" (Laws 1867, chap. 754), adopted a by-law prohibiting its members from receiving or publishing "the regular news despatches" of any

other news association covering a like territory and organized for a like purpose." A suspension of all the rights and privileges of the association was provided as a penalty for a violation of said provision. In an action to restrain defendant from enforcing this penalty, held, that the association had power to enact the by-law; that it was not objectionable either as unreasonable and oppressive, or as tending to restrain trade and competition and to create a monopoly. It appeared that while defendant only appoints and engages agents, in the strict sense of the term, in the state of New York, by virtue of contracts with other associations, it receives from them news collected from the principal portions of the civilized world. Plaintiffs are also members of, and they publish the news received from, another press association which collects its news, by its own agents, from substantially the same territory. Held, further, that this action of plaintiffs came within the prohibition of the by-law, and authorized defendant to enforce the penalty. The court in general term, among other things, said: "The business of collecting the news of the day and furnishing reports of it to the press for a compensation has become a very well-known and important industry. It can scarcely be called a branch of trade. There is no right of property in the news itself. That is neither bought nor sold. Any man who hears it may make such use of it as he can for his own advantage, or may communicate it to others. So, he may make a business of collecting news and furnishing reports of it to the newspapers, or to such of them as will compensate him for his trouble. The work is commonly done in the locality of each newspaper by its own reporters employed and paid for that purpose. . . . In this case the agents are employed by the defendant, the Associated Press of the State of New York, acting for all the publishers who are comprised in its membership. As to all these, the charter and by-laws of the corporation constitute the contract between themselves, and between them and the association. Among the provisions of that contract is one to the effect that none of the members shall contract with any other news association to employ for them agents for the procurement of news within the same territory as that in which agents of the defendant association are employed. This contract between the members of the association is mutual and is for the common benefit, and so is supported by a sufficient consideration. It is for the common benefit because the efficiency of the association depends upon the number and activity of its agents, and these largely upon the extent of its revenues, from which salaries are paid, and that, in turn, upon the number of its patrons; so the building up of competitors which must draw off from its patronage will necessarily detract from the extent and value of its work. The contract, therefore, of the associates with each other and of these with the association, which is embodied in the by-law in question, seems to us not to exceed the proper bounds

of self-protection, and not to be unreasonable nor obnoxious to any principle which has been invoked for its condemnation."

This ruling of the supreme court was unanimously affirmed by the court of appeals, Mr. Justice Peckham delivering the opinion, who afterwards delivered the opinion of the court in *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

In a prior case, *Dunlap's Cable News Co. v. Stone*, 15 N. Y. Supp. 2, the contention was made that newsgathering was a "public business." The Cable News Company was a corporation engaged in collecting news and selling the same to all newspapers applying therefor. The New York Associated Press was an association of newspaper proprietors, also engaged in the business of collecting news and furnishing it to newspapers. The association had a by-law to the effect that none of its members should take news from any other agencies. For violation of this by-law by a number of publishers the association threatened to discontinue its service to them. The suit was to enjoin the association from such proposed action. The plaintiff alleged that the business engaged in by the parties was "a public business, and that both plaintiff and the said New York Associated Press are therefore under an obligation to serve the entire public; and that it is essential for the proper conduct of a newspaper, and for the interests of its readers, subscribers, and advertisers, and for the interest of the public, that such newspapers should be at liberty to avail itself of all sources of information, and combine, if it thinks best, the intelligence and information furnished by the various agencies instituted for that purpose. A motion for an injunction *pendente lite* was denied. On appeal to the general term the ruling below was sustained. The court said: "The plaintiff's application amounted to nothing more nor less than an attempt to restrain the defendants from transacting their lawful business in their own way, lest in doing so plaintiff's rival business should be injured or diminished. The defendants have a perfect right to limit the sale of the news which they collect, to those who contract to deal exclusively with them. They are private individuals dealing, it is true, with a large public, but governed by no corporate duty or statutory obligation. They certainly owe no duty to the plaintiff, which is a foreign corporation attempting to compete with them, and with whom they have no privity or relation of any kind."

In the latter case the defendant association was not incorporated; in the former it was, but both cases were treated alike in this respect. And it has been determined that "a voluntary association, whether incorporated or not, has, within certain well-defined limits, power to make and enforce by-laws for the government of its members. Such by-laws are ordinarily matters between the association and its members alone, and with which strangers have no concern." *American Live Stock Commission Co. v. Chi-*

cago Live Stock Exchange, 143 Ill. 210, 18 L. R. A. 190, 32 N. E. 274.

The charter of respondent, after emendation, is couched in these words: "The object for which it is formed is to buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same." Under the terms of its charter, respondent owes no duty to relator, since it possesses no greater right in regard to the gathering and purchase, etc., of news than its incorporators possessed as individuals, before the act of incorporation (authorities *supra*). But on the basis that the charter, by-laws, etc., place respondent on the plane of any other corporation in charge of a "public utility," relator asserts that respondent's business is to be regarded in the same light precisely as a railroad, telegraph, or telephone company; that it involves a public franchise. But in *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 32 N. E. 274, it was ruled that the mere fact that the business of a particular market owned by a private corporation has become so large as to influence the commerce of a large section of the country will not give the courts any power to declare such market public and impressed with a public use, or to apply to it any rules of public policy peculiar to that class of markets. That power belongs alone to the legislative department of the state. See *Express Cases*, 117 U. S. 1, 21, 24. *subnom. Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 800, 801, 6 Sup. Ct. Rep. 542, 628; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. Rep. 559, 569 (per Caldwell, J.); *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 499, 42 L. ed. 243, 253, 17 Sup. Ct. Rep. 896; *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146. In making this ruling, not only was *Munn's Case* on the point involved, cited with approval, but, in addition thereto, *Ladd v. Southern Cotton Press & Mfg. Co.* 53 Tex. 172, was cited, and its language approvingly quoted: "We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici*, merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature, if not restrained from doing so by the Constitution, before a demand for such use could be enforced by the courts."

It is not pretended here that such legislation as would make respondent corporation's business *juris publici* has been enacted, granting that such legislation could have any extraterritorial effect, as to which see *Fawcett v. Missouri P. R. Co.* 84 Mo. 679, 54 Am. Rep. 104; *State v. Gritzer*, 134 Mo. 512, 36 S. W. 39, and cases cited; *Harris v. White*, 81 N. Y. loc. cit. 544.

It is needless to discuss, in this connection, cases which bring into view the duties of railroad, telegraph, and telephone companies, since those companies having accepted legislative favors, right of eminent domain, etc., they must shoulder the burdens along with the benefits, and their business becomes, by such acceptance, *ipso facto publici juris*. Not so, however, with respondent, which was granted no privileges, asks none, and cannot, therefore, be burdened with conditions such as pertain to common carriers and the like.

As to the case of *Minnesota Tribune Co. v. Associated Press*, 27 C. C. A. 542, 55 U. S. App. 136, 83 Fed. Rep. 350, it seems to recognize the validity of such contracts by the Associated Press as are the subject of complaint here. But if this is not so, we prefer the ruling and reasoning on this point in *Matthews' Case*.

In regard to *New York & O. Grain & Stock Exchange v. Chicago Bd. of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855, much relied on by relator: For many years the board of trade had been accustomed to furnish to all customers the telegraphic reports as to daily and hourly conditions of the grain and other markets. Having done so for such a long time, it undertook suddenly to disrupt those long-continued business relations, and leave the plaintiff, a corporation engaged in the commission business, without any means of conducting its ordinary and long-established business; and upon this basis it was very properly held that plaintiff was entitled to injunction to prevent the threatened disruption of business. This was the very gist of the decision in that case, and we need not say whether we fully indorse much of the language and of the reasoning used in arriving at the conclusion reached; and this reason, among others, occurs, why we need not, and that is respondent has never entered into business relations with relator, and consequently there are no such relations to be severed, and no such injurious results can occur in this case as in the one referred to.

Relative to the recent decision by the supreme court of Illinois in *Inter-Ocean Pub. Co. v. Associated Press* [184 Ill. 439, 48 L. R. A. 568, 56 N. E. 822], to which our attention has been called: The Inter-Ocean Company was engaged in publishing two newspapers in Chicago, the Daily and the Weekly Inter-Ocean. A contract was entered into between the parties as to furnishing news in accordance with the by-laws of the Associated Press. This contract the Inter-Ocean Publishing Company violated by procuring and publishing news obtained from other news concerns located in the city of New York. Being notified by the Associated Press to appear to answer such charges of violation of contract, the Inter-Ocean Publishing Company resorted to injunction to prevent expulsion for violation of the by-laws of the Associated Press, which formed part and parcel of the contract between the parties. The Inter-Ocean Publishing Company admitted, in its bill for injunction,

that it had violated its contract, and, seemingly, by way of excuse, alleged that it could not obtain all the news from the other contracting party, and so was forced to engage the services of other newsgathering associations. Answer was filed, and, upon hearing had, the bill was dismissed for want of equity, and this decree was affirmed in the appellate court. But when the cause reached the supreme court, the decrees of the lower courts were reversed and the cause remanded, with directions to enter a decree as prayed. The rulings in that case were: 1. The by-law and contract created a monopoly. 2. That it was necessary to publish news from other sources to make a check on the defendant. 3. That the by-law tends to restrict competition, because it prevents members from purchasing news from any other source. 4. That the contract and by-law are void as being beyond the power of the defendant to make. 5. That the "obligation [of the defendant] to serve the public is one not resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that public interest has attached thereto." And, 6th, that the fact that the defendant possessed the right to use the power of eminent domain as to telegraph and telephone lines, although not exercised, contributed to determine the character of its corporate organization. And on these grounds was based the ruling that the defendant must furnish everyone applying, with the same service of news.

The above decision is evidently at war with the rulings in the *Live Stock Commission Case*, 143 Ill. 210, 18 L. R. A. 190, 32 N. E. 274, where "the amount of business annually transacted at said stockyards is such as to constitute the market thus established, the largest live-stock market in the world." If the facts just related did not impress the business with a public use, it is difficult to conceive what facts could do so, and, in addition to the utterances heretofore quoted in the *Live Stock Commission Case*, the court there also said: "The views here expressed do not conflict with what was decided in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. The question raised and decided in that case was as to the constitutionality of the act of the legislature of this state declaring certain grain elevators to be public warehouses, and prescribing rules for their management, and fixing maximum charges for the storage and handling of grain. There the legislative department had interposed and declared the public use, and the court, in holding the act constitutional, held merely that the legislative power had been properly exercised. This was the only question having any relevancy here, presented in that case, or which the court undertook to decide, and the discussion of the evidence showing that the business carried on in said grain elevators was of such character that it had in fact become impressed with a public use was only for the purpose of showing that a condition of things existed which justified the legislature in passing the statute then under con-

sideration." 143 Ill. *loc. cit.* 239, 18 L. R. A. 200, 32 N. E. 282. That case clearly announces that it is necessary in cases like the present one, that the legislature should declare that the business "had in fact become impressed with a public use;" something which, as there stated, the courts were powerless to declare. But that case was wholly ignored in the case under comment. For these reasons, besides those already given during the course of this investigation, we decline to follow that case or regard its rulings authoritative.

7. There is one remaining point to be considered, and that relates to the anti-trust laws. So far as concerns those of Illinois they are not of force in this state, and as to those of the United States they must be enforced in another forum. The law on the subject in this state prohibits "any pool, trust, agreement, combination," etc., "to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair; any product of mining, or any article or thing whatsoever; or the price or premium to be paid for insurance of property;" or to fix or limit the production of the things whose price may not be regulated or fixed. Rev. Stat. 1899, § 8965.

Nothing is discovered in this section which is at all applicable to the business in which respondent is engaged. Whether we apply to the words of the statute the rule of *noscitur a sociis* (*McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457), or that of *ejusdem generis* (*State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842), the result must be the same. And there is an especial reason why the ruling in this regard should be a strict one, and this is because the statute is highly penal.

Moved by these considerations we deny the peremptory writ.

All concur.

ELLA DOWNEND, *Respt.*,

v.

KANSAS CITY, *Appt.*

(156 Mo. 60.)

1. A narrow strip of land on the border of a platted block will, for the purposes of an action against the city for injuries caused by defects in a walk thereon, be treated as part of a street formed adjacent to it in the platting of adjoining property, where it has been so treated by the persons interested, and it appears on the plat in such a form that it might be considered as dedicated to public use.
2. The approval of the plat of a proposed addition to a city by the common council does not constitute an acceptance of the streets thereon laid out, or amount to an act of jurisdiction over them,

NOTE.—As to public user as acceptance of dedicated highway, see *Southern P. R. Co. v. Ferris* (Cal.) 18 L. R. A. 510, and *note*.

51 L. R. A.

or impose an obligation upon the city to keep them in repair, although such plat vests the fee of the streets therein described in the city, and the charter of the city provides that it shall be unlawful to make or file any such plat without the approval of the common council.

3. Mere user by the public of a strip of land dedicated by the owner as a street does not constitute it a public street or highway which the city is bound to keep in repair, where the officers authorized by the city charter to lay out, open, and establish streets have not accepted the street, or treated it as such.
4. Leaving an opening from a city street to a strip of land used by the public as a street, but not accepted by the city, and placing a light at the same point, do not constitute an adoption of the alleged street as a public highway which the city is bound to keep in repair.

(April 18, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by a fall on a defective street in defendant city. *Reversed*.

Statement by Marshall, J.:

The plaintiff sues the defendant for damages for injuries sustained by her by falling on a sidewalk on what is alleged to be a public street of the city. The principal question in the case is whether it was such a public street. It is called "Twenty-third street," and extends from Woodland avenue westwardly for a distance of about 150 feet, at which point there is a bluff about 30 feet high, which effectually stops travel; but from the top of the bluff it extends westwardly to Highland avenue, and perhaps further. This alleged street is claimed to have become a public street in this manner: On October 5, 1880, Dudley & Cook laid out an addition to Kansas City, and the common council of the city, in pursuance to the duty devolved upon it by § 9 of article 7 of its charter (1875), approved the plat. Block 4 of this addition, as laid out on the plat, was bounded on the north by Cottage avenue, on the east by Woodland avenue, on the south by what is here claimed to be Twenty-third street, and on the west by Henry street (now Highland avenue). No street was shown on the plat on the south, but a space 5 feet wide was left at the south end of the lots which fronted on Cottage avenue. This space is not designated on the plat as an alley, nor as dedicated to public use in any manner or for any purpose. It simply appears as 5 feet fronting on Woodland avenue, and extending along the rear of said lots westwardly for a distance of 500 feet. Thereafter, on December 22, 1885, Walter H. Holmes, who owned the property adjoining the Dudley & Cook property on the south, laid out an addition to the city, which he called "Mt. Evanston Addition;" and the common council of the city, likewise, under the charter provision referred to, approved

the plat. This plat showed Twenty-third street (a 30-foot street) to be dedicated as a public street. In this way, solely, it is claimed that Twenty-third street became a public street 35 feet wide. Thereafter, in 1887, Mr. Haynes, who had become the owner of lots 22, 23, and 24 of block 4 of Dudley & Cook's addition, built two double flats on the south end of those lots, fronting them upon the alleged Twenty-third street. Lot 24 began 50 feet west of Woodland avenue, and his property extended westwardly for 75 feet. He graded his lots, and constructed a sidewalk 4 feet wide in front of his flats. He wanted to extend the sidewalk eastwardly to Woodland avenue, but the owner of lots 25 and 26, which lay between his property and Woodland avenue, would not permit him to grade in front of his lots, because he had a barn built on these lots, which would be inaccessible if the grading was done. So Haynes built the sidewalk in front of lots 25 and 26 on the natural grade. In consequence of this manner of construction, there was a step, rise, or offset of 5 inches in height at the dividing line between lots 24 and 25. On the 23d of April, 1893, about 7 o'clock in the evening, while walking along this sidewalk, going eastwardly towards Woodland avenue, the plaintiff stumbled her toe against this step on the sidewalk, and fell, and was seriously injured. Beyond Haynes's house, on the north side of the alleged Twenty-third street, there were a pretzel factory and several barns; and on the west side of Woodland avenue, or the south side of Twenty-third street, as shown on the plat of Mt. Evanston addition, there was a grocery store. Prior to the accident the city had not accepted the dedication of the alleged Twenty-third street, unless the approval of the plats of those two additions constitutes an acceptance, and had exercised no authority over the alleged street. In improving Woodland avenue, however, the city had left an opening into the alleged Twenty-third street, and had placed a light in Woodland avenue at that point. The tenants of Haynes and the operatives of the pretzel factory, and the public generally, had used the 5-foot space shown on the Dudley & Cook plat, and the 30-foot space called "Twenty-third Street" on the Mt. Evanston plat, for about six years before the accident to the plaintiff. The city had exercised no jurisdiction over the alleged street, but, on the contrary, its officers had expressly stated that "they would not have anything to do with the street." The plaintiff had on a former trial recovered judgment against the city for \$2,000, but on appeal the Kansas City court of appeals reversed that judgment (*Downend v. Kansas City*, 71 Mo. App. 529) on the ground that the approval of the plats by the common council of the city was not such an acceptance of the street by the city as imposed the duty upon the city to keep it in repair, but that the city is not responsible for injuries received upon such streets until it has assumed control over them, "or 51 L. R. A.

until they have become necessary to the public, and have been so used as to charge a duty on the city." On the retrial the case was submitted to the jury upon instructions that authorized a recovery by the plaintiff if the city had assumed control over this alleged street, or if it was necessary to the public, and had been used by the public as a street. There was a verdict for the plaintiff for \$10,000, but the court ordered, and the plaintiff entered, a remittitur of \$5,000, and judgment was accordingly entered for \$5,000, from which, after proper steps, the defendant appealed.

Messrs. R. B. Middlebrook, H. S. Hadley and L. A. Laughlin, for appellant:

The court erred in instructing the jury that the acceptance of Twenty-third street by the city, so as to make the city liable for repairs upon it, could be established solely by evidence of its use by the public as a highway.

Meiners v. St. Louis, 130 Mo. 274, 32 S. W. 637; *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; *Landis v. Hamilton*, 77 Mo. 554; *Garnett v. Slater*, 56 Mo. App. 207; *Downend v. Kansas City*, 71 Mo. App. 529; *Mayberry v. Standish*, 56 Me. 342; *State v. Wilson*, 42 Me. 24; *Folsom v. Underhill*, 36 Vt. 580; *Oswego v. Oswego Canal Co.* 6 N. Y. 257; *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. 692; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Kennedy v. Williams*, 87 N. C. 6; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 300; *People ex rel. Shurtz v. Worth Twp. Highway Comrs.* 52 Ill. 498; *Willey v. People*, 36 Ill. App. 609; *Tegarden v. McBean*, 33 Miss. 283; *State v. Carver*, 5 Strobb. L. 217; *Wilkins v. Barnes*, 79 Ky. 323; *Stons v. Brooks*, 35 Cal. 489; *Kennedy v. Cumberland*, 65 Md. 514, 9 Atl. 234; *Com. v. Kelly*, 8 Gratt. 632; *Moore v. Cape Girardeau*, 103 Mo. 470, 15 S. W. 755.

The court erred in refusing the peremptory instruction to find for the defendant, because the evidence of public user was insufficient. It had not continued for such a length of time as to be notice to the municipality of the existence of the street.

Jennings v. Tisbury, 5 Gray, 73; *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635.

In a common-law dedication of a street the acceptance of the dedication may be shown by public user or by some act of the municipal authorities, but the adoption of a street can be shown only by some act of the municipality.

Heitz v. St. Louis, 110 Mo. 618, 19 S. W. 735.

There was a valid dedication of Twenty-third street, and the abutting owners of lots fronting on it had acquired a vested right to its use as a street, which was as much their property as the soil they bought.

Lackland v. North Missouri R. Co. 31 Mo. 180; *Ferrenbach v. Turner*, 86 Mo. 416, 56

Am. Rep. 437; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463.

No power exists in the city to close a private way.

Brinck v. Collier, 56 Mo. 160; *Page v. Weathersfield*, 13 Vt. 429; *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626.

Messrs. William F. Borland, Willard P. Hall, and Frank Hagerman, for respondent:

The city was bound to maintain in a reasonably safe condition Twenty-third street at the scene of the accident, because upon the facts it was dedicated to the city as a street, and by it expressly accepted as such, and because it acquiesced in the public use thereof as a street.

Twenty-third street became a street by virtue of a statutory dedication. In this state a statutory dedication acts as a grant, and has the effect of vesting the fee to the street at once in the city, and therefore no acceptance is required.

Reid v. Edina Bd. of Edu. 73 Mo. 295; *California v. Howard*, 78 Mo. 88; *Buschman v. St. Louis*, 121 Mo. 536, 26 S. W. 687; *Brown v. Carthage*, 128 Mo. 17, 30 S. W. 312; *Meiners v. St. Louis*, 130 Mo. 284, 32 S. W. 637.

Aside from the effect of the statutory dedication, Twenty-third street was a street of defendant because the long use of it by the public showed an acceptance thereof by the defendant, and the fact of platting showed an intention on the part of the owner to dedicate.

If the public are permitted by the city to use said strip of ground as a street by traveling over it for any length of time sufficient to indicate the purpose to appropriate it to that use, the acceptance by the city will be regarded as complete.

Meiners v. St. Louis, 130 Mo. 274, 32 S. W. 637; *Baldwin v. Springfield*, 140 Mo. 205, 42 S. W. 717; *Landis v. Hamilton*, 77 Mo. 554; *Brinck v. Collier*, 56 Mo. 160; 2 Dill. Mun. Corp. 3d ed. 631; *Beach, Pub. Corp.* 1449; *Cohoes v. Delaware & H. Canal Co.* 134 N. Y. 397, 31 N. E. 887; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207; *Rose v. St. Charles*, 49 Mo. 509; *Baker v. Vandenburg*, 99 Mo. 378, 12 S. W. 462; *Kansas City Mill. Co. v. Riley*, 133 Mo. 574, 34 S. W. 835; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735.

The fact that Twenty-third street was only two blocks long, or was broken into two parts by an abrupt fall, makes no difference so far as it concerns the question of street or no street.

Heitz v. St. Louis, 110 Mo. 618, 19 S. W. 735; *Stone v. Brooks*, 35 Cal. 489; *Bateman v. Bluck*, 14 Eng. L. & Eq. 69; *People ex rel. Williams v. Kingman*, 24 N. Y. 559; *Rugby Charity v. Merryweather*, 11 East, 375, note; *Wiggins v. Tallmadge*, 11 Barb. 461. See also *Beach, Pub. Corp.* 1448.

After a city has opened any street or portion thereof for public travel its liability begins. Its duties in relation to the street or

portion thereof opened become purely ministerial.

The city does not have to open the street, but if it does so, its duty is plain and absolute, and a failure to perform it renders it liable beyond peradventure.

Taubman v. Lexington, 25 Mo. App. 226; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Walker v. Kansas*, 99 Mo. 652, 12 S. W. 894.

This duty is ministerial and absolute, and cannot be avoided on any plea whatever.

Young v. Kansas, 27 Mo. App. 101; *Hinds v. Marshall*, 22 Mo. App. 214; *Jordan v. Hannibal*, 87 Mo. 676.

A city may open a street for public travel without municipal action of any kind.

Moss v. Springfield, 101 Mo. 617, 14 S. W. 630; *Haniford v. Kansas*, 103 Mo. 181, 15 S. W. 753; *Schenck v. Butler*, 50 Mo. App. 106; *Boyd v. Springfield*, 62 Mo. App. 456; *Walker v. Point Pleasant*, 49 Mo. App. 244; *Golden v. Clinton*, 54 Mo. App. 100.

The obligation of a city to keep its streets in a reasonably safe condition for travel is a continuing obligation, and cannot be shirked or shifted to the shoulders of another.

Welsh v. St. Louis, 73 Mo. 73.

Where the city has notice of a defect in any of its opened streets, i. e., streets opened for travel, it matters not who caused the defect, the city is liable for all injuries caused thereby.

Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325; *Shannon v. Tama City*, 74 Iowa, 22, 36 N. W. 776; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Streeter v. Breckenridge*, 23 Mo. App. 244; *Taubman v. Lexington*, 25 Mo. App. 218; *McCarroll v. Kansas City*, 64 Mo. App. 287.

Marshall, J., delivered the opinion of the court:

1. The evidence does not clearly show whether or not the 4-foot sidewalk was built on the 5-foot space left by the Dudley & Cook plat at the south end of block 4. As before stated, the plat shows a strip of land, marked 5 feet, fronting on Woodland avenue, and extending westwardly 500 feet, and running along the rear of the lots which front on Cottage avenue. Section 6569, Rev. Stat. 1879, which was in force when this plat was filed, required that when an owner laid out an addition to a city he should make out an accurate map or plat thereof, showing, first, all parcels "reserved for public purposes, by their boundaries, course, and extent, whether they be intended for avenues, streets, lanes, alleys, commons, or other public uses; and, second, all lots for sale, by numbers, and their precise length and width." All the lots on the plat are numbered, and their precise length and width are shown. The precise width of this 5-foot strip is stated on the plat, and its precise length is ascertainable by reference to the lots on which it abuts, but it is not numbered. So in this respect it does not comply with the plat laws then in force, so

as to be treated as a lot reserved for sale. Upon the principles laid down in *California v. Howard*, 78 Mo. 88, and *Buschmann v. St. Louis*, 121 Mo. 536, 26 S. W. 687, this strip may therefore be considered as having been dedicated to public use for such purposes as it might appropriately be applied to. The parties hereto treated it as an alley until the plat of Mt. Evanston addition was filed, and because that plat showed Twenty-third street 30 feet wide, adjoining it on the south, they have treated it as a part of Twenty-third street, and called that a street 35 feet wide; and, as they so treated it, we shall so deal with it in this case.

2. The main contention of the plaintiff is that, when the common council of the city approved the Dudley & Cook and Mt. Evanston plats, the city thereby accepted Twenty-third street, and became bound to keep it in repair, and therefore is liable to plaintiff for its failure so to do. The Kansas City court of appeals decided adversely to this contention when this case was before that court, and, we think, properly so decided. At the time these two plats were filed for record the plat laws of the state (Rev. Stat. 1879, chap. 139) did not require the approval of such plats by municipalities, nor was it then required that the streets and alleys dedicated by such plats should conform to the existing streets of the city or town. The act of 1887 (Laws 1887, p. 227) required the approval of such plats by the common council of the city or town, and also required a conformity to existing streets, before they could be recorded. Prior to the passage of this act, however, the charter of Kansas City (§ 9, art. 7, Charter Kansas City 1875) made it unlawful to make or file any such plat unless it was approved by the common council of that city. In *State ex rel. Strother v. Chase*, 42 Mo. App. 343, the Kansas City court of appeals held that, when an owner presented a plat to the common council for approval which conformed to the requirements of the act of 1887, the common council had only a ministerial duty to perform, and was bound to approve it, and could be compelled by mandamus to approve it, and that the common council had no power to add additional conditions, qualifications, or restrictions, nor could it dictate the length or width of a street or alley, since the legislature had not seen fit to require such conditions. The court construed the act of 1887 strictly, and held that the statute only required the proposed platted streets to "conform to the streets of such city, town, or village, so that the streets and avenues of such additions or plats shall, as near as may be, run parallel to, or be continuations on a straight line of, the streets of said city, town, or village, and all taxes against the property proposed to be platted shall be paid." Accordingly in that case the common council was compelled by mandamus to approve the plat. The sole purpose of requiring plats to be submitted to and approved by the common council of a city was to secure systematic prolonga-

tions of its streets, and thus conform to the plan upon which the city was laid out. The landowner can or cannot dedicate streets or alleys to the public. He may lay out an addition, and reserve all the ways and means provided for access to platted lots as private ways; but, because the city has the right to condemn a private way and convert it into a public street, the city has an interest in seeing that the private ways shall, as near as may be, be prolongations of existing streets, to the end that, if they are ever condemned as public streets, there may be conformity and regularity. So, when a common council approves a plat of a proposed addition, this is the extent to which it binds itself. Such an approval is a certificate that the plat conforms to the law, but it is in no sense an acceptance of the street as a public highway; nor does it cast upon the city the duty of keeping it in repair. Such a statutory plat vests the fee to the parcels of land thereon described as intended for public use in the city (Rev. Stat. 1889, § 7313; Rev. Stat. 1879, § 6573), but neither the plat nor its approval is a present acceptance thereof by the city. As a common-law dedication is a continuous, irrevocable offer to dedicate, which the dedicator cannot retract, but which does not become a street until the properly constituted authorities do some act showing acceptance thereof (*Heits v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Buschmann v. St. Louis*, 121 Mo. 536, 26 S. W. 687), so a statutory dedication vests the fee to the street in the city; but, until the properly authorized city officers do some act evidencing an intention to assume jurisdiction over the same, the obligation of the city to keep it in repair does not begin, and consequently it is not liable for a failure to do so. And the mere approval of the plat is not such an act of jurisdiction. *Meiners v. St. Louis*, 130 Mo. loc. cit. 284, 32 S. W. 637; *Baldwin v. Springfield*, 141 Mo. 205, 42 S. W. 717; *Brinck v. Collier*, 56 Mo. 166; *Holmes v. Jersey City*, 12 N. J. Eq. 299; 2 Greenl. Ev. § 622. It follows that the mere approval of these plats by the common council of the city did not constitute an acceptance of the streets thereon laid out by the city, nor amount to an act of jurisdiction over them, nor impose an obligation upon the city to keep them in repair; and therefore this cannot be considered a public street of the defendant city, and the city cannot be held liable for defects existing therein.

3. The plaintiff asked, and the court gave, the following instructions: "The jury is instructed that the place where the injury complained of is alleged to have occurred was dedicated by the owners of the land for public use as a highway, and such dedication was approved by the authorities of Kansas City in accordance with law; and you are further instructed that, while such dedication and approval do not of themselves impose upon the city the duty to keep the street in repair, yet the court instructs you that if you find from the evidence that

Twenty-third street, west from Woodland to a point beyond the point where plaintiff alleges she was injured, was at the time of such alleged injury an open thoroughfare, with dwelling houses and places of business fronting thereon, and that such thoroughfare was actually used, and had been used previous thereto as a public thoroughfare by those living and doing business thereon, and by people visiting and doing business with them, and by others; that there were no fences in said street, or anything to prevent free ingress and egress thereto from Woodland avenue; and that the closing of said street would inconvenience those living and doing business thereon,—then so much of it as was so used was accepted by the city as a street, and the city was liable to keep the portion so used in a reasonably safe condition for travel.” In a word, this instruction declares the law to be that a statutory dedication, and the approval by the common council of the plat, do not of themselves impose upon the city a duty to keep the proposed street in repair, but that the use thereof by the persons living thereon, and by the public, for a length of time not stated, and the fact that it was not fenced so as to prevent persons using it, and that fencing it would inconvenience persons living and doing business on it, constituted an acceptance of the proposed street by the city, and imposed on it the obligation to keep it in repair. Cases may be found in England holding that necessity and long use by the public create a highway, and impose upon the constituted authorities an obligation to keep it in repair; and cases can be found in Missouri which hold that streets and highways may be created by prescriptive use, or by the public using them as such for a period long enough to bar the owner's right to recover under the statute of limitations. But this is, perhaps, the first case where the doctrine has been bluntly stated that by the use of what is conceded not to be a street by virtue of any act of the constituted authorities it has become a street, first, because the public has used it for a time not specified; second, because the public authorities have not fenced it up so as to prevent the public from using it; and, third, because, if the public authorities had fenced it up, it would have been inconvenient to those living on it, and their friends. Or, otherwise stated: The proper public authorities have never accepted it as a street. The public has used it for a day, a week, a year, six years, but not prescriptively or for ten years. The authorities have no power over it, because they have never adopted it as a street, and, notwithstanding they had no authority to do so, they have never fenced it to prevent the public from using it. But the public authorities ought not to have fenced it up, because it would have been inconvenient to the persons living on it, and their friends, if they had fenced it. Therefore it is a public street, and the city is liable for injuries received on it because the city did not keep it in repair. It is hardly possible to seri-

ously discuss the errors and manifest incongruities which this instruction embodies. The mere use by the public does not constitute the way a street or highway, so as to cast the burden of keeping it in repair on the public authorities. As between the owner of the land and the public, prescriptive use or public use for longer than ten years bars the owner's right to close it up or to deny the use as a way. But the public acquire no right by such use to demand that the city shall keep it in repair; for the power to lay out, open, and establish streets is vested by the organic law of the cities in Missouri, at least, in the city as a political subdivision of the state, and can only be exercised by the officers and in the manner specified in the charter of the city. Our government is a democracy, but a representative democracy. The people have themselves vested the power in certain city officers to acquire streets, but the people have not reserved to themselves, nor has such power been delegated to them, the power to acquire streets by user, nor by user to cast the burden of maintenance upon the city. The owner of the land may be barred by limitation, or estopped by acts *in pais*, from claiming that the way belongs to him, but the city is not barred or estopped into accepting that as a public street which the officers authorized by its charter to speak on that subject have never accepted or treated as a street.

The plaintiff relies upon *Maus v. Springfield*, 101 Mo. 613, 14 S. W. 630, to support the proposition asserted in this instruction,—that mere user by the public will establish a street and require a city to keep it in repair; and plaintiff quotes from the opinion in that case the following: “To establish the character of the locality where the injury occurred as a part of a public street, nothing more was essential than to show that it was in actual possession of the city, and open to and used by the public as a thoroughfare, at the time.” To which should be added what was further said in the same connection: “This, plaintiff did. It was not necessary to prove any formal dedication or appropriation of the street.” There is perhaps no case in the books which is oftener misapplied than the *Maus Case*, and none which is more generally misunderstood than that case. It affords no foundation whatever for the statement that mere user by the public can establish a street and require the city to keep it in repair. No such question was before the court in the *Maus Case*, and therefore the court could not have decided any such proposition. The statement of facts in that case is: “The alleged defect in the street was upon the crosswalk in prolongation of the sidewalk on Phelps avenue (a much-frequented thoroughfare), at the intersection of Benton avenue.” Only this; nothing more. Now, it is apparent that the court assumed that Phelps and Benton avenues were both public streets. Not only this, but neither the opinion of the court nor the briefs of counsel contain even

the remotest suspicion of an intimation or suggestion that there was any issue in the case as to the street being a public street. But, even if there had been any such issue in the case, what the court said would not bear out the contention that it decided that mere user by the public, without any action by the city authorities, could establish a street, so as to require the city to keep it in repair. What the court said was that it is only necessary to show "actual possession of the city," and that it was "open to and used by the public as a thoroughfare." If it was in the actual possession of the city, and open to public use, the city must have done some act evidencing an intention to accept it as a street; and therefore it was a street by virtue of the act of the city authorities, and not by virtue of user alone by the public, without any act on the part of the city. Instead of deciding that mere user by the public is enough to establish it as a street, as against the city, the *Maus Case* decides that, in addition to such public user, the street or way or place must be shown to be in the "actual possession" of the city. And that this was the meaning intended by Barclay, J., in the *Maus Case* is conclusively shown by his later opinion in *Baldwin v. Springfield*, 141 Mo. loc. cit. 212, 42 S. W. 717, where he said: "The mere dedication of a city street to public use by means of a recorded plat does not of itself render the municipality liable for negligent failure to keep the street in repair. It is necessary, further, to show that the street in question has been accepted, before that liability begins. Even an acceptance of a dedication transferring title to the street in trust for the public does not impose a liability to keep the dedicated land in repair as a street. The latter obligation does not attach until the corporation, in some official and appropriate manner, has invited or sanctioned its use as a street by the public. But such sanction may be given by acts of its proper officers, as well as by acts in the form of ordinances. To the extent to which the city has sanctioned the use of such land by the public as a thoroughfare may the city justly be held liable for ordinary care to maintain the thoroughfare in reasonable repair for such use." This is not only a complete refutation of the improper interpretation put upon the *Maus Case*, but it is directly in point in the case at bar, and decides not only that the filing of the plats and their approval by the common council did not make Twenty-third street a public street, but also that the use of such platted street by the general public could not give it the character of a street, nor throw upon the city a duty to keep it in repair, and that it would not be a public street, and such obligation to repair would not attach, until the city, "in some official and appropriate manner, has invited or sanctioned its use as a street by the public." In the *Baldwin Case* the question was squarely raised, and it will be noted that it was held to be a street because the street commissioner of the city had exercised jurisdiction over it, in repairing

it, and had thrown or left it open for public use. This case states the law correctly, and is in harmony with the decisions in this state and elsewhere, as is shown by the cases cited in the opinion, and also by the following cases: *Brinck v. Collier*, 56 Mo. 166; *Landis v. Hamilton*, 77 Mo. loc. cit. 563; *Meiners v. St. Louis*, 130 Mo. loc. cit. 284, 32 S. W. 637; *Garnett v. Slater*, 56 Mo. App. loc. cit. 212; *Mayberry v. Standish*, 56 Me. 342 (where the public use was for sixty-five years); *State v. Wilson*, 42 Me. 24; *Folsom v. Underhill*, 36 Vt. 579, 580; *Oswego v. Oswego Canal Co.* 6 N. Y. 257; *Spir v. New Utrecht*, 121 N. Y. loc. cit. 429, 24 N. E. 692; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Gilder v. Brenham*, 67 Tex. 345, 3 S. W. 309; *People ex rel. Shurtz v. Worth Twp. Highway Comrs.* 52 Ill. 498; *Willey v. People*, 36 Ill. App. loc. cit. 615. The distinction should never be lost sight of between user by the public for such length of time as will bar the owner of the land from stopping the use, and mere user by the public when relied upon to give the land the character of a street and impose upon the city the duty to repair. As between the owner and the public, the owner can stop the use by the public at any moment before his right to do so becomes barred by limitation. But the city is in a very different position; for, up to the last minute of the last day of the tenth year of the use of the land by the public, the city has no right to stop the use, for it has no title to the land used; and on the first moment of the first day of the eleventh year it could not stop the use, on the principle contended for, because the ten years' use by the public has established it as a street or highway, and thereby cast the duty to repair upon the city. Thus, it will appear that the city would be absolutely helpless to prevent its becoming a street, and equally helpless to get rid of the duty to repair. The people would have established the street against the will of the city authorities, and perhaps at a place which would not conform to existing streets, notwithstanding the people, by the organic law of the city, had divested themselves of the power to establish streets, and had expressly vested the sole power to do so in the city as a political corporation. This is enough to show that neither upon precedent nor principle is the contention true that mere user by the public, for any length of time, without any act of the city, of land, can impress upon it the character of a street, and thereby cast upon the city the duty to keep it in repair, or make it liable for failure to do so. It follows that the instruction above set out, given for the plaintiff, is fundamentally wrong.

The leaving by the city of an opening to Twenty-third street on Woodland avenue cannot be regarded as an act adopting or assuming jurisdiction over Twenty-third street, for such openings are always left at intersections with private places, or at entrances to private premises which have driveways into them. The placing of the

light on Woodland avenue at the same point must be regarded in the same way.

This case has now been tried twice in the circuit court, once in the Kansas City court of appeals, and once in this court; and it is fair to assume that counsel who have shown such marked ability in this case have elicited all the facts that exist as to the acts of the city with respect to this street, and that no new light could be thrown on the case by another trial. Therefore, to the end that there may be an end to litigation, we hold that the plaintiff has no case against the city, and reverse the judgment of the Circuit Court.

All concur, except Robinson, J., absent.

Rehearing denied.

Re Helen FLUKES.

(.....Mo.....)

1. A statute making it a crime to send any chose in action out of the state for the purpose of suit thereon and of having garnishment or other process issued against the wages of a resident of the state, and served upon any person indebted to him for wages who is subject to the processes of the courts of the state, is in violation of the provisions of U. S. Const., 14th Amend., for equal protection of the laws and the equal privileges and immunities of citizens of the United States, and also of a provision of Mo. Const. art. 2, § 30, against granting special or exclusive privileges or immunities, since the statute discriminates between employees whose employers are subject to the processes of the courts of the state, and others, and also discriminates among creditors by granting greater exemptions of wages in suits out of the state than can be had in suits within the state, while it denies the creditor of a wage earner the same right that other creditors have to bring suits in other states, and permits a creditor of a wage earner who obtains judgment in the state to enforce it out of the state by processes denied to creditors who bring suit out of the state in the first instance.

2. A statute depriving a creditor of his vested right of bringing an action in another state is a deprivation of property without due process of law.

3. It does not lie in the power of the legislature to make that act a crime which consists in the bare exercise of a simple constitutional right.

(April Term, 1900.)

PETITION for a writ of habeas corpus to obtain the discharge of petitioner from custody to which she had been committed for alleged violation of a statute forbidding the levying in a foreign jurisdiction upon the wages of a resident of the state. *Petitioner discharged.*

NOTE.—As to liability for evasion of exemption laws by action in other state, see note to *Stewart v. Thomson* (Ky.) 36 L. R. A. 582.
51 L. R. A.

The facts are stated in the opinion.
Mr. Thomas B. Harvey for petitioner.
Mr. P. W. Haberman for respondent.

Sherwood, J., delivered the opinion of the court:

This is an original proceeding instituted in the court, the object of which is to test the constitutionality of an act passed by the 40th general assembly of this state, which act is the following: "Every Person or Persons, Company, Corporation, or Firm, and Every Agent of Any Person, Persons, Company, Corporation, or Firm, Who Shall Take or Send, or Cause to Be Taken or Sent, out of This State Any Note, Bond, Account or Chose in Action for the Purpose of Instituting or Causing to be Instituted Any Suit Thereon in a Foreign Jurisdiction against a Resident of This State, for the Purpose of Having Execution, Attachment, Garnishment, or Other Process Issued in Such Suit, or upon a Judgment Rendered in Any Such Suit, against the Wages of a Resident of This State, and Having Such Process Served upon Any Person Who Is, or Firm, Company or Corporation Which Is Subject to the Processes of the Courts of This State, Who is Indebted or may Become Indebted to a Resident of This State for Wages, Shall be Deemed Guilty of a Misdemeanor, and, on Conviction Thereof, shall be Punished by a Fine of not Less than One Hundred Dollars nor More than Five Hundred Dollars, and by Imprisonment in the County Jail for a Period of not Less than Thirty Days nor More than Ninety Days." § 2356, Rev. Stat. 1899. If the act just quoted be unconstitutional, the petitioner's right to be discharged can no longer be questioned in this court, because we now treat (just as it ought always to have been treated) an unconstitutional law as no law at all. *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. 628, and cases cited. When put in more condensed form, the section on which the prosecution of the petitioner is based gives forth these results: It subjects any person, etc., to a fine of not less than \$100 nor more than \$500, and imprisonment in the county jail for not less than thirty nor more than ninety days, who sends out of this state, etc., any note, etc., account, etc. for the purpose of "instituting . . . any suit thereon in a foreign jurisdiction against a resident of this state, for the purpose of having execution, attachment, garnishment," etc., "issued in such suit, or upon a judgment rendered in such suit, against the wages of a resident of this state, and having such process served upon any . . . corporation . . . subject to the processes of the courts of this state, which is indebted . . . to a resident of this state for wages." Under the provisions of § 3435, Rev. Stat. 1899, no person can be "charged as garnishee, on account of wages due from him to a defendant in his employ for the last thirty days' service: provided, such employee is the head of a family and a resident of this state." It will thus be seen that under the

laws of this state the wages of a single person, an employee and a resident of this state, are not exempt from the process of garnishment here, while under the terms of § 2356 such wages are expressly exempted from the process of garnishment in another state, unless the creditor who attempts to garnish them over there is willing to incur the punishment of both fine and imprisonment for such a course. This, in effect gives to single and unmarried persons who are residents of and employees in this state an exemption in Illinois and other states that they are not allowed in this the state of their residence. This results in exempting all those single men, residents, etc., whose wages are attempted to be seized under process of a foreign court, while it leaves unexempt those whose wages are garnished under process of our own courts. Besides, those wage earners, residents of this state, who are married, can only claim in this state an exemption of wages due for the last thirty days' service, while they, and all single wage earners, by the law in question, so far as concerns suits in foreign jurisdictions, are exempt, without any limit as to their exemption. The effects of the section are more widespread than already related, as will presently appear. The creditor of any other than a wage earner may freely send over to Illinois or elsewhere, without fear of arrest or of fine or imprisonment "any note, bond, account or chose in action," and institute such suit as he may please, and obtain any such process as he may desire, and levy and seize on any personal or real or mixed property or debts or wages, and may collect his claim in due and usual course of law, without let or hindrance. Why should such discrimination be made among creditors merely because the debtors in one case receive their remuneration for their labor in wages, and in the other in cash payments day by day, or in a cow, horse, produce, or a tract of land? Again, the creditor, though resident of this state, while he may not institute suit in a foreign jurisdiction, in the manner contemplated in § 2356, on a "note, bond, account or chose in action," yet, so soon as he converts his note, etc., into a judgment against his wage-earning debtor, he immediately becomes "law proof," so far as concerns the section under discussion, and, securing a copy of his judgment, may do with it as he will, so far as foreign courts and processes are concerned, even against his coresident and wage-earning debtor, and cannot be punished for so doing. This instance affords fresh illustration of the discriminations which the questioned law makes in favor of some creditors and against others,—those who live side by side in the same town. Furthermore, the controverted law does more still. Not content with its rigorous restrictions and severe punishments on creditors resident of this state, it levels its denunciations against all mankind. It comprehends within its forbidding and globe-encircling enactment all creditors having a note, bond, account, or chose in action within the con-

ties of this state who dare to send or cause to be sent such note, etc., to another state, to institute a suit on it as contemplated in the section under review. Is not such a far-reaching, world-embracing law beyond the power of the legislature to make valid? But the act does not stop even there. It separates wage earners in a way different from any yet suggested. Only those wage earners who are in the employ of "any person who is, or firm, company, or corporation which is, subject to the processes of the courts of this state," are under the protection of the statute. If the person, firm, company, or corporation is not subject to such processes, then there is no prohibition against the creditor sending his note, etc., into a foreign jurisdiction for collection. It is a familiar principle in equity jurisprudence that if a resident creditor brings suit in a foreign jurisdiction to seize upon the wages of a resident debtor which are exempt under our laws, a court of equity in this state will interpose by injunction to prevent such result; and we have been cited to the case of *Sweeney v. Hunter*, 145 Pa. 363, 14 L. R. A. 594, 22 Atl. 653, where an act was under discussion which forbade a resident creditor of Pennsylvania from suing in another state to collect the wages of a debtor resident in Pennsylvania, and imposed as a penalty that in case of such collection they might be recovered by the debtor in a court in Pennsylvania. And, from the fact that a court of equity would enjoin such collections in a foreign state, it was argued that the law was valid which allowed the debtor to recover the sum of which he had been deprived by the judgment of a foreign court. Conceding the correctness of this ruling, which is certainly opposed by the vigorous dissent of Judge Miller, concurred in by Judges Field and Harlan, in *Cole v. Cunningham*, 133 U. S. loc. cit. 134, 33 L. ed. 549, 10 Sup. Ct. Rep. 269, and supported by the opinion of the Supreme Court in the case of *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Id.*, 7 Wall. 139, 19 L. ed. 109,—still the ruling in *Sweeney's Case* does not cover the present one, because by the provisions of the litigated statute the act of sending a note out of this state for the purpose, etc., is made a crime. Under the prohibitions of § 1, art. 14, of the Amendments to the Constitution of the United States, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Our own Constitution contains a provision which declares "that no person shall be deprived of life, liberty, or property without due process of law" (art. 2, § 30), and also a provision forbidding the legislature to grant "to any corporation, association, or individual any special or exclusive right, privilege, or immunity" (art. 4, § 53). And art. 4, § 2, of the Constitution of the United States pre-

cribes that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." As is said by an eminent judge: "The rights thus guaranteed are something more than the mere privileges of locomotion. The guaranty is the negation of arbitrary power in every form which results in a deprivation of a right." These terms, "life," "liberty," and "property" are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may,—all our liberties, personal, civil, and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law. 2 Story, Const. 6th ed. § 1950; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

Now, as elsewhere stated, each of the rights heretofore mentioned carries with it, as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right. And it has been determined by this court and numerous other courts that no one can be deprived of a vested right of action without infringing on that provision of our Constitution and that of the United States respecting the deprivation of life, liberty, and property without due process of law. *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Id.*, 141 Mo. 584, 42 S. W. 927. And this court has also determined that it does not lie in the power of the legislature to make that act a crime which consists in the bare exercise of a simple constitutional right. *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781. The right to bring a suit to enforce a contract is part and parcel of that contract, and one of the essential attributes of property, of which the owner cannot be deprived if the organic law of both state and nation be obeyed. *People v. Otis*, 90 N. Y.

48. The act under discussion also deprives any creditor, as therein mentioned, of the equal protection of the laws, and abridges the privileges and immunities of citizens of the United States, and denies to such creditors those rights which § 2, art. 4, of the Constitution of the United States grants to them, by declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." A citizen of New York or of California could bring just such a suit as the petitioner has brought, and be held wholly blameless. The act is also obnoxious to the charge that it grants special and exclusive privileges to certain persons or associations of persons, and denies the same to others in the same or similar situations. Judge Cooley says: "A statute would not be constitutional . . . which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. . . . Everyone has a right to demand that he be governed by general rules, and a special statute, which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." Cooley, Const. 6th ed. 481-483. Finally, § 2356 undertakes to arbitrarily separate natural classes of people, and to provide different rules of action for each of the dissevered fractions, thus unwarrantably formed into a class of its own. *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

The premises considered, we declare the law unconstitutional, on the various grounds hereinbefore set forth, and hence *discharge the prisoner*.

All concur.

GEORGIA SUPREME COURT.

J. L. BOARDMAN, *Plff. in Err.*,

v.

Minnie L. SCOTT.

(102 Ga. 404.)

*1. Under a deed bounding the land therein conveyed by an artificial pond, which had been in existence for more than forty years, and which had thus be-

*Headnotes by FISH, J.

NOTE.—Boundary on artificial body of water.

In the absence of special circumstances, an artificial watercourse is, for the purpose of boundary, treated like a natural stream, so that a mere mention of it as a boundary will carry title to the center, while, on the other hand, the boundary may be limited to the edge in the same manner that it may in the case of ordinary watercourses. The rule in regard to watercourses generally will be found in a 51 L. R. A.

come a permanent body of water, and was still being kept up and maintained as such, its waters, however, ebbing and flowing, from time to time, so as to leave a margin of land between its high and low water marks, the line of the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the execution of the deed.

2. In view of the evidence introduced

note to *Hanlon v. Hobson* (Colo.) 42 L. R. A. 502.

Where one who has constructed a ditch through his land conveys a portion of the land bounding it on the ditch, the grantee will take title to the center of the ditch, and the ditch will be treated as a common fence. *Warner v. Southworth*, 6 Conn. 471.

A boundary running "with" a ditch will carry the title to its center. *Cansler v. Henderson*, 64 N. C. 469.

at the trial, the court erred in adjudging, as matter of law, that the true boundary between the contending parties was the high-water mark of the pond as it existed on the 15th day of August, 1888.

3. The case should be tried again, in the light of the law as announced in the first headnote; and at the next hearing it can be investigated and determined whether or not, for any reason, depending upon the particular facts as then made to appear, the high-water mark, rather than the low-water mark, should be treated as the true dividing line between the possessions of the plaintiff and the defendant.
4. In no event, under the facts appearing in the record now before this court, can the plaintiff, as against the defendant, claim title to the additional land covered by water in consequence of the raising of the dam after the present litigation began.

(March 29, 1897.)

An artificial watercourse which is made a boundary will be regarded, as between the parties to the deed, as a natural stream. But this was said with reference to the right to change the course of the stream after the conveyance. *Dunklee v. Wilton R. Co.* 24 N. H. 489.

A grant of land on both sides of a mill race, by a description running around each separately, the line running to the edge of the mill race, thence with the side of the race, will not convey any part of the bed of the race. And in case the course is marked by stakes on the bank, the grant will extend no further than the stakes. *Carter v. Chesapeake & O. R. Co.* 26 W. Va. 644, 53 Am. Rep. 116.

A grant of land with reference to a map which shows it to be bounded by an artificial mill race, will not carry title to any portion of the race. The court holds that the presumption that the grant carries title to the center of the stream does not arise when the stream is an artificial reservoir created for purposes wholly irrespective of any connection with the premises conveyed by the deed since then such presumption would be inconsistent with the uses and purposes for which it is obvious the reservoir was created. *Hoff v. Tobey*, 66 Barb. 347.

Canal.

In case of a canal the fee of which is not in the public the same rule applies as in case of watercourses generally, so that a boundary on it will carry title to the center if the grantor owns to that extent.

Where a deed undertakes to convey all the land owned by the grantor bounded by a navigable canal, it will carry title to the center if the grantor owns to that point, so that, upon the abandonment of the canal, the title so far as the center will vest in the grantees. *Goodyear v. Shanahan*, 43 Conn. 204.

In *Lawson v. Mowry*, 52 Wis. 219, 9 N. W. 280, it seems to be recognized that one who receives a deed of land abutting on a canal will take to the center.

Where two owners of land on both sides of a private canal exchange land so that one shall own all on one side, and the other all on the other, the land being bounded "on the canal," the center of the canal will be taken to be the dividing line. *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

Deeds bounding land on a navigable canal should be interpreted so as to give effect to the intention of the parties. *Goodyear v. Shanahan*, 43 Conn. 204.
51 L. R. A.

ERROR to the Superior Court for Bibb County to review a judgment in favor of plaintiff in a proceeding to establish a boundary. *Reversed.*

The facts are stated in the opinion.

Messrs. Hill, Harris, & Birch for plaintiff in error.

Messrs. Dessau, Bartlett, & Ellis for defendant in error.

Fish, J., delivered the opinion of the court:

This litigation arises out of a dispute between the proprietors of adjoining tracts of land over the boundary between their respective possessions. The land of the defendant, Boardman, is described in his deeds as being bounded on the south by McCall's mill pond. Under this description of his southern boundary, Boardman claims

A boundary on a canal will carry title to the highest water line, although figures on the plat showing the side lines running toward the canal indicated a length which would not extend to that point, so that, although during the continuance of the existence of the canal the public may be entitled to use a space on the bank for purposes of navigation, upon its abandonment and sale the purchaser will acquire no title beyond high-water mark. *Morgan v. Bass*, 14 Fed. Rep. 454.

Pond.

Where the pond is created by the damming back of the waters of a stream the tendency is to apply the rule applicable to streams generally, but if it is an artificial raising of a natural pond the rule applicable to ponds and lakes will be applied.

When a lot of land is bounded by a pond artificially created by a milldam the same rule applies to the pond as was applicable to the stream before the dam was built. So that, in case the boundary runs to the pond thence by the side of the same, the title will extend to the center. *Mansur v. Blake*, 62 Me. 38.

A deed of land bounding the grant by an artificially created pond through which the thread of the stream has always been apparent, conveys title to the thread. *Phinney v. Watts*, 9 Gray, 269.

A boundary on an artificial millpond, not expressly or by clear implication limiting the grant to the margin, will convey title to the middle of the original stream as if no pond existed. *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462. One judge dissented on the ground that where ponds have been in existence for a long time, and in all probability will continue to exist so long as they are useful, the identity of the stream is lost, and it is going too far to presume that the parties actually contemplated a grant of the land under it. The margin of the pond is a plain, visible boundary, and in nine cases out of ten it is the one actually contemplated by the parties.

If a grant of land on a pond formed by the artificial expansion of a stream describes the boundary as beginning at a stake on the side of the pond, thence around the land to another stake on the side of the pond, thence "by the said pond to the first-mentioned bounds," the grant extends to the center of the pond. *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671.

In *Stevens v. King*, 76 Me. 107, 49 Am. Rep. 609, the boundary ran to a pond, thence by the shore of said pond, and the court held that the

that his title extends to the center of the pond, through which he claims there flows a well-defined current. On the other hand, the plaintiff claims that Boardman's title extends only to the high-water mark of the pond. It is admitted by both parties that the plaintiff's ancestor, under whom both of them claim, had title to all the land adjacent to and covered by McCall's mill pond, as well that portion now owned by Boardman as that part owned by the plaintiff; that the title to all of said land is now in the plain-

tiff, except in so far as it was devested by the deed of Sarah McCall and E. J. Davis to Henry B. Davis, dated August 15, 1883, conveying the land now owned by Boardman to Henry B. Davis, from whom Boardman derives his title; and that Boardman has title to all the land covered by said deed. The evidence shows that H. B. Davis conveyed the land covered by his deed to H. T. Powell, on August 18, 1886; and on May 10, 1887, Powell made a deed to the same to Boardman, the defendant. Each of these three

conveyance was to low-water mark. But the report does not show whether the pond was wholly or only partly artificial.

In *Wheeler v. Spinoia*, 54 N. Y. 377, the rule is recognized in argument that a boundary on an artificial pond carries title to the center.

Where the boundary is described as a straight line through the center of the pond, the surface of the pond will be divided into two equal parts as nearly as practicable. *Kingsland v. Chittenden*, 61 N. Y. 618, affirming 6 Lans. 15.

A grant of land excluding that covered by a river will exclude that covered by a pond formed by the damming back of the river to the height that it is likely to rise by reason of the dam during the ordinary changes of the seasons. *Brady v. Sadler*, 17 Ont. App. Rep. 365, reversing 16 Ont. Rep. 49, where it was held that the reservation embraced only the land covered by the river in its natural condition.

If the boundary is on the edge of the pond no title to the soil under the water will be conveyed, and no title will pass to the grantee to land formed by the gradual filling up of the pond. *Hoiden v. Chandler*, 61 Vt. 291, 18 Atl. 310.

If the boundary line is to commence at a stake near the high-water line on an artificial pond, thence running "along the high-water mark to the upper end of the pond," the line so fixed is permanent, and will not change with the subsidence of the water in the pond. *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270, reversing 2 Thomp. & C. 434.

In *Primm v. Walker*, 38 Mo. 94, where the call was for the middle of the pond, the court says, doubtless when the call is for the pond merely or for metes and bounds along the bank of the river, the margin of the pond at low-water mark, or the edge of the pond, by many authorities is to be taken as the boundary.

Where land covered by an artificial pond, and that adjoining, is conveyed to different parties by deeds which bound each "on the edge of the pond," the grantee of the upland will not take to the center of the pond, although the upland is conveyed first. *Eddy v. St. Mairs*, 53 Vt. 462, 38 Am. Rep. 695.

A boundary running to low-water mark, thence along low-water mark of an artificial pond, will convey no land under the water. *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 50 N. W. 514.

A conveyance bounded by a pond which at the time is artificially raised beyond its natural limits will carry title to the low-water mark of the pond in its natural state. *Paine v. Woods*, 108 Mass. 160.

A conveyance of land on a pond permanently enlarged by a dam across its outlet conveys title to low-water mark of the pond in its enlarged state. *Wood v. Kelley*, 30 Me. 47.

Where the boundaries of a lot conveyed are shown by a plan to be a pond which at the time is raised by artificial means, the grant will not be limited to the margin of the pond as it appears at the time, but, upon its recession

on account of the removal of the dam, the title will extend at least to the margin of the original pond. *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167.

A grant of land bounded by a pond will carry title only to the margin as it at the time exists, although it is then raised above its natural level by a dam so as to form a reservoir for the storage of water. The case of *Hathorne v. Stinson* is distinguished on the ground that in the latter the pond was created by the expansion of a river, so that the rule to be applied was that pertaining to streams rather than pertaining to ponds. The court says, had the land been bounded upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the middle of the stream. *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501.

Permanent artificial pond.

In *Waterman v. Johnson*, 13 Pick. 265, it is said by way of argument that where an artificial pond is raised by a dam swelling a stream over its banks it will be natural to presume that a grant of land bounding on such a pond will extend to the thread of the stream upon which it is raised, unless the pond has been so long kept up as to have become permanent and to have acquired a well-defined boundary. But that rule is not applicable to a boundary on a natural pond which has been raised more or less by artificial means.

The rule of *Waterman v. Johnson*, 13 Pick. 261, is recognized in *Robinson v. White*, 42 Me. 209, although the question was not before the court for decision in that case.

It thus appears that *BOARDMAN v. SCOTT* is the first case to really apply the rule governing boundaries on lakes to artificial ponds which may have acquired some degree of permanency. Reason and analogy seem to be against this decision. There is no doubt but the title to the bed of the pond is in the private owner, and not in the state, so that the principal reason for limiting grants on natural lakes to the water's edge, as was done in the cases cited by the court, does not exist. Moreover, there is no such thing as a permanent artificial pond.

As soon as the dam disappears the pond will no longer exist, and the dam will be maintained only so long as it is commercially valuable. The fact that it has been valuable for many years does not establish that it will continue to be so for any time in the future, so that for all the parties can know it may be abandoned any day. If there is a desire to exclude the pond from the grant it may be done by appropriate language the same as in case of streams. In the absence of express exclusion every reason which has led to the establishment of the rule that boundary on a stream will carry title to the center would seem to apply in case of boundary on a pond formed by artificial expansion of the stream.

H. P. F.

deeds purports to convey 30 acres of land, more or less, the southern boundary of which is described as being "McCall's Mill Pond." According to the evidence, there is no perceptible current in the pond when the water is up, but, when the water is down, there is; and the water on the edge of the pond rises and falls to the extent of whether the pond is full or low. The pond has been in existence since prior to 1840. The Central Railroad & Banking Company, in 1840, made a contract with the then owner of the pond, by which it agreed to keep up the dam of the pond, in consideration of a "right of way" across it; and during that year it built its track across the top of said dam, and it has been in possession of this "right of way" and track ever since. The dam washed away once, and burst out once, and the railroad company restored it. Since the commencement of this litigation, the plaintiff has raised the height of the dam 1 foot, which has caused a small amount of additional land to be overflowed. In the opinion of the only witness who testified on this subject, the whole amount of land submerged by reason of the raising of the pier head was not over an acre.

1. The boundary question raised in this case is an interesting one, which is now for the first time before this court. Therefore, and because of the conflict of authorities, we shall not content ourselves with mere citations which might sustain our rulings, but will fully discuss the subject. It is well settled, both by the common law and the decisions of the courts of this country, that, where land is bounded by a non-navigable stream, the boundary extends to the center, or thread, of the stream. Such has ever been the law in this state. *Hendrick v. Cook*, 4 Ga. 255; *Jones v. Water Lot Co.* 18 Ga. 539; *Stanford v. Mangin*, 30 Ga. 355; Civil Code, § 3053. While under the common law a navigable stream was one in which the tide ebbed and flowed, in this state it is a stream capable of bearing upon its bosom, either for the whole or part of the year, boats loaded with freight, in the regular course of trade. Civil Code, § 3059. Whether, where land is described as being bounded by a natural lake or pond, the title of the grantee extends to the center of the pond or lake, is a question upon which the authorities, as we have said, are by no means harmonious, there being much respectable authority upon either side of it. But we think the decided weight of authority sustains the proposition that, where a deed bounds the premises therein conveyed by a natural lake or pond, the title of the grantee does not extend beyond the low-water mark. Angell, *Watercourses*, 6th ed. § 41; 3 Washb. *Real Prop.* 5th ed. p. 443; Gould, *Waters*, § 203; Devlin, *Deeds*, § 1026; 4 Am. & Eng. *Enc. Law*, 2d ed. p. 832; 6 Lawson, *Rights, Rem. & Pr.* 2008; Tyler, *Boundaries*, 70; *Waterman v. Johnson*, 13 Pick. 261; *West Roxbury v. Stoddard*, 7 Allen, 167; *Nelson v. Butterfield*, 21 Me. 238; *Jakeway v. Barrett*, 38 Vt. 323; *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Bradley v.*

Rice, 13 Me. 200, 29 Am. Dec. 501; *Wood v. Kelley*, 30 Me. 47; *Paine v. Woods*, 108 Mass. 170; *Boorman v. Sunnucks*, 42 Wis. 233; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243; *Stevens v. King*, 76 Me. 197, 49 Am. Rep. 609; *Mansur v. Blake*, 62 Me. 38; *State v. Gilmanton*, 9 N. H. 461; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Seaman v. Smith*, 24 Ill. 521; *Noyes v. Collins*, 92 Iowa, 566, 26 L. R. A. 609, 61 N. W. 250. We think that this view is not only supported by the weight of authority, but also by sound reason. If the common-law rule which is applied to land bounded by a stream is applicable to land bounded by a lake or pond, then every lake or pond which is surrounded by separate tracts of land, belonging to different owners, some of which abut upon it at each end, and some at each side, will have to be supplied with, at least, two imaginary threads of streams, which will intersect each other, at right angles, in the center of the body of water, and the side lines projected into the water to find a *filum aquæ* for one proprietor will intersect the similar outgoing lines of another proprietor; and if there are several of such tracts at each end, and several at each side, the side lines of one proprietor may intersect those of several other proprietors, so that land under water may be included within the lines of two, three, or even more ostensible owners. Let us suppose, simply for the sake of easy illustration, that there is a natural lake or pond, which is perfectly square, currentless, and the marginal lines of which run with the cardinal points of the compass. A owns all the land which abuts upon the lake at the north; B all that touches it at the south; and C and D, respectively, own all the land at the east and west sides of the same. The land of each of the four proprietors is described as being bounded, on one side, by the lake. If the rule that we are discussing is to be applied to lakes and ponds, as to A and B the thread of the stream is an imaginary straight line running due east and west, through the center of the lake; while as to C and D it is an imaginary straight line running exactly midway of the lake, north and south, and necessarily intersecting, at right angles, the *filum aquæ* made for the purpose of bounding the tracts of A and B. Does A own one half of the bed of the lake, to the exclusion of C and D, or do the two latter, taken together, own all the land under the water, to the exclusion of the two former? We know that there is authority for holding that, when an attempt to apply the common-law principle relative to streams to a lake or pond develops such complications, the land under the water should be divided ratably between the different shore owners. Taking this view in the case put, a modification of the principle might be adopted by drawing two diagonal lines from the angles of the lake, intersecting each other at its central point, and holding that each of the four proprietors is entitled to

the bed of the lake within the triangular space thus formed, immediately in front of his shore line, and to no more. But it is evident that each proprietor would then be deprived of one half of the land covered by water to which he would be entitled under the application to his boundary alone of the rule, *Usque ad filum aquæ*. If, however, we gradually increase, upon each side of the lake, the number of shore owners, it will be seen that the difficulty of adopting even a modification of the rule, which will be fair and just to all parties whose interests conflict with each other, will become greater and greater, soon becoming so great as to render it practically impossible to uphold, in any reasonable and sensible degree, in behalf of each proprietor, this principle, which is so well adapted to streams, and so ill adapted to lakes and ponds. Of course, it is not at all probable that any natural lake or pond is square; but no matter what the shape of a body of water may be, if there are several shore owners at each of its sides, or if there be several at each end, and several at each side, the difficulties in the way of a practical application of the principle under consideration will be equally as great, if not greater, than in the case supposed. In fact, owing to the irregular and more or less circular outlines of most lakes and ponds, in the great majority of cases the difficulties will be greater.

In *Indiana v. Milk*, 11 Biss. 197, 11 Fed. Rep. 389, Gresham, D. J., well and forcibly states the reasons why the common-law principle relative to land bounded by a stream is not applicable to land described as being bounded by a lake or pond. He says: "Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to anyone. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current. The rights of riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But, when this rule is attempted to be applied to lakes and ponds, practical difficulties are encountered. They have no current; and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds. Beaver lake is $7\frac{1}{2}$ miles east and west, and less than 5 miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think that the mere proprietorship of the surrounding lands will in all cases give ownership to the beds of non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and

paid for the small surrounding fractional tracts,—the mere rim." We think it is very unreasonable to presume that one owning a large pond and all the land under and around its waters, who sells and conveys to another a small tract of the surrounding land, intends, by designating the pond as one of its boundaries, that his grantee shall take all the land beneath the water between the shore line of the premises conveyed and the center of the pond. This presumption is particularly unreasonable when the pond is, and has been for many years, probably ever since it came into existence, the reservoir which supplies the necessary power to operate a mill belonging to the grantor, located at its mouth. Surely, in such a case there is neither reason nor common sense in presuming that the grantor intended to convey to the grantee, in addition to the acreage named in the deed, part of the reservoir which is absolutely essential to the operation of his mill.

We are aware that the Supreme Court of the United States, in *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 423, 11 Sup. Ct. Rep. 808, 838, a case which went up from the northern district of Illinois, in an elaborate and carefully prepared opinion, held that "by the common law, under a grant of lands bounded on a lake or pond which is not tide water and is not navigable, the grantee takes to the center of the lake or pond, ratably with other riparian proprietors if there be such," and that this was the law of Illinois, "notwithstanding the opinion of its highest court in *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243." Three of the justices, however, dissented from this ruling, holding that "the question how far the title of a riparian owner extends is one of local law," and that the Supreme Court of the United States was bound by the decision of the supreme court of Illinois in *Trustees of Schools v. Schroll*, which Mr. Justice Brewer, who delivered the dissenting opinion, termed "the distinct and well-considered, as it was also the unanimous, decision of the highest court of the state." He further said: "We do not think it sufficient to overthrow the force of this decision to say that the common law of England was different, a proposition which, in passing, we may say we doubt." We have carefully read and considered the opinion of the majority of the court in *Hardin v. Jordan*, and with all due deference to so high an authority, for which we have the greatest respect, we must say that we are not convinced that the common law was as therein stated. While the opinion shows that the case received a careful investigation and consideration, as, from the high character of the court which rendered it, one would naturally have presumed, no case decided by an English court prior to the American Revolution is cited as authority upon this point. We therefore naturally conclude that no such case could be found. If there is such a case, we have been unable, with the resources at our command, to discover it. To sustain the proposition that, under the common law, the rule as to land

bounded by a lake or pond was the same as that applied to land bounded by a stream, the court cites and seems to lay great stress upon the case of *Bristow v. Cormican*, decided by the House of Lords in 1878, and reported in L. R. 3 App. Cas. 641. We shall presently endeavor to show that the establishment of this proposition was not necessary in order to reach the conclusion arrived at by the House of Lords in that case, and that, as we understand the case, the court did not pass upon it. Before citing and commenting upon that case, however, the able and learned justice who delivered the opinion of the court in *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, in attempting to demonstrate this proposition, says: "Lord Coke, however, when enumerating the different things that are comprehended under the term 'land,' as a subject of ownership, mentions land covered with water. His words are: 'Also the waters that yield fish for food and sustenance of man are not by that name demandable in a præcipe; but the land whereupon the water floweth or standeth is demandable; as, for example, *viginti aeras terras aqua cõpertas*, —20 acres of land covered with water.' Co. Litt. 4a. And, after showing that the right of fishery may be granted by the owner distinct from the right of soil, he adds: 'If a man grant *aquam suam*, the soil shall not pass, but the fishery within the water passeth therewith.' But, where a collection of water has acquired a specific name, he says that the land may be included under that name; as, '*Stagnum*, a poole, doth consist of water and land, and therefore, by the name of *stagnum* or poole, the water and land shall pass also.' So, of a gorse or gulf, for which a præcipe will lie with the *esplées* in taking of fish therefrom. Co. Litt. 5b. This shows that still water, as well as rivers and streams, was the subject of private ownership by the old English law." It seems to us that it shows something more than this; for if the thing designated by the specific name which has been acquired by the collection of water consists of land and water, so that, when this name is used in a conveyance, the land under the water is thereby included and described, it would seem that, when a boundary is designated by this specific name, the land covered by the water would be included and designated as the boundary; and, as no part of land described as a boundary passes as appurtenant to the land which it bounds, the boundary line of the contiguous land would be at the water's edge. We may remark in this connection that in was decided in *Jackson ex dem. Teed v. Halstead*, 5 Cow. 216, upon the authority of Lord Coke, that "a grant of a river, *eo nomine*, will not pass the soil of the river, or an island within it." The specific name which has been acquired by the collection of water now in question is "McCall's Mill Pond." Now, if one who owns the thing described by such specific name—that is, the water and the land upon which it stands—conveys to another a tract of land contiguous

ous to it, and designates McCall's mill pond as one of the boundaries of such contiguous tract, is not the land under the water as much designated as the boundary as the water? Does he not designate the whole thing, consisting of land and water, and known as "McCall's Mill Pond," as the boundary?

In the further discussion of the subject, the learned justice cites the case of *Bristow v. Cormican*, L. R. 3 App. Cas. 641, as being "directly in point," and of which he says: "Of course, this decision has not the controlling authority which it would have had if it had been made before our revolution. But it is the judicial decision of the highest authority in the British Empire, and is entitled to the greatest consideration on a question like this, of pure common law." Undoubtedly, the decision of the highest court of the British Empire, on a question of pure common law, is entitled to great consideration in this country, even though, by reason of its having been rendered since the American Revolution, it is not to be considered here as a controlling precedent upon the question involved. But, as we have said, we do not think that the precise question which we are considering was passed upon by the House of Lords in that case. There the plaintiffs "brought trespass against the respondents to assert a right to a several fishery in Lough Neagh. The plaint contained three counts: (1) Trespass on the plaintiffs' several fishery in Lough Neagh, at a place called Feumore; (2) Trespass on the plaintiffs' land, covered with water at Feumore, being part of Lough Neagh; (3) Conversion of the plaintiffs' fish. The defendants pleaded a denial of the alleged trespasses; a denial of the plaintiffs' property in the several fishery, lands, and goods; a denial that there was a several fishery in Lough Neagh; and, as a special defense to the first two counts, they alleged that the several fishery and the land covered with water were, and from time immemorial had been, part of an inland sea, called Lough Neagh, and at the time when, etc., the said inland sea had been a common or public navigable inland sea, and that, in the part thereof mentioned, every subject of the realm had, and of right ought to have, the right and privilege of fishing, and that, in the exercise of that right, the defendants committed the trespasses in said counts mentioned. The plaintiffs, by their replication, took issue on the allegations of fact, and also averred that the tides of the sea had never flowed in Lough Neagh, and that the fishery in the first count mentioned, and that the place in the second count mentioned, had been put in defense, and was an ancient possession of the Crown, and had been granted by the Crown to the Earl of Donegal, through whom the plaintiffs claimed. The defendants demurred to this replication, and joined issue on the other pleadings. The demurrer was overruled." We have quoted thus fully from the statement of the case by the reporter to show that no question as to the rights of riparian proprietors in the bed of the lake

was made. The question whether the Crown has a *de jure* right to the soil or fisheries of an inland, nontidal lake, was squarely made, and was decided in the negative. This was the main and controlling question in the case, as the plaintiffs relied upon a grant from the Crown, without showing prior possession in the Crown. The defendants, as will be seen, did not set up any riparian rights in themselves, nor claim under the riparian rights of anybody else. They claimed that "every subject of the realm had, and of right ought to have, the right and privilege of fishing in Lough Neagh," "in the part thereof mentioned." Such a claim was necessarily antagonistic to the idea that any riparian rights in reference to the matters in controversy existed. While the court did not pass upon this claim of the defendants, as it did not become necessary to do so, neither did it decide any question arising out of riparian ownership on Lough Neagh. Certainly, Lord Blackburn, who delivered an able opinion in the case, could not have thought that such a question was involved in the case, or he would not have used the language in that opinion which we shall presently quote. In discussing some remarks of Mr. Justice Wightman, in *Marshall v. Ulsterwater Steam Nav. Co.* 3 Best & S. 742, he says: "This is the only case cited, and, as far as I can find, the only case which exists, where there is even a suggestion that the Crown, of common right, is entitled to the soil of lakes. Neither the passage in Comyns, nor that in Hale, *de Jure Maris*, cited by Mr. Justice Wightman, gives any countenance to such a doctrine. But it does appear that that learned judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water as to justify him in unnecessarily deciding it was the same. More than this, I think, does not appear from that case. I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad filum aquæ*, should apply to a lake, is a different question. It does not seem very convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage. But no question arises in this case as to the rights of the riparian proprietors amongst themselves, for no title is made by either party through anyone as riparian owner." (The italics in this quotation are ours.)

A case much more in point is that of *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, which the supreme court of Ohio, in *Lembeck v. Nyc*, 47 Ohio St. 336, 8 L. R. A. 578, 24 N. E. 686, in discussing the rule with reference to land bounded by non-navigable lakes, cites as authority for the statement that "in England the rule is to limit the operation of the

conveyance to the water edge." And it is to be observed that this statement as to the law in England is made by a court which itself took the opposite view. In the case of *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, the first headnote is: "King James I.—being seised of the lands of Rossmore and other lands adjacent to Lough Erne, (2) (which is a large, navigable, inclosed water, in which the tide does not flow or reflow), and of the whole soil and bed of the lake,—did, by letters patent, grant the said lands, and also certain islands, named, in Lough Erne, and also all other islands in Lough Erne, being parcel of the said lands or any of them, and also a free fishery in the lake or waters of Lough Erne, and all waters, watercourses, fisheries, fishings, etc., lying and being in or within the same:—Held, that the soil of Lough Erne covered with water adjacent to the lands did not pass to the grantee to the middle thread of the lake." Whitesides, Ch. J., said: "In the decision of the case before us, the determination of three very important questions is involved: First, whether the soil passes by a deed granting a several fishery; secondly, as to the distinction (if any), between *liberia piscaria* and *separalis piscaria*; and, thirdly, whether the law as to riparian ownership in streams applies to the case of great inland lakes, such as Lough Erne." In reference to the third question, he said: "We are required by the pleadings of the plaintiff to give him 8 miles of land covered with water. Where is the grant of these lands? Lord Coke says such should be conveyed by the words *terra aqua cooperta*. Where are such words to be found on this grant? Nowhere. Certain lands described are given to the grantee,—certain islands by name, and others parcels of the premises; but the lands covered with water are not granted, nor intended to be granted. Is the Crown, the grantor, excluded by this grant from the fishery, or from the bed and soil of the lake, and, if so, by what means? The case of *Allen v. Donnelly*, 5 Ir. Ch. Rep. 229, shows that the Crown knew when and how to grant the ground and soil of a lough or lake, because it has in the grant to the Society of the Plantation of Ulster granted 'the whole water, bay, river, stream, or rivulet of Lough Foyle, within the limits aforesaid, and the whole ground, and soil thereof, and also the whole piscary,' etc." Further on, he said: "The bold doctrine that, without any words to pass this property, it has passed from the Crown, cannot be maintained. The law as to riparian ownership of the banks of a river or stream flowing between the estates of adjoining proprietors cannot here dispense with a grant of the land covered with water. On the whole case, therefore, I am of opinion that the words of the patent are perfectly clear, and there is nothing in it to give the patentees the bed and soil; and I am not prepared to extend the presumption that the bed and soil of a stream belongs to the riparian proprietors *ad medium filum aquæ*, to a large inland lake like Lough Erne." Pigot, C. B., con-

curred in the opinion of the chief justice. O'Brien, J., concurred in the judgment, and, with reference to an illustration used by Lord Coleridge, in *Lord v. Sydney Comrs.* 12 Moore, P. C. C. 473, that, "if land granted were described as bounded by a highway, it would be absurd to suppose that the grantor had reserved to himself the right of the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable," he said: "This does not apply to the case before us, as, from the size of Lough Erne, so well adapted for general navigation, and used by the public for that purpose, there is no absurdity in supposing that the Crown, in granting all the lands lying along the lake, should have reserved the soil of the lake, but, on the contrary, various reasons may be suggested why it would be advisable to reserve it." Fitzgerald, B., did not decide this point, thinking that the case could be ruled without doing so; and Fitzgerald, J., and Deasy, B., concurred in his opinion. This is the only case, so far as we have been able to find, where the question whether the common-law rule with reference to streams should be applied to lakes has been before a court in Great Britain; and, as we have seen, the judges who considered and decided it were of opinion that it should not.

The rulings of those of our American state courts which have held that the grantee of land described as being bounded by a lake or pond takes title to the center of the water have not been reached by following any like rulings made by the English courts, but by applying to such a case the well-established common-law principle in reference to land described as being bounded by a stream, upon the idea that the analogy between the two cases is such as to make the same rule applicable to both. The fact that there is, when the water is low, a perceptible current in the pond, leads us to remark that we think that there has been, in some cases, too much stress laid upon the mere presence of some current, however slight, or upon the fact that there is absolutely no current whatever. It was well said by Shope, J., in *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243, that "the riparian proprietor claiming to the thread or middle of the stream must show the bordering water to be a stream, and that his grant, in terms or legal effect, is bounded upon or along such stream,—that the stream is made the boundary. And, while it is obvious that a currentless body of water cannot be a stream, the fact of some current in a body of water is not of itself, in every instance, sufficient to determine its character as a stream, as distinguished from a pond or lake. The presence of some current is not enough, alone, to work an essential change in so essentially different things as a stream and a lake; for a current from a higher to a lower level does not necessarily make that a stream or river which would otherwise be a lake; nor the swelling out of a stream into broad water sheets does not necessarily make that a lake which would otherwise be a river."

We believe that the question should be 51 L. R. A.

viewed rather from a practical, common-sense standpoint than from a purely technical one, and that if the prominent, tangible characteristics of the thing named as a boundary, taken as a whole, are those of a lake or pond, and not those of a stream, and it is commonly known and designated as a certain lake or pond, and it has been in existence in this condition long enough to have become what may be termed a permanent body of water, with well-defined boundaries, the law applicable to lakes and ponds should be applied to it, even though there may be some evidence of a current in it. We can readily see how a little stream, by means of a dam placed across its current, checking its onward flow, and causing its accumulated waters to spread out above the dam into a large, still pond, covering a vastly greater space than that previously occupied by the stream at that point, may, during a sufficiently long period of time, during which the pond is maintained, with well-defined boundaries, completely lose its separate identity as a stream at that particular place, its identity as such having become swallowed up and obliterated by the large expanse of dead water, which is known and designated, by a definite name, as a particular pond. In such a case, when one owning the pond and the lands surrounding it grants to another a tract of land, and makes the pond one of its boundaries, the most natural presumption is that he means what he says,—that the pond, and not the little stream flowing into it, shall be the boundary. If he intends the stream to be the boundary, it would seem natural for him to name the stream as such. It is true that courts which have refused to apply the principle *usque ad filum aquæ* to natural lakes and ponds have held that it is applicable to those that are artificial. We apprehend that this distinction is based upon the presumption that the natural ones are permanent, while the artificial ones are but of a temporary character. This is correct as a general rule, and the presumption upon which it is based is good as a *prima facie* one; but every natural lake or pond is not permanent, nor is every artificial one necessarily of a purely temporary character. It was said in a leading case that, "where an artificial pond is raised by a dam swelling a stream over its banks, it would be natural to presume that a grant of land bounding upon such a pond would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary." *Waterman v. Johnson*, 13 Pick. 265. In *Wood v. Kelley*, 30 Me. 47, it was held that where a conveyance bounded land upon a fresh-water pond, which had been permanently enlarged by means of a dam at its mouth, the title extended to the low-water mark of the pond in its enlarged state.

In the case at bar it is not clear from the evidence in the record whether there is a stream flowing from a higher level into the pond, or whether it is simply fed by springs arising in its bed, or located at its head.

But, however this may be, the evidence shows that "McCall's Mill Pond" had been in existence, and kept up as such, for more than forty years prior to the execution of the first deed to the Boardman tract, which describes its southern boundary as being this pond. During all of this time, with but temporary interruptions on two occasions, the dam at its mouth had been a part of the roadbed of one of the oldest and most important railway lines in the state, which was, and is, under a perpetual contract to keep it in good repair, thus insuring its stability and permanency. It had existed for more than twice the length of time required to acquire title to real estate by bare possession alone. It had been there long enough for a generation to come upon the scene of human action, play its part, and be succeeded by another, which was well advanced in its own career. Surely, this pond had existed long enough to have become a well-known landmark in the neighborhood,—long enough to be considered a permanent body of water, and to have acquired as well-defined and well-known boundaries as most natural lakes or ponds. Under these circumstances, we think the rule is the same as that applied to natural lakes and ponds. See 4 Am. & Eng. Enc. Law, 2d ed. p. 837; Gould, Waters, § 203, where the principle above quoted from *Waterman v. Johnson* is recognized.

2. One of the assignments of error is that "the court erred in holding and deciding, as matter of law, upon the deeds admitted and the facts agreed on, that the defendant, John L. Boardman, had no right or title in and to said pond or the land thereunder, nor any right of easement or fishery, boating, or user therein when raised to the full capacity allowed by the height of dam as said dam existed at the time of the conveyance to H. B. Davis." This assignment of error is good, because, when the pond was "raised to the full capacity allowed by the height of the dam," it was necessarily at its high-water mark, while the true boundary line, under the description in the deed to H. B. Davis, according to the weight of authority, is the low-water mark of the pond. See authorities upon this subject cited *supra*, and *Austin v. Rutland R. Co.* 45 Vt. 215; *Wheeler v. Spinola*, 54 N. Y. 377; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484. The reasons for holding the low-water mark, instead of the high-water mark, or the margin of the pond at the precise time of the conveyance, to be the boundary, when a fresh-water pond is named as the boundary, are thus stated by Shepley, Ch. J., in *Wood v. Kelley*, 30 Me. 47: "The use of the waters of such ponds at all seasons [of the year] is of great importance to the owners of the adjoining lands. When the water is low, its use becomes more desirable and valuable. . . . Unless rebutted by some proof, the presumption is that it was the intention of the parties to a conveyance of land bounded by a pond that the land should be bounded upon it at all seasons of the year, and not while the pond remained only at the level existing

at the time of the conveyance." And Shaw, Ch. J., in *Waterman v. Johnson*, 13 Pick. 265, says: "A large natural pond may have a definite low-water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold that land bounded upon such a pond would extend to low-water line, it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any other construction." In the case of *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113, it was decided that the state of Virginia, when she ceded to the United States the territory northwest of the Ohio river, retained the entire bed of the river, and yet that land on the northwest side of the river was bounded by the low-water mark. And Marshall, Ch. J., said: "Wherever the river is a boundary between states, it is the main, the permanent river which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark." As the defendant in error has raised the dam somewhat since this litigation began, we will say that, under the description in the deeds, Boardman's land extends to the low-water mark of the pond as it existed before this was done.

3. Counsel for defendant in error contends that, irrespective of the proper legal construction to be given to the description of the boundary in the deeds, "the edge of the pond" has been "recognized, admitted, and acquiesced in" by each of the several owners of the Boardman lot as the true boundary. The expression "edge of the pond" is indefinite. It may mean the margin of the pond at high water, at low water, or at an intermediate stage of the water. If the intention be to claim that the high-water mark has been fixed by acquiescence as the true dividing line between the lands of the contending parties in this case we do not think it is sustained by the evidence. As we have seen, under the description in Boardman's deeds, the boundary of his land on the south is the low-water mark of the pond. The evidence contained in the record does not show that this boundary has been changed by acquiescence. Section 3247 of the Civil Code provides that "acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line." We could easily demonstrate, by analyzing and discussing the evidence bearing upon this point, that no dividing line has been established in this way; but as the case is to be tried again, when other evidence may be introduced, we do not deem it either necessary or profitable to do so. The case should be tried again, in the light of the law as announced in the first headnote; and at the next hearing it can be investigated and determined whether or not, for any reason, depending upon the particular facts as then made to appear, the high-water mark, rather

than the low-water mark, should be treated as the true dividing line between the possessions of the plaintiff and the defendant.

4. The court below rightly held that the plaintiff was not entitled to the additional land covered by water in consequence of the

raising of the dam after the present litigation began; for in no event, under the facts appearing in the record now before this court, could the plaintiff, as against the defendant, claim title to this land.

Judgment reversed.

KENTUCKY COURT OF APPEALS.

W. T. BONTE, *Appt.*,

v.

Peter POSTELL *et al.*

(.....Ky.....)

1. A joint liability for injuries to a building caused by water from an underground sewer is not imposed upon persons who have discharged surface water from their respective premises into such sewer, where each in so doing acted independently and without intent to cause the injury that resulted, but each person's liability in such case is limited to that part of the damages that was caused by his own act.
2. Failure to give instructions, though correct, that would have been mere surplusage because already substantially given, is not prejudicial error.

(October 8, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Christian County in favor of defendants in an action brought to recover damages for injuries alleged to have been caused by the wrongful casting of surface water upon plaintiff's premises. *Affirmed.*

The facts are stated in the opinion.

Messrs. Joe McCarroll and A. P. Crockett, for appellant:

An action will lie, either jointly or severally, against joint wrongdoers, and in either case each joint wrongdoer is liable for all the damages sustained by reason of the joint wrong.

Cooley, Torts, pp. 133, 135; Webb's Pollock, Torts, p. 230; 3 Lawson, Rights, Rem. & Pr. §§ 1041, 1044; 26 Am. & Eng. Enc. Law, p. 682; *United Society of Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214; *Elliot v. Porter*, 5 Dana, 299; *Knott v. Cunningham*, 2 Sneed, 210; *Sellards v. Zomes*, 5 Bush, 91; Ky. Stat. § 12.

It was prejudicial error in the court below to receive evidence tending to prove that the plaintiff might have so constructed his buildings or north wall as that it would have resisted without injury the unlawful trespass complained of.

26 Am. & Eng. Enc. Law, p. 575, title *Trespass*.

Messrs. Hunter Wood & Son, John Feland, and Downer & Russell for appellees.

NOTE.—As to right to recover against one of several defendants in action for tort, see *Boston v. Simmons* (Mass.) 6 L. R. A. 629, and *note*, 51 L. R. A.

Burnam, J., delivered the opinion of the court:

Appellant in this suit charges that the brick walls of his warehouse and carriage factory have been greatly damaged by water flowing from certain sewer and waste pipes unlawfully constructed by appellees for the purpose of conducting from their premises the surface and waste water accumulating thereon. Appellees deny that appellant's property has been damaged through any negligent or unlawful act on their part, and allege, by way of defense, that the house occupied by appellant stands on lower ground than theirs, and that the natural flow and drainage from the premises occupied by them is in the direction of and against plaintiff's house. They allege that the building occupied by appellant is across the mouth of an alley, in the rear of their premises, and that the city of Hopkinsville many years since caused a brick sewer to be built along the side of plaintiff's house, for the purpose of conducting surface water from the premises occupied by appellees and others to the main sewers of the town, and that the water from the waste pipe emptied into this sewer; that appellant had made no efforts to protect his walls, but that, on the contrary, he had, by means of a gutter, conducted all of the water that fell on the north side of his house into the same sewer. It is further alleged that the surface and waste water from all of the lots fronting on Main and Seventh streets was conducted into the sewer pipe which led into the alley, and that the water from their premises constituted only a small proportion of the total amount which flowed through this pipe. The trial resulted in a verdict and judgment for defendants. Appellant complains that both were flagrantly against the weight of evidence, and that the trial court erred in the instructions given to the jury, and in refusing those asked for by appellant.

The instructions given to the jury are as follows:

"(1) The court says to the jury that if they believe from the evidence that the defendants, or either of them, collected the waste water from their said business house, or the surface water from their lot, into pipes or ditches, and thus conducted the same on or against the house of appellant, and thereby the walls, floors, and joists of his house were damaged, then, in that event, the defendants would be liable to the plaintiff for any actual damage he sustained by reason thereof, not exceeding the amount

claimed in the petition. Given. Thomas P. Cook, Judge.

"(2) The court instructs the jury that, if the natural flow of water is on or over the lot of plaintiff, then it would be the duty of the plaintiff to protect himself against such natural flow of surface water, and the defendants would not be liable for any damage caused by such surface water, unless they so collected or changed its natural flow in such a way that the same flowed against appellant's house in unusual quantities, or out of the natural way, and by reason of such collecting or change of flow the same was damaged as alleged in the petition. Given. Thos. P. Cook, Judge.

"(3) The court further says to the jury that, if they believe from the evidence that the plaintiff is entitled to recover in this action, then they will find such damages only against the party who caused the same, as set out in instruction No. 1. Given. Thos. P. Cook, Judge.

"(4) The court further says to the jury that they cannot in this action find against the defendants, or either of them, for any damages which accrued more than five years before the filing of this action, nor for any damages caused by others than defendants. Nine of the jurors may find a verdict in this case; but, if all do not agree to such verdict, then those so agreeing must sign it. Given. Thos. P. Cook, Judge."

As to each and every one of said instructions the plaintiff objected, and, the objections being overruled, excepted at the time, and still excepts.

And thereupon came the plaintiff, by attorney, and offered the following written instructions, to wit:

"(a) The court instructs the jury that it is not necessary that the defendants should have done all the damage sustained by the plaintiff, if any, before they can be held liable, but if the plaintiff has sustained damage by reason of the negligent location of water pipes, by and through which quantities of water were from time to time collected and conveyed to, against, or under the plaintiff's building, and the walls, beams, joists, or floors of the same were damaged and injured thereby, and the defendants, or either of them, contributed to the said damage in any degree by connecting water pipes therewith and conveying water through the same, then such defendant or defendants would be liable for damage, although he or they have contributed to the same a comparatively small extent. If, therefore, they believe from the evidence that the defendants, or either of them, within the time and at the place alleged in the petition, so carelessly and negligently constructed, located, or used drainage, waste, or water pipes, or permitted such pipes to be so located, constructed, or used, or connected any drainage, waste, or water pipes with any pipes so located, constructed, and used, as to collect, carry, and convey water to, against, or under plaintiff's carriage buildings, whereby his brick walls, floors, sills, or beams, or any of them, have

51 L. R. A.

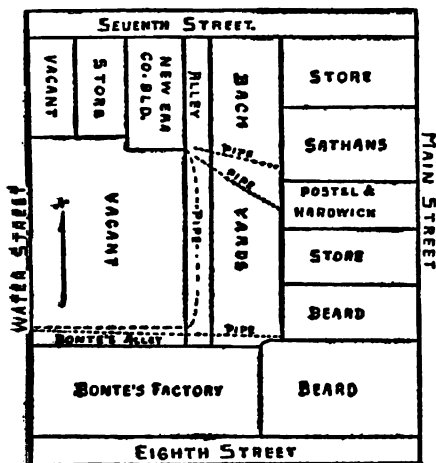
been injured or damaged, or rendered unsafe or unhealthful, then such defendants or defendant are liable to the plaintiff for whatever damage he has sustained thereby, if any, without regard to the quantity of water that may have passed through defendants' said pipes, if any, from defendants' premises, provided the water passing through such pipe from defendants' premises contributed in any degree to the damage complained of, if any; and, in that event, the jury must find for the plaintiff the entire damages he has sustained during the period of five years prior to the bringing of this action, not exceeding the amount claimed in the petition. Refused. Thos. P. Cook, Judge.

"(b) The court instructs the jury that if they believe from the evidence that the defendants, or either of them, exclusive of other persons, or in connection with others, did, within five years before the commencing of this suit, so carelessly construct or use their water pipes, either by themselves or in connection with other persons, if any, who had connected their water pipes therewith, as to collect and to convey water up to, against, or under plaintiff's said building in such quantities as would naturally dampen, rot, and damage, age or injure, plaintiff's said building, and the plaintiff was in fact damaged thereby, then such defendant or defendants would be liable in this action for the full amount of plaintiff's damage so caused, provided that he or they in any degree contributed to such damage or injury, if any, whether intentional or not. Refused. Thos. P. Cook, Judge.

"(c) The court further instructs the jury that they are not to consider any evidence showing, or tending to show, that plaintiff's carriage building might have been constructed so as to protect it from the flow of water conveyed against it by means of the sewers or other artificial means. Such evidence is not competent to be heard in this case for any purpose. Refused. Thos. P. Cook, Judge."

The building of appellant is situated on the southwest corner of the square which is bounded on the north by Seventh street, on the east by Main, on the south by Eighth street, and on the west by Water street. That part of the block which fronts on Main street is covered by business houses, which run back to a blind alley in the center of the block, which opens on Seventh street, but is shut off from Eighth street by the building of appellant, which extends beyond the mouth of the alley on that end. The lot on which appellant's building is located is the lowest level in the square, being about 10 feet below the level of the lot occupied by appellees, and the surface water, when unobstructed, flows naturally thereon. To prevent this, the city of Hopkinsville many years since constructed an open sewer from the blind alley across a vacant lot to Water street. This open sewer is upon the north side of appellant's property, and about 8 feet from it. Subsequently an underground pipe was laid through this blind alley to the

open sewer above referred to, which was tapped by connecting pipes from the premises of appellees and other property holders. The following diagram, taken from the brief of appellant, more clearly illustrates the location of the buildings, alleys, and sewers referred to :



It is the contention of appellant that appellees and the other property holders binding upon the alley have diverted the surface water from their premises into the underground sewer in the alley which empties into the open sewer north of his premises, leading to Water street, in such quantities as to flood his wall, or that the water thus collected seeped into his building through the intervening ground; that for this action he is entitled to maintain an action, either jointly or severally, against the alleged wrongdoers, and that each, when sued separately, is liable for all the damages sustained by reason of the misconduct of all; and that if the defendants, or either of them, contributed in any degree by conveying the water through the sewer, they are liable for all the damages sustained, although they may have contributed thereto in a very small degree. It is the contention of appellees, on the other hand, that, to hold persons liable as joint trespassers for the acts of others, there must be co-operation and concert of action which produces the injury complained of; that in cases where two or more persons act independently, and without co-operation, in such trespass, one cannot be charged with responsibility for the acts of the other.

The principle of law is well established that where two or more persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it at a time and under circumstances that fairly charge them with intending the consequences thereof, the law compels each to assume and bear the responsibility of the misconduct of all. See Cooley, Torts, p. 133. But where two or more persons acting inde-

pendently, without concert, plans, or other agreement, inflict a damage or cause an injury to another person, one of such persons cannot be held liable for the acts of the others. Authorities to support both propositions are abundant, and we are of opinion that this case belongs to the latter class, as there is no evidence conducing to show that the various property holders who ran water from their premises into the underground pipe in the alley which emptied into the open sewer which ran along appellant's wall either acted in concert in so doing, or believed that any injury would result therefrom to appellant's property. Each acted entirely independent of the others. The cases relied on by appellant to support his contention belong to the first class, and there are numerous and very respectable authorities which support the latter proposition. Black's Law Dictionary defines "joint trespassers" as "two or more persons who unite in committing a trespass." And in the case of *Ferguson v. Terry*, 1 B. Mon. 96, it was held that "none were liable for trespasses committed by others unless they give authority, command, or assent to it." The proof showed in this case that the trespassers were separate and distinct. In *Bard v. John*, 26 Pa. 482, it was held that where two persons acted each for himself, so as to produce an injury to the plaintiff, they could not be sued as joint trespassers, unless it appeared that they acted in concert. In *Ellis v. Howard*, 17 Vt. 330, the court said: There must be a privity between the wrongdoers in order that each may be held responsible for the whole of the damages. In *Gallagher v. Kennermer*, 144 Pa. 509, 22 Atl. 970, which was an action to recover damages for injuries to plaintiff's land for deposits of mine water and dirt accumulating thereon from the defendant's mining operation on a creek having its source some 4 or 5 miles off in the mountains above plaintiff's land, it appeared in the proof that the Highland Coal Company had been mining coal several miles above on the same stream, and that this company, as well as defendant, dumped the refuse of its mines directly into the creek. The court said: "It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with the operations of the defendants' mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely or certainly, the proportion of the whole damage done by each of these operations respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership, management, and control were wholly distinct and separate. There was no concert of action or common purpose or design which would support the theory of joint injury." In the case of *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 200, which was a case in which the milldam of the plaintiff had been filled by the deposit of coal dirt from different mines, which had

been washed down by the stream from the mines above of several owners, the plaintiff sought to charge the defendants below with the whole injury caused by filling up his basin; the substance of the complaint being that if at the time the defendants were throwing coal dirt into the river the same was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of the series of deposits of dirt from the mines above. In this case the court held that, where a tort was severally committed without concert with others at the time of commission, it did not afterwards become joint because its consequence united with other consequences; that without concert of action no one suit could be maintained against the owners of the collieries. They support the conclusions reached in that case with numerous authorities. In the case of *Miller v. Highland Ditch Co.* 87 Cal. 430, 25 Pac. 550, the plaintiff was the owner of a tract of land near where a canyon came out of the mountains, but did not reach his land, and naturally the waters of the canyon would not flow upon his land; but defendants, by means of different ditches, turned foreign water into the canyon, and the commingling water from said ditches passed through said canyon, and by cutting new channels, etc., flowed out on plaintiff's land, covering part of it with sand and debris. The ditches were not owned jointly by all of the defendants. Each ditch was operated by part only of the defendants, who had no interest in the other ditches. In that case the court said: "It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert or unity of design between them. . . . The tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. . . . If it

were otherwise, . . . one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants, and would have no remedy against the latter because no contribution can be enforced between jointfeasors." These authorities, we think, very conclusively establish the doctrine that without a common intent and co-operation there can be no joint liability in the commission of several trespasses, and § 12 of the Kentucky Statutes does not change the common-law form of proceeding, or authorize a joint action for several trespasses, but only authorizes several verdicts and several judgments against each of the several joint trespassers in a joint action. See *Ferguson v. Terry*, 1 B. Mon. 96; *Henry v. Sennett*, 3 B. Mon. 311.

Appellant also complains that the court erred in failing to specially call the attention of the jury to the fact that it was no part of his duty to have protected his building against water collected into artificial channels, and wrongfully cast upon it by appellee. "Of course, it is an actionable injury for one to collect surface water and cast it in a body upon a neighboring proprietor, and it is no part of the duty of the person so injured to expend a dollar or do any act to secure for himself the exercise or enjoyment of the legal right of which he is deprived by reason of the wrongful act of another." See *Wood, Nuisances*, 2d ed. 506, and cases cited.

And the instructions given to the jury lay down these propositions, and it would have been mere surplusage to have added instruction "c," asked by appellant.

It is also contended that the verdict is flagrantly against the weight of evidence, and that appellant is entitled to reversal on this account. The testimony as to the alleged injury, and the cause thereof, is decidedly conflicting, and it appears to us that there is ample proof to sustain the verdict of the jury.

For reasons indicated, the judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Robert O. TREADWELL, App.,

v.

John P. TREADWELL.

(176 Mass. 554.)

The use of the proceeds of trust property by the trustee in his own business with the knowledge and consent of the cestuis que trust, and which are credited to him as a debt on the trustee's books, although with the understanding that it is to be paid when there is a favorable opportunity for investment and without any technical revocation of the indenture of trust, changes the trust relation into one of debtor and cred-

itor, so that when the debtor has become financially ruined without repayment of the money an action therefor is subject to the statute of limitations governing the actions for debt.

(September 12, 1900.)

APPEAL by complainant from a decree of the Supreme Judicial Court of Suffolk County sitting in equity which dismissed a suit brought to compel an accounting of trust property alleged to have been placed by plaintiff in possession of defendant. Affirmed.

The facts are stated in the opinion.

Mr. Richard Stone, for appellant:

The statute of limitations is not a bar, be-

NOTE.—The effect of laches on the right to enforce a trust is considered also in *Robinson v. Stone* (Aia.) 45 L. R. A. 66.
51 L. R. A.

cause the right to maintain the suit did not accrue until a demand was made, and the suit was brought within six years after the demand.

Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070.

At the outset the parties created an express trust, the terms of which are set forth in the indenture annexed to the bill.

Under this express trust no lapse of time would bar the suit unless there was a clear repudiation of the trust brought home to the plaintiff, so as to require him to act as upon a clearly asserted adverse title.

Merriam v. Hassam, 14 Allen, 516, 92 Am. Dec. 795; *Davis v. Coburn*, 128 Mass. 377; *Jameson v. Jameson*, 72 Mo. 640.

To enable a trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim must be brought home to the *cestui que trust* beyond question or doubt. The attitude of the trustee must be hostile, and continuously so; and there must be no mistake or misapprehension as to the character of his holding, by either party.

2 Perry, Tr. 5th ed. § 864; *Ward v. Arch*, 12 Sim. 472; *Dickenson v. Holland*, 2 Beav. 310; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622.

The case comes within the rule that the doctrine of laches is not to be applied between relations with the same strictness as between strangers.

2 Story, Eq. Jur. § 1520; *Paschall v. Hinderer*, 28 Ohio St. 568; *Laver v. Fielder*, 9 Jur. N. S. 180.

The plaintiff was out of the country from 1874 until the fall of 1889, and on his return he sought an interview with the defendant, and demanded a settlement.

By the statute of limitations in force in this state from the earliest times, absence of a party from the country at the time when his cause of action accrued was a disability which excused him from bringing his action until his return.

Stat. 1786, chap. 52; Rev. Stat. chap. 120, § 6; Gen. Stat. chap. 155, § 6; *Hall v. Little*, 14 Mass. 203; *Von Hemert v. Porter*, 11 Met. 210.

This was the law in Massachusetts down to February, 1880, when the words, "or absent from the United States," were stricken out of Gen. Stat. chap. 155, § 6, by Stat. 1880, chap. 13.

The question whether the statute of limitations shall operate in cases of trust in chancery proceedings is within the discretion of the court.

Farnam v. Brooks, 9 Pick. 212.

Mr. Solomon Lincoln, for appellee:

It is not important in this case to determine whether or not a demand upon the respondent was necessary in order that the statute of limitations should begin to run. It began to run without demand, and became a bar in six years, that is to say, in 1884.

This demand, if necessary, should have been made within six years from 1878, and the statute would clearly become a bar, at 51 L. R. A.

the farthest, in 1890. This proceeding was not commenced till 1895.

Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070.

The case is one for law, not equity. Then the statute of limitations would have its full effect. Then laches need not be considered.

Speidel v. Henrioi, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

Loring, J., delivered the opinion of the court:

This case comes up on an appeal from a decree overruling the plaintiff's exceptions to the master's report and dismissing the bill. The only questions argued in this court are the two questions whether the plaintiff has been guilty of such unreasonable delay, either in making a demand or in bringing this action, that he ought not to be allowed to recover, and whether the statute of limitations is a bar to this action. From the findings made by the master it appears that on the 30th day of September, 1869, the plaintiff and the defendant, who are brothers, executed an indenture of trust by which the plaintiff transferred to the defendant certain personal property of the face value of \$23,500, in trust to sell, invest, and hold the same for the benefit of the plaintiff until the indenture was revoked by a writing to that effect recorded in the Suffolk registry of deeds. The personal property so transferred to the defendant consisted of four notes, five railroad bonds, and two bonds of the United States of America. The investments which by the indenture of trust it was contemplated should be made were investments in real estate. Two days after the execution of the indenture the four notes were paid, and \$17,000, the amount thereof, together with \$300.09 interest, was received by the defendant. On June 6, 1872,—two years and eight months after the date of the indenture of trust,—the United States bonds were sold, and the proceeds, amounting to \$1,681.87, were received by the defendant; and three months later, or nearly three years after the date of the indenture, the railroad bonds were paid at maturity to the defendant, and the proceeds, \$4,985, were also received by the defendant. In 1872, and after this sale, the defendant invested \$6,011.77 of the trust funds in discounting a note of Richardson, Page, & Co., due in six months. This was repaid seven months afterwards, with interest for the time it was overdue. With the exception of this investment, all the money received from the collection and sale of the personal property transferred to the defendant by the indenture of trust was used by him in his own investments. The defendant had on his books a ledger account with the plaintiff, which had been begun before the indenture of September 30, and was continued after that date without change. In this account the plaintiff was credited with the proceeds of the four notes, five railroad bonds, and two United States bonds as they were received, and with interest at 7 per cent on the daily

balance of cash in the defendant's hands. In this account was also entered the interest on the original investments, and on the only new investment in the Page-Richardson note, while those investments were held by the defendant. The defendant also charged the plaintiff with 5 per cent commission on the income of the trust property collected by him, including in that income the interest on the daily balance due from himself. In the same account there were entries crediting the plaintiff with sums due from other sources, and charging him with payments made generally on his account. The defendant sent the plaintiff regular statements of this account from 1869 up to and including June, 1877. These statements were usually sent once in three months, and were a complete transcript of the plaintiff's account as it stood on the defendant's books. Except in the years 1869 and 1870, the payments made by the defendant to the plaintiff "were uniformly less than the total amounts carried to his credit, so that the amount standing to the credit of the plaintiff steadily increased, and by the end of the year 1877 it amounted to \$29,080.99, which was more than the proceeds of the original securities by nearly \$5,500." "By the end of the year 1876, they [the defendant's investments] were entirely gone, and the defendant was financially ruined." In 1877 all remittances from the defendant to the plaintiff stopped, and the plaintiff was made aware, by the stopping of these remittances, "that the defendant was unable to meet his obligations, and the defendant's financial failure soon became well known to the plaintiff through other members of his family." The plaintiff, who was a physician, went to Europe shortly after the execution of the indenture of trust, and remained there until the end of the year 1893, with the exceptions of a short time in 1874 and of six months in 1889. Since 1893 the plaintiff has remained in this country. The defendant is a lawyer, and resided in Boston during all the time in question. On April 1, 1895, the plaintiff filed in the Suffolk registry of deeds a revocation of the trust, and on the 13th of May following brought this bill against the defendant for an accounting. The master made the following findings: "On the evidence as a whole, I find that the defendant took and used the plaintiff's money, allowing him interest thereon, and made himself a debtor for the sums so used; that he informed the plaintiff of what he was doing; that the plaintiff acquiesced in the arrangement, and that the terms of the indenture were modified or suspended by mutual understanding so as to permit it, at least until the money should be invested in the plaintiff's behalf; and that the plaintiff waived all provisions of the indenture inconsistent with this method of using the money." "The fact that the defendant was charging a commission on income might indicate, if standing alone, that he was collecting the income

51 L. R. A.

from some person other than himself, and this charge is not altogether easy to explain in view of the actual situation and the position taken by the defendant in his accounts and correspondence. But, whatever may have been the defendant's explanation of this charge on income which he was paying out of his own pocket, the charging of the commission could not, in my judgment, have misled the plaintiff into the belief that this interest, periodically credited at the invariable rate of 7 per cent, was anything else than what it purported to be,—a credit allowed by the defendant on the daily balance standing to the plaintiff's credit." The master has found that when the defendant was ruined financially at the end of the year 1877, and all remittances from him stopped, and the defendant's financial ruin became known to the plaintiff, as it did shortly after it took place, there was no longer any trust in existence in fact, although the indenture of trust had not been technically revoked. When a trustee, with the full knowledge of the *cestui que trust*, has taken all the proceeds of the trust property, and has become his debtor for it, the whole transaction has been reduced in fact to a debt due from the trustee to the *cestui que trust*. When this is followed by the financial ruin of the trustee, there is no room to hold that the trust relation also continues because by the understanding of the two the debt was to be paid when a favorable investment should be found. In such a case there is no trust property except the debt due from the trustee, which cannot be collected, and there is no occasion to end the trust, for it has been already changed into a debt. There was no recognition by the defendant of any trust after 1877. The suit having been brought eighteen years after the transaction had been reduced to a mere chose in action, is barred by the statute of limitations. *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070, has been much relied on by the plaintiff; but in that case the money was not to become due until demanded by the plaintiff, and the plaintiff supposed that her money was safe, and her right to it was recognized by the defendant until he refused to pay her her money when she demanded it. This cannot be said in this case, after the defendant, having with the plaintiff's knowledge taken all the proceeds of the trust fund, and become his debtor therefor, became financially ruined. The defendant argues that the charge of a 5 per cent commission on income is inconsistent with the conclusion that the plaintiff became a creditor of the defendant for the amount of the proceeds of the trust property. There seems to have been much confusion in the minds of both parties throughout these transactions, but we agree with the master that this fact is not controlling, and in spite of it we affirm the finding made by the master on the whole evidence.

Decree dismissing the bill affirmed.

OHIO SUPREME COURT.

Michael LEGER *et al.*, *Piffs. in Err.*,
v.

David H. WARREN.

(62 Ohio St. 500.)

- *1. A person who has been arrested without a warrant cannot lawfully be held in custody for any longer period than is reasonably necessary to obtain a legal warrant for his detention. Where he is held for a longer period without such writ or other authority from a competent court, he has a right of action for false imprisonment against the officer or person who made the arrest and those by whom he has been so unlawfully held in custody.
- *2. In such an action it is not a defense for the officer who made the arrest that he acted under orders from a superior officer.
- *Headnotes by the COURT.

NOTE.—Liability of an officer for making an arrest.

- I. Under a warrant or writ
 - a. Valid on its face.
 - b. Where the warrant or writ is irregular.
 - c. Where the warrant is invalid or void.
 - d. Where the court has no jurisdiction.
 - e. Where the defendant is exempt from arrest.
 - f. Return.
 - g. Where the warrant is not in possession of the arresting officer.
 - II. Without warrant.
 - a. For a felony.
 - b. For a breach of the peace "on view."
 - c. For a breach of the peace not "on view."
 - d. For breach of a city ordinance.
 1. Where a statute authorizes arrests on view.
 2. Where an ordinance authorizes arrests on view.
 3. Other arrests made on view.
 4. Arrests not made on view.
 - e. For other misdemeanors.
 1. Past offenses.
 2. For offenses "on view" under statutory authority.
 3. Arrests in other cases.
 - III. Circumstances attending arrest.
 - a. Time.
 - b. Place of arrest.
 - c. Manner of making arrest.
 - d. Disposition of prisoner.
 1. Unreasonable detention.
 2. Place of detention or delivery.
 - IV. Arrest of wrong party or by wrong name.
 - a. Name unknown.
 - b. Arresting wrong man.
 - c. Arresting right man under wrong name.
 - d. Arrest after judgment taken against wrong party.
 - V. Joinder.
 - VI. Liability on official bond.
 - VII. Arresting for one offense and justifying for another.
 - VIII. Question of probable cause.
 - IX. Summary.
- 51 L. R. A.

By the failure to procure the necessary warrant or authority for the prisoner's detention, the imprisonment becomes unlawful from the beginning, and all concerned in it are equally liable.

(April 24, 1900.)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for false imprisonment. *Affirmed.*

Statement by **Williams, J.:**

The defendant in error, David H. Warren, brought his action in the court of common pleas of Franklin county on the 2d day of February, 1897, against Michael Leger and three other police officers of the city of Co-

I. Under a warrant or writ.

a. Valid on its face.

An officer acting in good faith, and in obedience to a warrant of arrest apparently regular, issued from a court having jurisdiction of the subject-matter, is not liable for false imprisonment. *Pepper v. Mayes*, 81 Ky. 674; *Hanke v. McCord*, 53 Iowa, 378; *Hubbard v. Garfield*, 102 Mass. 72; *Mangold v. Thorpe*, 33 N. J. L. 128; *Kelsey v. Klabunde*, 54 Neb. 760, 74 N. W. 1099; *Butler v. Washburn*, 25 N. H. 260; *Hann v. Lloyd*, 50 N. J. L. 1, 11 Atl. 346; *Leib v. Shelby Iron Co.* 97 Ala. 626, 12 So. 67; *Ortman v. Greenman*, 4 Mich. 291; *Atwood v. Atwater*, 43 Neb. 147, 61 N. W. 574; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Tefft v. Ashbaugh*, 13 Ill. 602; *Burdett v. Abbott*, 14 East, 1, 5 Dow. P. C. 165, 4 Taunt. 410; *Jennings v. Thompson*, 54 N. J. L. 55, 22 Atl. 1008; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633; *Marks v. Sullivan*, 9 Utah, 12, 20 L. R. A. 590, 33 Pac. 224; *Hallock v. Dorniny*, 69 N. Y. 238; *Cowdery v. Johnson*, 60 Vt. 595, 15 Atl. 188; *Kessler v. Peata*, 86 Ill. 275; *Wheaton v. Whittemore*, 49 Mich. 348, 13 N. W. 769; *Hildreth v. Brigham*, 12 Allen, 71; *Lewin v. Uzuber*, 65 Md. 341, 4 Atl. 285; *Ortman v. Greenman*, 4 Mich. 291; *Clarke v. May*, 2 Gray, 413, 61 Am. Dec. 470; *Stone v. Dana*, 5 Met. 98; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181; *Hofschulte v. Doe*, 78 Fed. Rep. 486; *Whitten v. Bennett*, 30 C. C. A. 140, 57 U. S. App. 145, 86 Fed. Rep. 405, Affirming 77 Fed. Rep. 271; *Nowak v. Waller*, 31 N. Y. S. R. 458, 10 N. Y. Supp. 199; *Merchant v. Bothwell*, 60 Mo. App. 341; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Churchill v. Churchill*, 12 Vt. 661; *Stewart v. Hawley*, 21 Wend. 552; *Munroe v. Merrill*, 6 Gray, 236; *Chase v. Ingalls*, 97 Mass. 524; *Underwood v. Robinson*, 106 Mass. 296; *Neth v. Crofut*, 30 Conn. 580; *Andrews v. Maris*, 1 Q. B. 3.

And the same was said to be the rule in the following cases: *Henry v. Lowell*, 16 Barb. 268; *Schultz v. Huebner*, 108 Mich. 274, 66 N. W. 57; *Hersog v. Graham*, 9 Lea, 152; *McQuinty v. Herrick*, 5 Wend. 240.

So where the writ or warrant is valid on its face the officer is not liable for executing the same, although the ordinance may be invalid or unconstitutional.

As where the ordinance is unconstitutional on account of unreasonableness and discrimination in favor of residents. *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633.

lumbus and the sureties on their official bonds to recover damages for his unlawful arrest and imprisonment by those officers in January, 1897. The petition alleges: "That defendants Michael Leger, Jacob Miller, and Andrew Frank did, on or about the 19th day of January, 1897, near the hour of midnight of said day, at the home of plaintiff, in the city of Columbus, Ohio, unlawfully, maliciously, and without any reasonable or probable cause, arrest plaintiff, and with force and violence, and against the will of plaintiff, unlawfully place plaintiff in a patrol wagon, and carried him to the city prison, where plaintiff was, by the defendant Patrick Kelly, chief of police of said city, forcibly, unlawfully, maliciously, and against the will of plaintiff, placed in a cell in said prison, and confined therein from said midnight of said 19th day of January, 1897, to

noon of the 25th day of January, 1897; that at the time of his said arrest and imprisonment, and many times thereafter, he demanded of said defendants Leger, Miller, Frank, and Kelly that they inform him what crime he was charged with having committed for which he was so arrested and imprisoned, which information said defendants refused to give plaintiff; that many times while so imprisoned plaintiff demanded of the defendant Kelly that written charges be filed against him, and that he have a hearing in the police court of said city on said charges so to be filed,—all of which said defendant Kelly refused to do; and that many times during said false imprisonment plaintiff demanded of said defendant Kelly that he be allowed to have the assistance of an attorney at law to advise plaintiff as to his rights and to secure his release from said illegal

And where a justice of the peace in an action of trespass against a constable refused to allow the officer to justify under a warrant, on the ground that Mich. act 1853, prohibiting manufacturing and trafficking in liquors, was unconstitutional, the appellate court said: "We forbear to make further quotations upon this point, and hope the example and precepts of these eminent judges may not be disregarded; and that, hereafter, no justice of the peace, however great his legal learning may be, will presume to sit in judgment and decide upon the constitutionality of an act of the legislature." *Ortman v. Greenman*, 4 Mich. 291.

And a marshal was held not liable for making an arrest on a warrant under an ordinance where the warrant was valid on its face, although the enforcement of such ordinance was subsequently enjoined for invalidity. *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

And a city marshal, receiving for service a writ issued by the chairman of the board of aldermen, in the alleged absence of the mayor, did not have to determine whether the ordinance under which the writ issued was regularly adopted or transcribed in the records, nor the exact whereabouts of the absent mayor. *Merchant v. Bothwell*, 60 Mo. App. 341.

And a marshal is not liable in false imprisonment for making an arrest under an invalid ordinance against peddling, where the justice who issues the warrant has jurisdiction of prosecutions for violations of ordinances, and the marshal is the proper officer to execute his process. *Hofschulte v. Doe*, 78 Fed. Rep. 436.

The officer will not be required to inquire into the facts prior to the issuance of the warrant or writ if it is valid on its face.

Where jurisdiction is given a magistrate over the subject-matter, his warrant, "reciting the substance of the accusation," will not always show upon its face whether the magistrate did or did not have the necessary jurisdictional facts before him. The officer is not required, for his protection, to inquire into the facts back of his warrant. *Wheaton v. Whittemore*, 49 Mich. 348, 13 N. W. 769.

And in an action against a sheriff for an unlawful arrest he may justify under a warrant from a court of limited jurisdiction, where the warrant shows on its face that the court had jurisdiction of the subject-matter, and nothing appears to apprise him that the court had not also jurisdiction of the person. He is not required to see whether the affidavit upon which it was issued was sufficient. *Ressler v. Peats*, 86 Ill. 275.

And a constable is not liable in trespass for 51 L. R. A.

making an arrest under an execution issued by a justice of the peace on a judgment rendered against the plaintiff, although the justice may have rendered said judgment without process or appearance. *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181. In this case the court said: "If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it. If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. *Bull*, N. P. 83; *Willes*, 32, and the cases there cited by Lord Ch. J., *Willes*."

And in *Marks v. Sullivan*, 9 Utah, 12, 20 L. R. A. 590, 33 Pac. 224, it was held that a constable was not liable in false imprisonment for making an arrest under a warrant regular on its face, where the justice had jurisdiction to issue it, even if the constable knew of the defects in the proceedings attending the issuance of the execution.

In an action of trespass against an officer who justifies making a civil arrest under a justice's execution, evidence that the same officer fraudulently served the original process is not admissible. *Allen v. Martin*, 10 Wend. 301, 25 Am. Dec. 564.

In *Hildreth v. Brigham*, 12 Allen, 71, which was an action of tort against a deputy sheriff for assault and false imprisonment in arresting the plaintiff on an execution against him for the possession of certain land and costs, it was held that no affidavit was necessary in order to justify the arrest of the defendant for costs. It was also held that, under Mass. Stat. chap. 124, § 5, providing that no person shall be arrested on execution issued for debt or damages in a civil action, except in actions of tort, unless the creditor or some person for him, after execution is issued amounting to \$20 exclusive of costs, shall make an affidavit as there-in provided, no affidavit was required for an arrest for costs and damages.

An arrest under a warrant valid in form, issued by a competent authority upon sufficient complaint, is not false imprisonment. The warrant cannot be attacked collaterally, and is a perfect shield in such an action to the officer and the party who has procured its issuance. *Whitten v. Bennett*, 30 C. C. A. 140, 57 U. S. App. 145, 86 Fed. Rep. 405, *Affirming* 77 Fed.

imprisonment, which the said defendant Kelly refused to do. Plaintiff further avers that he was by said defendant Kelly unlawfully confined as aforesaid in a cell, the floor of which was, for a period of two days of said confinement, covered with water. On account of said dampness and the unhealthy condition of said cell, plaintiff became violently ill. While he was thus ill, defendant Kelly refused to allow plaintiff the attendance of a physician, although requested so to do by plaintiff. On the 21st day of January, 1897, plaintiff was taken from said cell by defendant Kelly, handcuffed to one of the common prisoners of said prison, and compelled to march with a number of felons along the public streets of said city, in full view of a large concourse of people, to the photograph gallery of — at No. 276½, South High street, in said city, where he

was, by said defendant Kelly, compelled to undergo the shame, humiliation, and disgrace of being photographed as a common felon. Said photograph was so taken by defendant Kelly for the purpose of placing the same in the rogues' gallery, and has, by said Kelly, been exposed to view of a large number of persons whose names plaintiff does not know, and therefore cannot allege the same. Plaintiff was taken by said defendant Kelly from his cell many times, and paraded before a large number of citizens of said city whose names he does not know, and consequently is unable to plead them. Plaintiff further alleges that by reason of said false arrest and imprisonment he has been to great loss and expense, in this, to wit, plaintiff is a paper hanger and decorator by trade, and his services per day in that business are reasonably worth \$3.50. The

Rep. 271. In this case the point made was that the indictment was procured by mistake of the grand jury upon which the warrant issued.

In an action for false imprisonment a warrant issued from a court having jurisdiction of the subject-matter, regular on its face, is a protection to the constable. *Nowak v. Waller*, 31 N. Y. S. R. 458, 10 N. Y. Supp. 199. In this case the justice had made a mistake in failing to take an examination of the complainant and the witness, and reducing the same to writing, as required by N. Y. Code Crim. Proc. § 148, but it was held to be no part of the duty of a constable to examine the record made by the magistrate, and it was impracticable to do so.

And an officer executing a warrant of arrest issued by a magistrate is not liable in trespass, although the magistrate may have erroneously issued the warrant under a statute within his jurisdiction, and which called for the exercise of his judicial functions. *Munroe v. Merrill*, 6 Gray, 236, *Stewart v. Hawley*, 21 Wend. 552.

In the latter case it was said that to subject a constable to responsibility, it must be shown, not merely that the magistrate has no jurisdiction, but that it so appeared on the face of the process.

And a sheriff was held not liable in tort for an alleged illegal arrest, although the affidavit for a body execution in alimony was sworn to before a justice who was the attorney for plaintiff in that action; but this was unknown to the sheriff. *Chase v. Ingalls*, 97 Mass. 524. In this case the court said that an officer is protected by his precept if the court or magistrate has authority such as the precept assumes. "It is not his duty to inquire into the particular facts of the case, if the general power appear and the process be regular. He cannot be affected by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer."

So, an officer was held not liable for making a civil arrest where the affidavit was sworn to before the magistrate, who also filed out a writ as attorney for the plaintiff, where that fact did not appear on the face of the process, although the officer might have known this from the handwriting. *Underwood v. Robinson*, 106 Mass. 296.

In an action of trespass against a constable for assault and false imprisonment, an irregular warrant from a justice having jurisdiction of the person and of the subject-matter is a justification notwithstanding the preliminary 51 L. R. A.

steps to the process are irregular. *Taylor v. Alexander*, 6 Ohio, 144. In this case the court said: "The larceny is bunglingly enough charged in the warrant, yet it shows that there was a complaint under the laws for the punishment of crimes, for taking the property of another, and commanded the arrest, and the officer was legally bound to execute it."

And where there is nothing on the face of the warrant to apprise the officer that the justice has not acted rightly, he is bound to execute it, and can justify in trespass under it for breaking into a dwelling house to make the arrest. *Neth v. Crofut*, 30 Conn. 580. In this case the offense was committed in the town of W., and the justice who issued the warrant resided in the town of L.; but the warrant was issued by him within the town of W.

Where a commissioner's court had ordered a debt to be paid by certain instalments "or execution to issue," and the clerk could not on default issue a precept for execution without action of the court, it was held that the clerk was liable in trespass and false imprisonment for issuing a capias without authority. But the sergeant was not liable. The court said: "He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the court for disobedience, and at the same time suable by the party for obedience to the warrant." *Andrews v. Marris*, 1 Q. B. 3.

In *McGuinty v. Herrick*, 5 Wend. 240, it was said that where an irregular execution issues, which, in contemplation of law, has been satisfied, the officer who executes it by arresting the party will be protected if the process is regular on its face, and issues from a court having jurisdiction of the subject-matter.

In *Jennings v. Thompson*, 54 N. J. L. 55, 22 Atl. 1008, it was held that an officer was not liable for arresting plaintiff under a warrant regular on its face from a court having jurisdiction, although the process commanded the officer to bring the plaintiff before the court on a certain day to give evidence in a certain indictment lately found in said court against "J. H. C. J.," the latter being the witness named in the process. It was claimed that when this process was issued the indictment had been tried and the alleged witness could not have been compelled to testify against himself.

In *Clarke v. May*, 2 Gray, 413, 61 Am. Dec. 470, it was held that a constable would not be

time lost while so imprisoned was reasonably worth the sum of \$17.50. He was put to the expense of \$25 in securing the services of an attorney at law. By reason of said false arrest and imprisonment plaintiff lost a job of work, the reasonable profits of which were worth the sum of \$40. By reason of the wrongs and grievances committed herein by said defendants Michael Leger, Jacob Miller, Andrew Frank, and Patrick Kelly, his business has been damaged, and he has suffered great mental anguish, great humiliation, shame, and disgrace, and much physical suffering. By reason of the premises plaintiff has been damaged in the sum of \$5,000." The remaining allegations of the petition relate to the execution of the official bonds of the police officers, with their respective sureties, who are made defendants, the condition of each bond requiring

that the officer "shall pay any and all damages that may be adjudged against him by any tribunal for the illegal arrest, imprisonment, or injury by him of any person while he shall hold said office." No objection appears to have been made to the joinder of the sureties in the action at any stage of the case. The answer, which was filed by Patrick Kelly "for him and codefendants, admits that the defendants Michael Leger, Jacob Miller, Andrew Frank, and Patrick Kelly are police officers of the said city of Columbus, Ohio, as described in plaintiff's petition, and that Louis Seidensticker, Joseph Kolb, Joseph B. McDonald, Cyrus Huling, James Ross, Henry A. Reinhard, Dennis Kelly, and John E. Drugan are the bondsmen of said patrolmen. Defendants deny each and every other allegation in plaintiff's petition contained." And it

liable in false imprisonment in serving a *capias* for contempt and committing the plaintiff upon a mittimus where the magistrate had jurisdiction of the subject-matter, if the irregularity which constituted excess of jurisdiction in the magistrate did not appear on the face of the *capias*, which was regular, and contained nothing from which it could be known that there was any defect of jurisdiction.

But in *Smith v. Bouchler, 2 Strange, 993, 2 Barnard, K. B. 331, Cum. 89, 127, Cas. t. Hardw. 62, Kelynge, 144*, the right of a mere ministerial officer to justify under his process where the court or party cannot was considered, but not settled. Process was issued from the chancellor's court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice chancellor who held the court, and the officers who executed the process, were all sued for false imprisonment. Sir John Strange makes the court say that the officer and goaler might have been excused if they had justified without the plaintiff and vice chancellor. The court of common pleas in England, in their opinion in the case of *Perkin v. Proctor, 2 Wils. 382*, question this, saying: "Yet it seems they could not, as the whole proceeding was *coram non iudice* and a mere nullity." In *Cas. t. Hardw. 62, Hardwicke, Ch. J.*, says, respecting the right of these defendants to justify themselves: "Ifad they severed in plea each man might have stood upon the merits of his own case, but as they have joined in the plea, they must stand or fall together, as they have put themselves upon the same defense. . . . If this action will lie against either judge or party, it will lie against all the defendants, as they have made the same defense."

And in *Kreger v. Osborn, 7 Blackf. 74*, it was held that a constable could not justify an arrest and imprisonment under a *capias ad re; spondendum* issued by a justice of the peace against a person not a resident of his county, without an affidavit. In this case it was held that Ind. Laws 1842, p. 68, abolishing imprisonment for debt, provides that special bail shall in no case be required, unless the affidavit required by the statute shall be first made. This statute is a virtual prohibition of an arrest when the required affidavit is wanting. The effect of this statute is that a *capias* in such a case is of no more authority than a summons.

In an action against a city marshal and police judge for false imprisonment for making an arrest under an order of court, an allegation that neither the marshal nor the judge was an

officer, but pretended to be, and acted as such, was held insufficient, as it should have been also alleged that they were not duly elected and qualified, and were therefore without legal right, and usurpers. *Robinson v. Morgan, 100 Ky. 529, 38 S. W. 868*.

b. Where the warrant or writ is irregular.

It seems that an officer executing a warrant or writ that is irregular only, and not void, will not be liable in false imprisonment.

A constable is not liable in assault and battery for making an arrest on a warrant issued by a magistrate on a criminal charge where the warrant has no seal. *Welch v. Scott, 27 N. C. (5 Ired. L.) 72*.

And a person arrested on a justice's warrant for a breach of the peace cannot maintain an action for false imprisonment against a constable in consequence of a mere informality in the warrant, provided the justice has jurisdiction. *Cooper v. Adams, 2 Blackf. 294*.

In *Ressler v. Peats, 86 Ill. 275*, it was said: "It is again urged that the warrant fails to state where the offense charged was committed, and is therefore void, and affords the officer no protection. The warrant states that a complaint in writing had been that day entered before a justice of the peace, naming the person making the complaint, that a larceny or sundry larcenies had been committed in this state, and that it stated the person complaining had just reason to believe appellant was guilty of the larceny or larcenies charged. The supposed defect is that the warrant fails to state that these larcenies had been committed in the county of the justice of the peace. The case of *Barnes v. Barber, 6 Ill. 401*, announces the rule that an officer may justify under process from a court of limited jurisdiction, where it shows on its face that the court had jurisdiction of the subject-matter, and nothing appears to apprise him that the court had not, also, jurisdiction of the person of the defendant."

A party arrested under a warrant for violating a city ordinance by conducting a show and selling goods without a license cannot maintain an action against the police for an arrest, where he pleads guilty and pays the fine assessed. *Jones v. Foster, 43 App. Div. 33, 59 N. Y. Supp. 738*. In this case the court said: "The crime charged was violating the ordinance against selling goods by outcry in the village without a license. That offense was a misdemeanor and within the jurisdiction of the police justice. Inasmuch as that officer possessed jurisdiction both of the crime and of the person of respondent, any defect or irregularity in the warrant

avers: "That on the 12th of January, 1897, at the city of Columbus, and county of Franklin, Ohio, one Joseph McVey and other persons, whose full names are unknown to this defendant, into a certain storehouse of one Charles Mistereck, there situate, did unlawfully, maliciously, and forcibly break into, with intent then and there and thereby the personal property of said Charles Mistereck, in said storehouse then and there being, unlawfully to steal, take, and carry away, and eighty pairs of shoes, of the value of one hundred and sixty dollars (\$160.00), of the personal property of the said Charles Mistereck, in said storehouse then and there being found, then and there unlawfully did steal, take, and carry away. The defendants Patrick Kelly, Michael Leger, Jacob Miller, and Andrew Frank, on or about the 19th day of January, 1897, had good reason

to believe and did believe that the plaintiff above named unlawfully and fraudulently did receive the personal property above described belonging to said Charles Mistereck, then lately before stolen, he, the said plaintiff, then and there well knowing said property to have been stolen as aforesaid; and thereupon the said officers, Patrick Kelly, Michael Leger, Jacob Miller, and Andrew Frank, having good ground and reasonable cause to believe that said David H. Warren was guilty of receiving and concealing stolen property knowing it to have been stolen, which crime, as above described, is a felony in the state of Ohio, punishable by imprisonment in the Ohio state penitentiary, did cause and procure the arrest of said David H. Warren, and imprison him in a cell in the city prison. The defendants deny that they in any way used violence towards the plain-

or preliminary deposition was waived by the voluntary appearance and plea of the defendant in the proceeding."

And an execution under which plaintiff was arrested protected the deputy where the precept constituting the deputy was pasted on the execution by order of the sheriff, under Vt. Rev. Laws, § 858, providing that the sheriff may depute any proper person to serve a writ by indorsing thereon a special deputation. Cowdery v. Johnson, 60 Vt. 595, 15 Atl. 188.

The failure to indorse on the warrant deputizing the constable that there is a probability that the criminal will escape, under Ill. Laws 1819, p. 163, authorizing the appointment of a deputy "where there is a probability that the criminal will escape," will not render the constable liable in trespass and false imprisonment for executing the warrant, as the presumption will be that the contingency existed that gave him the power to appoint. Flack v. Ankeny, 1 Ill. 144.

But in *Dietrichs v. Schaw*, 43 Ind. 175, it was held that a special constable justifying an arrest under a warrant must show that the writ was directed to him specially by name, and his appointment to act as special constable should be noted by the justice on his docket, under 2 Gavin & H. (Ind.) Stat. 607, § 110, and 639, § 16, providing for such a writ. In this case there was no special appointment, but the writ was executed by a private citizen, and the warrant was directed to the "constable." If the warrant had been directed to "A B, special constable," the failure of the justice to enter the appointment on the docket might not have rendered the special constable liable.

See also *Taylor v. Alexander*, 6 Ohio, 144, *supra*, I. a.

Where a warrant was sent from an outlying county to a city, and before it was indorsed by the magistrate in the city an arrest was made, and afterwards it was properly indorsed, it was held that the only damages recoverable were for a trespass up to the time of backing the warrant, and that the subsequent detention under a proper warrant was valid. *Southwick v. Hare*, 24 Ont. Rep. 528.

c. Where the warrant is invalid or void.

Where the warrant is invalid or void on its face, or where there is a statutory prohibition against the issuance of the same, or where it is only a summons, the officer arresting the defendant will be liable in damages. *Frazier v. Turner*, 76 Wis. 562, 45 N. W. 411; *Poult v. Slocum*, 3 Blackf. 421; *Carratt v. Morley*, 1 Q. B. 18, 1 Gale & D. 45; *Nichols v. Thomas*, 4 51 L. R. A.

Mass. 232; Batchelder v. Currier, 45 N. H. 460; *Huckle v. Money*, 2 Wils. 205; *Money v. Leach*, 3 Burr. 1742, 1 W. Bl. 555; *Forbes v. Hicks*, 27 Neb. 111, 42 N. W. 898; *Gordon v. Clifford*, 28 N. H. 402; *Wasson v. Candfield*, 6 Blackf. 406; *Shergold v. Holloway*, 2 Strange, 1002; *Blythe v. Tompkins*, 2 Abb. Pr. 468.

A warrant for larceny is void on its face, and is no justification for an arrest by a sheriff, where it fails to state the value of stolen goods, under Wis. Rev. Stat. 1878, § 4415, prescribing different degrees of punishment for larceny, depending upon the value. *Frazier v. Turner*, 76 Wis. 562, 45 N. W. 411.

And a constable justifying an imprisonment under a marshal's warrant must show that the warrant on its face is legal, and that the magistrate had jurisdiction of the subject-matter. *Poult v. Slocum*, 3 Blackf. 421. In this case the warrant for bastardy was not in the name of the state as required by law. The officers averred that the process was in due form of law. The plea contained no averment showing that the warrant was issued on a complaint under oath, but stated that the supposed child was not born at the time of the arrest. It did not show that the overseers of the poor instituted suit, or that the mother had or had not sued.

A warrant for the arrest of an alleged fugitive, void because the complaint does not state that the original charge has been made upon oath, or made to a court, or that it was then pending, affords no protection to the constable. *Forbes v. Hicks*, 27 Neb. 111, 42 N. W. 898.

This action was for arrest and imprisonment. The decision does not distinguish between the arrest under the warrant and the imprisonment under the mittimus, but treats the whole proceeding as void.

A sergeant is liable for executing a ca. sa. where the writ misdescribes the court. *Carratt v. Morley*, 1 Q. B. 18, 1 Gale & D. 45.

And a sheriff having an execution against the president, directors and company of the Union Turnpike Corporation, directing him to make a levy, and for want of property to take the bodies of the president, directors and company and commit them in execution until they had paid the moneys, was held liable for arresting the body of one of the proprietors of the Union Turnpike Corporation. *Nichols v. Thomas*, 4 Mass. 232.

The court said: "In this case the corporation, as such, is sued. It has no body which can be arrested; and in the execution the words 'the president, directors and company' are the name of an aggregate corporation and are not the description of any individual persons, whose

tiff, and deny that the arrest and imprisonment was without cause." The new matter in the answer was controverted by reply, and the cause proceeded to trial to a jury. The plaintiff obtained a verdict for \$1,000, on which judgment was rendered; and, that judgment having been affirmed by the circuit court, error is prosecuted here to obtain the reversal of both courts. The only question deemed of sufficient importance to call for a report of the case arises upon the charge of the court, which, with such facts as may be relevant, will be more particularly noticed in the opinion.

Messrs. C. D. Saviers and David B. Sharp, for plaintiffs in error:

The unreasonableness of the time of the detention is a distinct question from that of

bodies are to be arrested. The precept is therefore absurd and impracticable."

And an officer is liable in trespass for executing a warrant of arrest void on its face because returnable before a justice of the peace and not before a police judge, under *N. H. Pamph. Laws*, chap. 835, establishing police courts in Concord, and providing that all warrants issued by any justice of the peace within said city shall be made returnable before said police court. The court said: "The officer had no legal authority to arrest the plaintiff, nor to convey him before the magistrate, as he was ordered, and became a trespasser by the arrest." *Batchelder v. Currier*, 45 N. H. 460.

Where a warrant was granted by the secretary of state, directed to four messengers to apprehend and seize the printers and publishers of a paper called the "North Briton, No. 45," without any information laid before the secretary of state, and without naming any person in the warrant, a journeyman printer was arrested and taken in custody for about six hours. Three hundred pounds damages were awarded against the messenger. *Huckle v. Money*, 2 Wils. 205. In this case Lord, Ch. J., said: "If the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the Kingdom, by insisting upon the legality of this general warrant before them. They heard the King's counsel, and saw the solicitor of the treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour. It was a most daring public attack made upon the liberty of the subject."

In *Money v. Leach*, 3 Burr. 1742, 1 W. Bl. 555, the messengers were also held liable for a like arrest, as the warrants were general in their nature.

And a tax collector was held liable in trespass for arresting a party under a tax warrant where the tax lists were not signed by the selectmen, under *N. H. Comp. Stat. chap. 45, § 8*, 51 L. R. A.

the first arrest, if the arrest itself can be justified.

Hawley v. Butler, 54 Barb. 490; *Dilcher v. Raap*, 73 Ill. 266.

The officers in the first place had reasonable ground to believe that Warren was guilty of the felony. Having obeyed orders, they paid no further attention to the matter, believing, as they had the right to believe, that all necessary steps for the conviction of Warren would be taken by those in authority.

Raist v. Green, 13 Ohio C. C. 455.

When these officers delivered the person to the officers of the patrol wagon their authority over him ceased. He was then in the hands of their chief. It was beyond their power to release him. Had he been detained a year they could not have done so.

providing that such lists shall be signed by the selectmen. *Gordon v. Clifford*, 28 N. H. 402. In this case it was held that the failure to put "L. S." on the copy left with the jailer by the officer arresting did not make the tax collector liable in trespass.

A felony which will justify an arrest by a private individual must be an offense which may be tried by the courts of the state in which the arrest is made; if it be committed in a foreign state, and be triable there only, it will not justify such arrest. A sheriff of another state, who arrests a man in this state on a bench warrant issued to him from the other state, and carries the plaintiff out of the state, is guilty of abduction, and liable therefor. *Mandeville v. Guernsey*, 51 Barb. 99.

A warrant issued for a matter that is not a criminal offense is no justification for a constable. *Wasson v. Canfield*, 6 Blackf. 405.

And an officer is liable in an action for arresting plaintiff, where the justice has no power to grant a warrant to apprehend the party, but can only issue a summons. *Shergold v. Holloway*, 2 Strange, 1002. In this case the warrant was as follows: "Whereas complaint is made to me on the oath of John White, that William Shergold refuses to pay him wages, these are to require you to cause the said Shergold to appear before me, or some other justice, to answer the complaint aforesaid, and give notice to the said White before what justice you appear;" and this was held not to be a warrant to arrest, and was not equivalent to the words "bring before me."

In *Savacool v. Boughton*, 5 Wend. 170, in referring to the case of *Shergold v. Holloway*, 2 Strange, 1002, the court said: "There the justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant; a summons being the only process. The constable could not therefore justify. He was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court said there was 'no pretense for such a jurisdiction.' This decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case."

In *Blythe v. Tompkins*, 2 Abb. Fr. 468, it was said that an officer who executes a warrant is liable for assault and battery and false imprisonment where the warrant is not valid on its face. The arrest was under a warrant for selling liquors, but the warrant did not state the place where the plaintiff sold the liquor. The allegation in the warrant that the plaintiff

Under these circumstances to hold these men in damages to Warren is to hold inferior officers responsible for the fault of their superior.

Messrs. Kinhead, Merwine, & Rhoads, for defendant in error:

One who arrests another either with or without probable cause, and does not take him before a magistrate within a reasonable time for his examination, and holds him in confinement for a longer period than that provided by law is a trespasser *ab initio*.

Six Carpenters' Case, 8 Coke, 146a; *Pastor v. Rogan*, 9 Misc. 547, 30 N. Y. Supp. 657.

Policemen do not possess the power of arbitrary arrest more than other officials do.

Harris v. Louisville, N. O. & T. R. Co. 35 Fed. Rep. 116.

Gold "Intoxicating or alcoholic liquors" was held insufficient, as more certainty is required, and the warrant showed that it was issued on mere belief of witnesses.

To reduce aggravation and damages the officer making an unlawful arrest under a void warrant may show that he had reasonable grounds to believe the plaintiff guilty of a felony. *Newburn v. Durham*, 10 Tex. Civ. App. 655, 32 S. W. 112.

A warrant that may afford no justification for the arrest may be shown in evidence to reduce damages. *Wasson v. Canfield*, 6 Blackf. 406.

It was also held that for such purpose the defendant could show that plaintiff belonged to a band of counterfeiters.

d. Where the court has no jurisdiction.

It is generally held that where the court has no jurisdiction the officer executing an order of arrest or warrant will be liable in damages. The exceptional cases are where the arrested party failed to demand a copy of the warrant under a statute, and where a parish was excepted from the territory within the jurisdiction of the court.

Where a justice has not jurisdiction which is apparent from the affidavit and warrant, the officer is not justified in acting under his process. *Moore v. Watts*, 1 Ill. 18.

And an officer executing a warrant of arrest on the Lord's day, for a violation of the Lord's day, was held liable in trespass where the justice of the peace who issued the warrant under which the defendant would justify had no jurisdiction over the person of the plaintiff because he did not live in the county wherein the alleged offense was committed, under Mass. Stat. 1791, chap. 58, providing for presentment before the grand jury for unnecessarily traveling on the Lord's day where the offender lives out of the county. *Pearce v. Atwood*, 13 Mass. 324.

And where the court of Marshalsea had no jurisdiction, and judgment was obtained against the principal, and one of the bail was arrested by process out of the Marshalsea, it was held that he could maintain an action against the marshal who directed the execution of the process and the officer who executed the same. *Marshalsea Case*, 10 Coke, 76.

And a constable was held liable for assault and false imprisonment for arresting the captain of a Norwegian vessel on his vessel in a civil action, where he was informed as to the nationality, and that the debt would be adjusted at the consulate of that Kingdom in Boston. The court said: Being informed of 51 L. R. A.

When a person is arrested without a warrant by an officer on suspicion of having committed a felony, and is detained in the custody of such officer for five days, and released without having been taken before a magistrate, there being nothing to prevent the officer from taking the prisoner before a magistrate immediately upon the arrest, the question whether the time was reasonable is a question of law, and it is error to submit it to the jury as a question of fact.

The detention in such case is, as a matter of law, unreasonable.

Cochran v. Toher, 14 Minn. 385, Gil. 293; *Ocean S. S. Co. v. Williams*, 69 Ga. 252.

A police officer has, and can only exercise, such powers as he is authorized to do by the legislature, either expressly or derivatively.

State v. Freeman, 86 N. C. 683; *Dill*.

the fact he was bound to know the law that the court had no jurisdiction over the person of the captain or the subject-matter of the action.

"Several cases have been called to our attention in which there are *dicta* to the effect that an officer is not bound to look beyond his precept, even if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defense to the action." *Tellefsen v. Fee*, 168 Mass. 183, 45 L. R. A. 481, 46 N. E. 562.

But in *Stewart v. Hawley*, 21 Wend. 552, it was held that, in order to subject a constable to responsibility in an action of trespass and false imprisonment in making an arrest under a warrant issued by a magistrate, it must be shown, not merely that the magistrate had no jurisdiction to issue the process, but that it so appeared on the face of the process.

And in *Oguel v. Paston*, 2 Leon. 84, it was said that if a sheriff takes a party by force of process awarded out of a court which has not jurisdiction of the principal case, he is a trespasser, but otherwise if the court has authority of the principal case. There, if the process is misconceived, it is only erroneous.

And where an officer seized goods supposed to have been feloniously stolen, and imprisoned the party in possession in obedience to a warrant of a magistrate, it was held that he was not liable in trespass for the arrest, where no previous demand of a copy and perusal of the warrant was made, under 24 Geo. II. chap. 44, providing that no action shall be brought against any officer for anything done in obedience to any warrant of any justice of the peace unless a demand hath been made of a copy and perusal of the warrant. *Price v. Messenger*, 2 Bos. & P. 158, 3 Esp. 96. In this case the court said: "The act therefore takes it for granted that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. For it is as much a defect of jurisdiction if the justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all. The only question therefore is, Whether the act of the officer was done in obedience to any warrant of any justice of the peace. And, considering the nature of the protection intended to be given to officers by this act, I think it reasonable to say that the defendants in this case acted in obedience to the warrant within the meaning of the legislature."

And under 47 Geo. III., chap. 78, constituting

Mun. Corp. § 211; *Johnson v. Americus*, 46 Ga. 80; *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Judson v. Reardon*, 16 Minn. 431, Gil. 387; *Phillips v. Fadden*, 125 Mass. 198; *Slate v. Parker*, 75 N. C. 240, 22 Am. Rep. 669; *Hanscomb v. Russell*, 11 Gray, 373; *Sands v. Graves*, 48 N. Y. 653; *Six Carpenters' Case*, 8 Coke, 146a; *Twilley v. Perkins*, 77 Md. 263, 19 L. R. A. 632, 28 Atl. 286; *Linnen v. Banfield*, 114 Mich. 93, 72 N. W. 1.

Williams, J., delivered the opinion of the court:

The following are the material parts of the court's charge, of which the plaintiffs in error complain: "It was the duty of the defendants, whether they caused the arrest and imprisonment, or made the arrest and

imprisonment, to carry the plaintiff without unreasonable delay before a magistrate of lawful competency for that purpose, to accuse him there according to the forms of law, and obtain the necessary magisterial sanction for any further detention of him. The defendants making the defense here (I mean all the defendants except the sureties) did not comply with the command of the law which required them to take him before a magistrate, and obtain a warrant for his arrest. They have not shown any lawful reason for omitting to do this. He was detained in prison an unreasonable time without the filing of an affidavit and the procuring of a warrant. Their failure to comply with this law made them trespassers from the beginning of the arrest. The permission which the law gave them to arrest and imprison him originally because there was rea-

a court of justice by the name of "The Court of Requests for the sokes of Bollingbrooke and Horncastle and wapentake of Candleshoe (except the parishes of Hagnaby . . . Steeping Magna and Firsby) in the county of Lincoln and for the wapentakes of Gartree . . . in the said county," an action of trespass for assault and false imprisonment could not be maintained against the serjeant executing a ca. sa. issued from such court, on account of the want of jurisdiction of the court over the plaintiff, who resided in an excepted parish. *Carratt v. Morley*, 1 Q. B. 18, 1 Gale & D. 45.

As to jurisdictional facts, see: *Hofschulte v. Doe*, 78 Fed. Rep. 436; *Wheaton v. Whittemore*, 49 Mich. 348, 13 N. W. 769; *Ressler v. Peats*, 86 Ill. 275; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181; *Clarke v. May*, 2 Gray, 413, 61 Am. Dec. 470,—*supra*, I. a; *Poult v. Slocum*, 3 Blackf. 421, *supra*, I. c.

e. Where the defendant is exempt from arrest.

There seems to be a conflict of authority as to the liability of an officer making an arrest, where the defendant is exempt from such an arrest. The officer is generally held liable where he arrests twice on the same writ, or arrests after bail is given, or arrests on civil writs without exhausting property. But some cases hold that the privilege of exemption of infancy, or discharge in insolvency, must be pleaded, and may be waived.

A constable who arrested a debtor on an execution, and committed him to jail, but left no copy of the execution with the jailor, who refused to receive him, was held liable for assault and battery and false imprisonment for arresting him again on the same execution, as the release was a voluntary escape, and the constable again arresting him became a wrongdoer. *Houghton v. Wilson*, 10 Gray, 385.

And a sheriff arresting a man on a warrant for bigamy, and taking a defective bail bond, void because for insufficient amount, cannot thereafter arrest on the same warrant, as the process has served its purpose, and the sheriff has no further power to act under it, and is liable for arrest and false imprisonment. *McQueen v. Heck*, 1 Coldw. 212.

And an officer is liable for false imprisonment where he arrests a party after he is discharged from arrest by a justice of the peace on giving a recognizance. *Doyle v. Russell*, 30 Barb. 300. The court said that if the recognizance was void it was an escape voluntary on the part of the officer and the complaining witness, and the warrant had spent its force.

And an officer arresting a debtor on an exe-

cution, and thereafter discharging him upon his showing a writ of protection and returning the execution unsatisfied, cannot justify under the execution in an action for wrongful arrest and false imprisonment. *Donahoe v. Shed*, 9 Met. 326. The court said the officer may apply for leave to amend his return so as to show that the arrest had been made on that execution.

And a sheriff is liable for causing plaintiff to be rearrested on a remand order after the judgment confining the plaintiff to jail limits is satisfied, and notices by the attorney of the judgment creditor are filed in the sheriff's office to discharge the debtor. *Davis v. Rowe*, 118 N. Y. 53, 23 N. E. 166.

A sheriff arresting a party under an order of arrest, and accepting bail from the defendant, has no right to rearrest him until after the failure of the bail to justify, as prescribed by N. Y. Code Proc. § 192, providing that the sheriff shall deliver a certified copy of the undertaking to the plaintiff, who, within ten days, may serve notice that he does not accept the bail, and § 193, providing that on such notice the sheriff or defendant may, within ten days, give to the plaintiff notice of justification. *Arteaga v. Conner*, 88 N. Y. 403. In this case the court said: "If the plaintiff in the action fails within the time named in § 192, to give notice that he does not accept the bail, he is deemed to have accepted it, and the sheriff is exonerated. If he gives the notice, then the sheriff, for his own protection, or the defendant's attorney, or both of them, may, by notice, require the bail to justify; and if no such notice be given, either by the sheriff or the defendant's attorney, and thus the bail fail to justify, or if the notice be given and the bail fail to justify,—then, under § 201 of the Code, the sheriff himself becomes liable as bail, and his liability as bail does not spring into existence until such failure to justify. Until such failure he cannot rearrest the defendant. To allow such rearrest would defeat the plain purpose of the statute."

And under a writ in a civil cause commanding to attach property or hold to bail, if the officer attaches property, and also arrests the defendant, he will be liable for false imprisonment, although it turns out that the defendant had no property liable to attachment. The Maine statutes do not authorize a levy on property and a seizure of the body of the debtor at the same time. *Trafton v. Gardiner*, 39 Me. 501.

In an action against a constable for false imprisonment in arresting plaintiff on a justice's execution, the burden of proof is on the plaintiff to show that he had property clearly subject to the execution, and that the constable

sonable cause for it, without first procuring a warrant, filing an affidavit, and procuring a warrant, was given to them on the condition that they would not detain him longer than 'was reasonably necessary to enable an affidavit to be filed and a warrant to be procured. Not having complied with that condition, the fact that he was arrested in the first instance for reasonable cause is not even a colorable defense. Three of these defendants were subordinate officers of the superintendent of police. They did what they did pursuant to orders given by one who had a right to command, presumably. That may, as it ought to, make you feel that they ought not, in a moral sense, be held responsible in damages. But the order of a superior, or of one who had a right to command them, is not a legal reason for their omission to comply with the law which required them,

in a reasonable time, to file an affidavit and procure a warrant. The court having this conception of the law applicable to the case, there is nothing for you to do but to assess the damages."

It was shown on the trial that the plaintiff was arrested by the defendant officers without warrant, as alleged in the petition, and was imprisoned after such arrest for a period of more than five days, without any warrant for his detention, and without any charge having been made against him before any competent tribunal, or opportunity allowed him for a trial; that during his imprisonment he frequently demanded to be informed of the nature of the charge on which he was detained, and to be taken before a proper court for a hearing thereon; and that at the end of the period named, when he was discharged from prison, no complaint

had due notice thereof. *Barhydt v. Valk*, 12 Wend. 146, 27 Am. Dec. 124.

But in *Cassler v. Fales*, 139 Mass. 461, 1 N. E. 922, it was said that an action of trespass for an arrest and imprisonment cannot be maintained against the officer making the arrest by an infant who is exempt from arrest for debt, if the process is issued by a court having jurisdiction, and it appears upon its face to be regular and valid, even if it is fraudulently or illegally issued.

And an action will not lie against a sheriff for arresting a party who was attending under a summons from the court, although it is alleged that the party was thereby privileged, and that the defendants knew the fact and made the arrest maliciously. *Magnay v. Burt*, 5 Q. B. 381, Dav. & M. 652, 7 Jur. 1116. In this case the court said: "Though the sheriff may know the party has the privilege, it is impossible for him to be certain that the party means to claim it, and unless he does claim it, he is in lawful custody, and the judgment satisfied."

And an officer is not liable for assault and battery and false imprisonment for arresting the defendant upon a valid execution, although the defendant shows to the officer before he is arrested a discharge under the insolvent law rendered after the judgment on which the execution issued. *Wilmarth v. Burt*, 7 Met. 257.

A sheriff was held not liable in an action of trespass and false imprisonment for arresting a discharged insolvent or person who took advantage of 20 Geo. III. chap. 64, passed on the occasion of the prisons in London being burned by rioters, providing that persons "shall not be liable to be arrested by virtue of any civil process out of any court," where the plaintiff, an inhabitant of Bath, gave special bail before the riot, and then came up to London to free his bail and himself. *Tariton v. Fisher*, 2 Dougl. 671. In this case the court said: "It would be extremely hard, indeed, upon the sheriff or his officers if they were bound to inquire into the truth of the exemption, and determine upon it at their peril."

A sheriff arresting an absconding debtor on a valid *mesne* process was held not liable in false imprisonment where he arrested the debtor after the plaintiff allowed him to depart, although at the time of the second arrest the declaration had become detached, and was lost. *Aldrich v. Weeks*, 62 Vt. 89, 19 Atl. 115. In this case the court said: "Had the officer the right to recapture the plaintiff, having lost the declaration? That depended upon whether the officer could return the writ and the justice legally take jurisdiction of the suit. The process 51 L. R. A.

was complete, it was duly returned, the defendant therein was present. We hold that the justice had jurisdiction; that he could, under § 1172, Rev. Laws, order a new declaration filed; that within that statute an action may be said to be pending in court at any time after the officer begins to make service; and that when the suit was entered such order could have been made, although the loss of the declaration happened before the return day of the writ." It also said: "All that is required of the sheriff in the service of *mesne* process is that he have the party in court to answer. If he does, he discharges his duty. It is stated in Bacon's Abridgment, *Escape* (C): 'If the prisoner is in custody on *mesne* process, the sheriff may retake him after having permitted him to go at large'; and so we hold. 3 Bl. Com. 290; *Nottingham's Case*, Noy, 72; *Lewis v. Morland*, 2 Barn. & Ald. 56; *Atkinson v. Matteson*, 2 T. R. 172; *Hawkins v. Plomer*, 2 W. Bl. 1048; *Stone v. Woods*, 5 Johns. 182. In *Ravenscroft v. Eyles*, 2 Wils. 295, it was adjudged to the contrary, citing only the cases of *Key v. Briggs*, *Skinner*, 582, and *Scott v. Peacock*, 1 Saik. 271, neither of which support the decision, for, in the first, as we construe the case, although the arrest was made upon *mesne* process, the prisoner was not produced at the return, and in the latter, the escape was of a prisoner in execution. The court were evidently misled, and applied the rule as to an escape in execution to an escape in *mesne* process."

In *Dickinson v. Brown*, 1 Esp. 218, where an alleged father of a bastard child was arrested on a warrant and brought before a magistrate to make him find sureties to indemnify the parish, and he was let go on a promise to find sureties, and was afterwards arrested on the same warrant, it was held that the second arrest was justified by the warrant. On a motion for a new trial, it was refused. The reporter says: "But it appeared to be rather on the ground of the plaintiff's having consented that the warrant should remain in force until the second surety to the parish was perfected, than as holding the second arrest under the warrant to be legal."

f. Return.

A writ authorizing an arrest is no justification if there is no return. But in England an inferior officer executing a warrant is not prejudiced by the failure of his superior officer to make a return.

A constable who justifies taking the plaintiff's body under an order of attachment must show the return of the process, or else he will be a trespasser *ab initio*. *Ellis v. Cleveland*,

had been filed against him, nor trial allowed him. These facts were not disputed. The evidence of the defense was directed entirely to the establishment of good cause for the arrest, and to the subject of damages. There was no impropriety, therefore, in the court treating as undisputed the facts above stated, and no complaint is urged here on that account. The objection made is to that part of the charge by which the jury were instructed, in substance, that, though the defendants making the arrest or causing it to be made had good cause therefor, that did not justify the imprisonment of the plaintiff thereunder for a longer period than was reasonably necessary to enable the defendants to obtain a warrant or authority from some competent tribunal for his further detention; and that his continued imprisonment, without such warrant or au-

thority, rendered them liable as wrongdoers from the beginning, leaving only the question of damages for the consideration of the jury. In this charge, we think, there was no error. It is provided by § 7130 of the Revised Statutes that "when a felony has been committed any person may, without a warrant, arrest another who, he believes, and has reasonable cause to believe, is guilty of the offense, and may detain him until a legal warrant can be obtained." And § 7143 contains the provision that, "if it becomes necessary, for any just cause, to adjourn the examination of the accused, the magistrate may order such adjournment, and commit the accused, from time to time, for safe keeping, to the jail of the county, until the cause of the delay is removed, and no longer; but the whole time of such confinement in jail shall not exceed four days; or, the officer

54 Vt. 437. In this case the court said: "He is commanded to return the writ, and he shall not be protected by it unless he shows that he has paid due and full obedience to its command."

In an action of trespass for false imprisonment against a sheriff, a plea alleging that his proceedings on the warrant will appear from the record thereof in the office of the clerk of the court is the substance of a good justification, and will avail when attacked by a general demurrer only, as it inferentially and argumentatively alleges that defendant did return his warrant. *Kent v. Miles*, 65 Vt. 582, 27 Atl. 194. In this case the court said that there can be no justification under a return of a process unless it is returned as alleged.

If a sheriff takes a man by a capias and does not return the writ, false imprisonment lies, but not against the bailiff if the sheriff does not return the writ, for the default of the sheriff shall not condemn the bailiff. *Hill, J.*, 11 Hen. IV. 58.

And where a sheriff having a latitat delivered a warrant to his bailiff to arrest the plaintiff, it was held that no action would lie against the bailiff, although the sheriff did not return the writ. *Girling's Case*, *W. Jones*, 378. In this case it was said that if a sheriff had no writ, and gave a warrant to a bailiff to make an arrest, that an action of trespass would lie against the bailiff and against the sheriff also.

A warrant returnable to an improper court affords no justification. *Batchelder v. Currier*, 45 N. H. 460.

In an action for malicious arrest, it was held that there was no arrest where the sheriff read his warrant of arrest for debt to the party, and taking his fee, proceeded to the defendant's attorney for bail, and returned that he had taken the party. *George v. Radford*, 3 Car. & P. 464.

g. Where the warrant is not in possession of the arresting officer.

It seems that there is a conflict of authority as to the liability of an officer making an arrest if the warrant is not in the officer's hands.

An officer arresting for taxes on a tax warrant was held to be a trespasser where he had not the warrant with him at the time of arrest. *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491. In this case the court said: "The only question that it is now necessary to decide is, whether an officer can lawfully make an arrest by virtue of process which he has not with him at the time. We think the authorities are adverse to the affirmative of this proposition. They are all to the effect that the officer making the arrest

must be in a situation to show, if required, the authority under which he is acting. It is the legal right of the citizen when arrested that such shall be the situation, and, therefore, when such situation does not exist the arrest is a legal wrong. I find no countenance whatever, either in the decisions or in legal theory, that such proceedings are legal until the person taken has demanded an inspection of the warrant. The true doctrine is, that the proceeding is wrongful *ab initio*." The authority of this case is denied in *Cabell v. Arnold*, 86 Tex. 102, 22 L. R. A. 87, 23 S. W. 645.

As to whether an officer is liable for making an arrest in a bastardy case where the warrant is not in the officer's possession but is in the possession of a superior officer, it was said in *Galliard v. Laxton*, 2 Best & S. 363: "We have already expressed our opinion that, if requested, the officers were bound to produce the warrant, and if so, the keeping him in custody after such request and noncompliance would not be legal, and it could hardly be contended that the arrest itself would be legal though the detention, under the circumstances above supposed, would be illegal; and in this view of the case it appears to us that the officers were bound to have the warrant ready to be produced if required, and that if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed, and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed, from the allegation of delivery to them, that they had continued to hold it."

In *Cabell v. Arnold*, 86 Tex. 102, 22 L. R. A. 87, 23 S. W. 645, it was held that a marshal of the United States court was not liable in false imprisonment where he held a warrant for the arrest of plaintiff on a charge of felony, and his deputy made the arrest, on a telegram from the marshal. The court said: "In the case before us, it is not shown that any act was done in arresting and detaining the plaintiff that would not have been strictly lawful had the warrant been in the possession of the deputies at time and place of arrest; nor does it appear that plaintiff suffered any loss, indignity, inconvenience, or deprivation of freedom which he would not have suffered had the warrant then been in their hands and every step in the procedure contemplated by the statute strictly followed; and under such circumstances we are of opinion that the charge of the court to the

leaving in custody any such person may, by the written order of the magistrate, detain him in custody in some secure and convenient place, other than the jail, to be designated by the magistrate in his order, not exceeding four days." The right to make arrests without warrant is conferred by the statute in order to prevent the escape of criminals where that is likely to result from delay in procuring a writ for their apprehension; and it was not the purpose to dispense with the necessity of obtaining such writ as soon as the situation will reasonably permit. To afford protection to the officer or person making the arrest, the authority must be strictly pursued; and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open to great abuse and oppression.

effect that the warrant did not justify the arrest unless it was in possession of the deputies at time and place of arrest was erroneous." It was also said that only one case has been found where a liability attaches for making an arrest under a warrant where it was not in possession of the executing officer. "Such seems to have been the ruling of the court of errors and appeals of New Jersey in case of Smith v. Clark, 53 N. J. L. 197, 21 Atl. 491; but the authorities cited in that case all had application to the question that arises in a criminal case where a person is charged with assault, assault and battery, or homicide, growing out of force used in resisting arrest, which are not believed to be applicable to this case."

In Meeds v. Carver, 80 N. C. (8 Ired. L.) 298, it was held that a deputy of a sheriff was so far bound by precepts in the hands of his principal that neither he nor his principal was liable to an action for false imprisonment, in detaining a man in prison, arrested upon one process and discharged on that, when another valid process was in the hands of the principal, on which he was subject to arrest; and this, although neither the deputy nor the person arrested knew that the sheriff had such process. In this case the court said: "If the officer expressly declare that he arrests under an illegal precept and on that only, yet he is not guilty of false imprisonment if he had, at the time, a legal one, for the lawfulness of the arrest does not depend on what he says, but what he has. State v. Kirby, 24 N. C. (2 Ired. L.) 201; State v. Elrod, 28 N. C. (6 Ired. L.) 250."

A constable was held not liable for false imprisonment where he made an arrest for a breach of the peace while a justice was making out the warrant. Taylor v. Strong, 3 Wend. 384. In this case the constable, while trying to arrest plaintiff on an execution, was assaulted by the plaintiff, who escaped and settled the debt, and the constable followed and applied to a justice of the peace for a warrant for such breach of the peace.

Where a capias issues to the sheriff without the original, and he serves it, false imprisonment does not lie, for it is not the default of the sheriff. 11 Hen. IV., 88.

Where the warrant is not in the possession of the officer, see Strong v. Ives, 1 Root, 888, *infra*, III. d.

II. Without warrant.

a. For a felony.

A police officer who makes an arrest on reasonable suspicion of felony will not be liable for 51 L. R. A.

The detention of the plaintiff in prison for a period of five days and more, without any writ, or order of any court, and in disregard of his repeated demands to be given a hearing, was without excuse or palliation. None was offered. It was a palpable and arbitrary abuse of official power. Not having pursued their authority to arrest without warrant by failing to obtain within a reasonable time a writ or order for the plaintiff's detention, the defendants placed themselves in the same situation as if they had originally acted without authority. It is a familiar rule that one who abuses an authority given him by law becomes a trespasser *ab initio*. That rule has often been applied in cases like the present one. In *Brook v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390, it was held that "an officer who arrests an offender without a warrant, by

false imprisonment, although no felony in fact has been committed. But where his information is obtained from persons who are known to be unreliable, or, having means at hand to ascertain the truth of the suspicion the officer fails to verify the same, he will be liable. Mere suspicion that a felony has been committed without reasonable grounds therefor will not justify an officer in making an arrest.

A peace officer is not liable in trespass and false imprisonment where he makes an arrest without a warrant on a reasonable charge of felony. *Samuel v. Payne*, 1 Dougl. 359; *Diers v. Mallon*, 46 Neb. 121, 84 N. W. 722; *Lawrence v. Hedger*, 3 Taunt. 14; *Beckwith v. Philby*, 6 Barn. & C. 635, 9 Dowl. & R. 487; *Rohan v. Sawin*, 5 Cush. 281; *Wakely v. Hart*, 6 Binn. 316; *Hobbs v. Branscomb*, 3 Campb. 420; *Fulton v. Staats*, 41 N. Y. 498; *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885; *Davis v. Russell*, 2 Moore & P. 590, 5 Bing. 354; *Wasson v. Canfield*, 6 Blackf. 406; *McCarthy v. DeArmit*, 99 Pa. 63; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1039; *Wade v. Chaffee*, 8 E. I. 224, 5 Am. Rep. 572.

This rule was held not to conflict with Pa. Const. art. 9, § 7, providing that no arrest is lawful without a warrant issued on probable cause supported by oath. *Wakely v. Hart*, 6 Binn. 316.

In *McCarthy v. De Armit*, 99 Pa. 63, the court said: "If a peace officer wantonly arrests and imprisons an innocent man, he ought to be held liable in quite as heavy punitive damages as a private person would be for a causeless and malicious prosecution; but if without malice, and in the honest endeavor to arrest and bring a felon to justice, he arrests and imprisons an innocent person who is unjustly suspected, he will not be held liable therefor."

In *Fulton v. Staats*, 41 N. Y. 498, the court said that, if, upon arriving at the plaintiff's residence, he finds the information to be erroneous, the officer has no right to proceed further.

In *Hobbs v. Branscomb*, 3 Campb. 420, Lord Ellenborough said "that very injurious consequences might follow to the public, if the peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out that in point of law no felony had been committed."

In *Rohan v. Sawin*, 5 Cush. 281, the charge was receiving stolen goods knowing them to have been stolen, and it was held to be substantially of the same character as larceny.

In *Beckwith v. Philby*, 6 Barn. & C. 635, 9 Dowl. & R. 487, the court said: "There is this

authority of a statute which authorizes such an arrest only as preliminary to taking him before a court, is liable for assault and false imprisonment if he omits to take him before the court." Numerous authorities for the similar application of the rule are collected in the opinion of the court in that case, and many others might be cited, some of which are referred to in the brief of the defendant in error. The arresting officer in such case cannot justify the holding of the prisoner without warrant on the ground that time is necessary to investigate the case and procure evidence against him. Section 7143 of the Revised Statutes, already quoted, provides for cases where such delay becomes necessary by authorizing the magistrate be-

fore whom the accused is taken to adjourn the examination from time to time and commit the accused until the cause of the delay is removed. But that section forbids the imprisonment for any period exceeding four days.

In behalf of the plaintiffs in error Leger, Miller, and Frank it is contended that, as they were subordinate officers, acting under orders from the chief of the police force in arresting the defendant in error and delivering him into the custody of the patrolmen, who conveyed him to the city prison in obedience to the chief's orders, they should not be held responsible for his subsequent imprisonment nor for the omission to obtain the necessary warrant and bring him to trial.

distinction between a private individual and a constable. In order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."

In *Ledwith v. Catchpole*, Holt, 481, note, which was an action against one of the marshals of the Lord Mayor of London, a verdict was found for the defendant. In this case S., who had lost some linens, brought a party to the defendant, who said that N. had called a coach and put S.'s goods into it at a public house; that the plaintiff put his head into the coach, and that afterwards the coach stopped at another house and plaintiff met it there, and S. took the plaintiff to the defendant for the purpose of having him apprehended, and S. said: "I have lost some cloth, but I don't say that it was he who stole it; I know nothing of that, but stolen it was." The defendant being asked by the plaintiff what authority he had to arrest him, produced a hanger, and said, "that was his authority." He then arrested the plaintiff, and he was brought the next day before the sitting alderman and discharged. In this case Buller, J., said: "Where a positive charge of felony is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action. In such case, the constable is merely ministerial, and bound to take the party up, and carry him before a magistrate; the magistrate must then examine into the matter upon oath, which the constable cannot do."

A sheriff was held not liable for making an arrest where he had a warrant for the arrest of Z. and another unknown person for destroying a dam, and they had been tracked by well-known citizens to the house of Z., and plaintiff and Z. were the only male occupants, and there were suspicious indications of guilt at the house, and on the clothing of both parties. The crime alleged was a felony. *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 883.

And where a constable had reasonable grounds to suppose that the plaintiff had committed a felony, he was held not liable in trespass for assault and false imprisonment where he, at the instance of H., apprehended plaintiff at her lodgings and took her from her bed, at night, to prison. *Davis v. Russell, 2 Moore & P. 390, 5 Bing. 354*. In this case H. had accused the plaintiff of robbery, and gave the constable a letter directed to plaintiff, which letter the constable opened, and this purported to come from an accomplice in the robbery. The charge against plaintiff was dismissed, and 51 L. R. A.

the letter was afterwards shown to have been written by H., who was convicted of the robbery and sentenced to seven years' transportation. She committed suicide the next day.

Where a constable arrested a party at the instance of another upon a charge of felony, the constable was acquitted under 7 James I., chap. 5, providing that if an action of trespass, battery, or false imprisonment shall be brought against any constable for or concerning any matter by them done by virtue of their office it shall be lawful for them to plead the general issue that he is not guilty, and to give such special matter in evidence to the jury which shall try the same, "which special matter being pleaded had been a good and sufficient matter in law to have discharged the said defendant or defendants of the trespass or other matter laid to his or their charge." *Hough v. Marchant, Moody & M. 510*.

Where an officer made an arrest on information of a passenger on a steamboat that her purse was stolen, an action against the constable failed for want of notice of action stating the time of the commission of the act, and that it was done maliciously. *Scott v. Reburn*, 25 Ont. Rep. 450.

In an action of trespass against a constable for arresting and imprisoning plaintiff without probable cause, it was held that the constable under the general issue might give evidence of the contents of plaintiff's trunk for the purpose of showing that he was addicted to burglary. *Russell v. Shuster, 8 Watts & S. 308*. In this case the plaintiff evidently was arrested without a warrant, and apparently was arrested on suspicion alone. The court said: "A constable may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favorable ground than a private person, who must show, in addition to such cause, that a felony was actually committed."

A defense justifying an arrest by officers without a warrant for a supposed felony by virtue of their authority and pursuant to their duty as police officers, for reasonable and proper cause without malice and in a reasonable and proper manner, puts the burden of proof upon the defendant. *Jackson v. Knowlton*, 173 Mass. 94, 53 N. E. 134.

In *McCloughan v. Clayton*, Holt, 478, it was said: "In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there were a reasonable charge of felony made; although he afterwards discharges the prisoner without taking him before a magistrate; and although it should turn out in fact that no felony was committed."

In *Neal v. Joyner*, 89 N. C. 287, and *Hedges v. Chapman*, 2 Bing. 523, it was said that "a constable having reasonable ground to suspect

But the delivery of the plaintiff, after his arrest, into the custody of another person to be by him taken to prison, could not, we think, absolve the arresting officers from the duty required of them to obtain the writ necessary to legalize his further imprisonment. If it could, the imprisonment might with impunity be prolonged indefinitely by the change of custodians and places of confinement at short intervals. The arrest having been made without warrant, it was necessary, in order to preserve the legality of that action, that the proper steps should be taken to prevent the further detention of the prisoner from becoming unlawful; for, as we have seen, unless those steps be taken, all legal protection for such

arrest ceases, and the arresting officers become wrongdoers from the beginning, liable, as such, equally with those by whom the unlawful imprisonment is continued. If the arresting officers choose to rely on some other person to perform that required duty, they take upon themselves the risk of its being performed; and, unless it is done in proper time, their liability to the person imprisoned is in no wise lessened or affected. There was no order of a superior officer in this case that did or could prevent the defendants who made the arrest from complying with the requirement of the law in the respect indicated, nor excuse their omission to comply therewith.

Judgment affirmed.

that a felony has been committed is authorized to detain the party suspected until an inquiry shall be made by the proper authorities."

In *Beatty v. Rumble*, 21 Ont. Rep. 184, it was held that a sheriff was not liable for arresting a bailiff, who attempted to remove property under a landlord's warrant, which the sheriff had previously seized under an execution. Canada Rev. Stat. chap. 164, § 50, provides that anyone taking away, without lawful authority, any property under a lawful seizure and detention is guilty of larceny. Section 25 provides that anyone found committing such an offense may be arrested without a warrant.

In *Gordon v. Rumble*, 19 Ont. App. Rep. 440, it was held that a sheriff was liable where he arrested another party at the same time, and afterwards denied under oath that such party was implicated in the offense.

But the officer will be liable if he has not reasonable grounds for believing that a felony has been committed. *Somerville v. Richards*, 37 Mich. 299; *Hogg v. Ward*, 3 Hurst. & N. 417, 27 L. J. Exch. N. S. 443, 4 Jur. N. S. 885; *Findlay v. Pruit*, 9 Port. (Ala.) 195; *Isaacs v. Brand*, 2 Starkie, 167; *Wills v. Jordan*, 20 R. I. 630, 41 Atl. 233; *Snead v. Bonnell*, 49 App. Div. 330, 63 N. Y. Supp. 533.

And it is no excuse for making an arrest for a felony without a warrant that plaintiff's personal appearance looked suspicious. The failure to interrogate a party living next door to plaintiff, as to the truth of rumors said to come from her against the plaintiff in regard to the crime, and upon which rumors the arrest was made, was held sufficient to render the arrest unreasonable. *Somerville v. Richards*, 37 Mich. 299.

A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion. *Hogg v. Ward*, 3 Hurst. & N. 417, 27 L. J. Exch. N. S. 443, 4 Jur. N. S. 885.

And mere suspicion that a felony has been committed will not afford a justification in an action of trespass, assault and battery, in making an arrest without a warrant. *Findlay v. Pruit*, 9 Port. (Ala.) 195.

And an officer is not justified in apprehending and imprisoning a person on suspicion of committing a felony on the mere assertion of one of the principal felons. *Wills v. Jordan*, 20 R. I. 630, 41 Atl. 233; *Isaacs v. Brand*, 2 Starkie, 167.

In the latter case the court left it to the jury, whether, since no charge was made against the plaintiff on the following day, there was no probable cause for apprehending the plaintiff and keeping him all night in the watch house. The jury found a verdict for plaintiff.

Police officers were held liable in an action 51 L. R. A.

for false imprisonment where they, without any warrant, demanded information from plaintiff as to what he had in his bag, after he had unsuccessfully attempted to pawn some jewelry, and he, demanding their authority, offered to prove his ownership. They refused to take him to his residence where he could be identified, but handcuffed him and took him to the police station. It was further held that the fact that he was guilty of the offense of carrying concealed weapons at the time of his arrest did not justify an unlawful arrest for an alleged felony; and that the failure to prefer a charge for the latter offense until after the magistrate was induced to remand without bail for another day on the charge of "suspicious person" rendered the defendants trespassers *ab initio*. *Snead v. Bonnell*, 49 App. Div. 330, 63 N. Y. Supp. 533.

In *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656, it was held that where a felony had been committed, and the plaintiff was not about to escape, the sheriff was not protected by article 229 of the Texas Code, providing that where it is shown by satisfactory proof to a peace officer upon the representation of a credible person that a felony has been committed, and the offender is about to escape so that there is no time to procure a warrant, such peace officer may without warrant pursue and arrest the person accused.

The sheriff and bailiff were liable for false imprisonment where the sheriff had a writ of *ca. sa.* and issued a warrant to the sergeant at mace of the sheriffs, who placed his son at one door of the plaintiff's house while he watched at the other. The son gave the plaintiff in charge of a policeman, accusing him of a felony, and on obtaining the warrant arrested him at the police station and took him to prison. *Price v. Peek*, 1 Bing. N. C. 380. But in this case it was held that the plaintiff was not entitled under the pleadings to recover damages for the arrest and imprisonment under the writ.

See *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *Cochran v. Toher*, 14 Minn. 385, Gil. 293, —*infra*, VIII.

b. For a breach of the peace "on view."

A peace officer is authorized to make an arrest for a breach of the peace committed in his presence, without a warrant, and he will not be liable therefor in an action of false imprisonment. *Vandever v. Matlocks*, 8 Ind. 479; *Osborn v. Veitch*, 1 Fost. & F. 317; *Spilsbury v. Micklethwaite*, 1 Taunt. 140; *McCully v. Malcom*, 9 Humph. 187; *Hutchinson v. Sangster*, 4 G. Greene, 340; *Montgomery v. Sutton*, 67 Iowa, 497, 25 N. W. 748; *Parks v. Gilligan*, 14 Misc. 121, 35 N. Y. Supp. 477; *Levy v. Edwards*, 1 Car. & P. 40.

A threat to shoot a person, coupled with the act of presenting a loaded fire-arm at him, although it is "half-cock," is in law an assault. And an attempt to shoot may justify a policeman in arresting without a warrant. *Osborn v. Veitch*, 1 Post. & F. 317.

In *Spilsbury v. Micklethwaite*, 1 Taunt. 146, it was held that a freeholder interrupting the proceedings for an election by making a great noise and disturbance might be arrested and taken into custody, and carried before a justice of the peace. It was sufficient, in a plea of justification to an action for an assault and false imprisonment brought against the sheriff, to state that "the plaintiff made a great noise and disturbance at the election, and molested and obstructed him [the defendant] in the execution of the duty," without stating that he thereby obstructed and molested him. The court said: "The plaintiff was guilty of a serious offense against public order; he was guilty of a breach of the peace, for which he might have been punished by indictment."

And a sheriff who was prosecuted for false imprisonment could show that he had a warrant for the arrest of another party in his hands, and that plaintiff attempted to rescue the defendant in that case, and it was necessary to confine plaintiff for a short time to prevent the rescue. *McCully v. Malcom*, 9 Humph. 187.

In an action for false imprisonment it was held that the defendant might justify that he was acting as a city marshal, and that plaintiff in his presence was disturbing public worship so as to make his arrest necessary, and that his confinement was only long enough to sober him up until he could be taken before the magistrate. *Hutchinson v. Sangster*, 4 G. Greene, 340.

Iowa Code, § 2742, provides that it is a violation of the public peace to make a disturbance at a public meeting.

An officer is justified in arresting without a warrant a party who is guilty of resisting him while making the arrest of another party for violating a city ordinance. Iowa Code, § 4200, provides that a peace officer may arrest without a warrant when a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. *Montgomery v. Sutton*, 67 Iowa, 497, 25 N. W. 748.

And a police officer may interpose to prevent a breach of the peace. *McIntyre v. Raduna*, 14 Jones & S. 123, *Zeiger v. Nolan*, 1 N. Y. City Ct. Rep. 54, Supp.

And where a sheriff had a warrant of arrest for the apprehension of persons making a riotous assemblage at plaintiff's house, and placed plaintiff and others on guard while he went for other help to make the arrest, and on returning found that plaintiff had allowed them to escape, he was held not liable for false imprisonment for then and there arresting plaintiff for permitting said escape. *Coyles v. Hurlin*, 10 Johns. 85. This was on the ground that the sheriff having gone for assistance was constructively present, and that plaintiff conniving at the escape was guilty of resisting the officer in the arrest. This is a strained construction, as the authority of the party on guard to detain while the sheriff was absent with the warrant is doubtful.

In an action against a police officer for trespass it is a good defense that defendant peaceably entered plaintiff's premises to make an arrest having reasonable grounds to believe that the liquor law was being violated, and that he was then and there assaulted by the plaintiff without just cause, and thereupon arrested him and caused charges to be preferred against him. *Parke v. Gilligan*, 14 Misc. 121, 35 N. Y. Supp. 477. In this case the court said that "no off-

icer has a right to force an entrance into any premises for the purpose of effecting an arrest for a misdemeanor which he may have reason to suspect is being committed thereon. Nor is he authorized to make an arrest without a warrant for a misdemeanor not committed in his presence. (Code Crim. Proc. § 177.) If he effects an entrance by force under such circumstances he may be ejected from the premises, but the person ejecting him has no right to use more force than is necessary to accomplish that purpose. Nor is the officer justified in arresting the person ejecting him for an assault under such circumstances."

If a constable is preventing a breach of the peace, and any person stands in his way with intention to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow. *Levy v. Edwards*, 1 Car. & P. 40. In this case *Burrough, J.*, said: "If they thought that as the defendant was apprehending the boy the plaintiff placed himself before the defendant to hinder him from doing so, that would justify the defendant in detaining the plaintiff at the watch house, but not in beating him; but if the plaintiff only said: 'You have no right to handcuff the boy,' the defendant was clearly a wrongdoer as to the whole."

c. For a breach of the peace not "on view."

An officer making an arrest without a warrant for a breach of the peace not committed in his presence will be liable in false imprisonment. But if there is danger of the past offense terminating in a felony, or if there is reasonable ground to anticipate that a breach of the peace is imminent, the officer will be justified in making the arrest without a warrant.

To justify a constable in apprehending a party without a warrant for an affray, it is essential that the party should have been engaged in the affray, and that the constable should have view of the affray while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension. *Cook v. Nethercote*, 6 Car. & P. 741; *Pow v. Beckner*, 3 Ind. 475; *Coupey v. Henley*, 2 Esp. 540; *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536; *Hall v. O'Malley*, 49 Tex. 70.

Where a sheriff was held liable for false imprisonment, an instruction: "Under the laws of Texas no civil officer has the right to arrest a citizen of Texas unless he has a warrant, and if demanded to exhibit same; or unless some offense against the criminal law is committed, by the person arrested, in the presence of the officer,"—was sustained. *Hall v. O'Malley*, 49 Tex. 70.

In *Winn v. Hobson*, 22 Jones & S. 330, it was said: "By the law of this state the officer had no legal power to arrest the plaintiff for a breach of the peace, without warrant, as it was not committed in his presence."

A threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person might have been guilty before the arrival of the officer. *Quinn v. Heisel*, 40 Mich. 576.

But in *Hayes v. Mitchell*, 80 Ala. 188, it was held that a town marshal was not liable in false imprisonment for making an arrest, where he had reasonable ground for apprehending that there would or might be a breach or disturbance of the peace, although there was no actual assault or threatened breach of the peace.

And where an affray had been committed and the aggressor was in a shop, it was held to be no trespass for the constable to break open the door to arrest the aggressor who was inside, having been ordered to do so by a justice of the peace, who was present and who demanded that the plaintiff open his shop. *Knot v. Gay*, 1 Root, 67. In this case the plaintiff struck at the justice when he attempted to enter; and it seems to have been conceded that an arrest may be made to prevent a breach of the peace which is about to take place, and also when a high-handed offense has been committed, and an immediate arrest becomes necessary to prevent an escape.

In *Coupey v. Henley*, 2 Esp. 540, it was said that if an affray has happened and a wound has been given, which there is reasonable ground to suppose may end in a felony, the constable may take the party who has given such wound into custody without a warrant. "The ground ought therefore to appear sufficient and satisfactory, such as may afford reasonable ground to the constable to believe a felony would probably ensue; for if the grounds are frivolous, or such as it appears he himself hardly credited, he will be liable to an action for false imprisonment if he proceeds in the arrest. In the present case I think there was not such an assault or blow given as could justify the imprisonment."

d. For breach of a city ordinance.

1. Where a statute authorizes arrests on view.

The officer is absolved from liability for making an arrest on view for the violation of a city ordinance where his authority to make the arrest is derived from a statute. Some cases questioned this rule, but it seems to be now generally accepted. But even in such a case the officer present must make the arrest at the time, for if he delays several hours he will be liable in false imprisonment. *Burroughs v. Eastman*, 101 Mich. 419, 24 L. R. A. 859, 59 N. W. 817; *O'Connor v. Bucklin*, 59 N. H. 589; *Scircle v. Neeves*, 47 Ind. 289; *Mitchell v. Lemon*, 34 Md. 176; *White v. Kent*, 11 Ohio St. 550; *Wiltse v. Holt*, 95 Ind. 469; *Boaz v. Tate*, 43 Ind. 60; *Roderick v. Whitson*, 51 Hun, 620, 4 N. Y. Supp. 112.

In *Burroughs v. Eastman*, 101 Mich. 419, 24 L. R. A. 859; 59 N. W. 817, it was held that an officer was not liable for making an arrest for a violation of a city ordinance on view, where the charter provided that the police shall have the power to arrest without process all persons who shall, in the presence of the officer, violate a city ordinance. It was further held that this statute did not violate the constitutional provisions of "due process of law" and arresting "without probable cause supported by oath or affirmation."

In the above case *Robison v. Miner*, 68 Mich. 549, 37 N. W. 21, was overruled so far as that case held that the legislature cannot authorize an arrest without a warrant except in cases where an arrest could be made at common law.

An officer is not liable in trespass for arresting a party, on view, violating a city ordinance, under N. H. Gen. Laws, chap. 254, § 3, providing that any officer, upon view of any crime or breach of the peace or offense against the police of towns, may arrest the offender, and forth-

with carry him before the proper court or justice to answer for the offense. It was further held to be the duty of the arresting officer to search and take from his prisoner money or articles that might be used to enable the prisoner to escape. *O'Connor v. Bucklin*, 59 N. H. 589. In this case it was said: "By the construction established by long and uniform understanding and practice, this statute authorizes an arrest by any officer on view of any criminal offense for which the offender is liable to arrest on a warrant. And, by the construction established in the same manner the statute re-enacts the common-law rule of this state, which authorizes an arrest by an officer, without a warrant in good faith for a proper purpose, and on reasonable grounds. On some subjects of this nature, by long usage and common consent, in this state, some of the rules of the common law of England have been modified, and reasonably conformed to the public safety and welfare."

A town marshal was held not liable in false imprisonment for arresting at 11 o'clock at night, and confining until the next morning, a drunkard who was not in a condition to be taken before a magistrate, where he filed a complaint the next morning and the accused pleaded guilty. *Scircle v. Neeves*, 47 Ind. 289. In this case the ordinance against drunkenness provided: "The marshal of said town is hereby required to be vigilant in enforcing the provisions of this section, and bringing all the offenders before the proper officer." The statute provided that a town marshal shall possess the powers conferred by law upon constables in enforcing the ordinance of said town. The court said: "The law confers upon constables, among other powers, the power to act as conservators of the peace, and to apprehend and take forthwith before the nearest justice all who violate the law in their presence, and then charge them with such violation on oath. . . . Putting the two statutes together, we think they authorize the marshal of a town to arrest a person who is violating or who violates an ordinance of the town in his presence or view, whether the ordinance expressly authorizes him to do so or not."

And a police officer is not liable in false imprisonment for making an arrest under ordinances prohibiting sales at auction on the street and authorizing police officers to apprehend without process, upon view or complaint, all persons offending. *White v. Kent*, 11 Ohio St. 550. In this case it was claimed that the ordinance authorizing an arrest on view without warrant was void because inconsistent with the general policy of the state, which permits such arrests only in case of felony or breach of the peace. But it was held that, under Ohio act May 3, 1852, § 62, amended by act May 1, 1854, giving city councils power to establish a police force and define its powers, and §§ 70 and 72 making it the duty of marshals and police officers in cities of the first and second class to apprehend all persons in the act of committing any offense against the laws of the state or an ordinance of the city, the city council may secure the use of thoroughfares by such reasonable ordinances as are not in conflict with the laws or policy of the state, or in violation of private rights. The city may prohibit by ordinance any nuisance on the street. The court said: "It is evident that many ordinances necessary for good and general convenience, as well as for the preservation of morals and decency, would be almost nugatory if offenders could only be arrested upon warrant. Such is clearly not the policy of the statute."

A marshal was allowed to justify in false imprisonment by showing that he found the

plaintiff on the street drunk having just assaulted a citizen, and arrested and detained him three hours until he became sober, when a criminal charge was made against him before a justice under Ind. Rev. Stat. 1881, § 1702, providing that marshals and other officers may arrest and detain any person found violating any law of this state until a legal warrant can be obtained, and § 5976, making it the duty of a constable to act as conservator of the peace and apprehend and take forthwith before the nearest justice all who violate the law in his presence. *Wiltse v. Holt*, 95 Ind. 469. In this case the court said: "A peace officer preserves the peace by preventing crime, as well as by causing it to be punished after it is committed, and in case of a breach of the peace it is his duty, not only to put an end to the breach, but, when necessary, to make an arrest as a means of restraining the offender."

A marshal was held not liable for making an arrest and committing the person arrested to prison for violating an ordinance with in view, the arrest having been made in the night-time, under 3 Ind. Stat. 75, § 29, act of 1867, providing that a city marshal may arrest without process all persons who within his view shall commit any crime or misdemeanor or violate any ordinance of the city, detain them in custody until the cause of arrest can be investigated, and if, when the arrest shall be made, the court shall not be in open session, he may confine the persons so arrested until there shall be an opportunity to bring them before the proper court, which he shall do at the earliest period. *Boaz v. Tate*, 43 Ind. 60. In this case it was said: "The appellee also insists that the arrest must be made immediately after the commission of the offense, to justify the officers for making it without warrant and as on view; and we are referred to *Com. v. Carey*, 12 Cush. 246, to sustain him. That does not sustain the doctrine contended for. What was held in that case was, that a constable or other peace officer could not arrest one without a warrant for a crime proved or suspected if such crime were not an offense amounting in law to a felony." It was further held that in an action for false imprisonment the plaintiff need not prove malice or want of probable cause.

A police officer appointed by the Department of Parks, New York city, under Laws 1871, chap. 290, § 6, giving the powers conferred in the metropolitan police act (Laws 1864, chap. 403, § 30), authorizing the arrest of persons violating corporation ordinances without warrant, may arrest without a warrant for the violation of ordinances of the department, committed on view. *Griffin v. Flock*, 11 Daly, 274.

And under New York village laws 1885, chap. 192, providing that it is the duty of the police constable to arrest persons concerned in noisy assemblages or breaking the peace or violating ordinances, a constable is not liable in false imprisonment for arresting without warrant a member of the salvation army for violating the city ordinance, although after sentence he was released upon *habeas corpus*. *Roderick v. Whitson*, 51 Hun, 620, 4 N. Y. Supp. 112. This arrest was sustained upon the ground that N. Y. Laws 1885, chap. 192, authorized the police constable to keep order, and to make arrests for noisy assemblages and breaches of the peace.

Under the city charter of Chicago, authorizing the arrest with or without warrant for breaches of the peace or threats to break it without regard to the presence of the officers, an officer is not liable where he is called in to assist in an arrest for a breach of the peace. An arrest may be made without warrant for violating a city ordinance by running a saloon on Sunday, and for resisting the officer. *Main* 51 L. R. A.

v. McCarty, 15 Ill. 441. In this case the court said: "The fourteenth instruction presents the question as to the power of arresting without warrants, for offenses committed out of the presence of the officers. This we must settle by the city charter, which expressly authorizes the arrest, with or without warrant, for breaches of the peace or threats to break it, without regard to the presence of conservators of the peace. All these officers, sued here, are made conservators of the peace. We are not prepared to hold this ordinance invalid on this account, and would construe it as applying more nearly to the rule as laid down at the common law, and even extended in principle to offenses below the grade of felony, in cases where charges are freshly made and officers are required to make the arrest. See *Hobbs v. Branscomb*, 3 Campb. 420; and *Samuel v. Payne*, 1 Dougl. 359. This ordinance expressly authorizes it, and in this case the facts do not present a voluntary arrest, even upon information freshly given of an offense, but upon a transaction in the presence of one of the defendants, who called in the others to his aid. We therefore hold the instruction to be wrong under this ordinance as connected with the facts upon the record."

The provisions of Ga. Code, §§ 4628, 4627, authorizing an arrest to be made without a warrant for an offense committed on view when there is likely to be a failure of justice for want of an officer to issue a warrant, and charter of Americus, authorizing the mayor and council to establish a city guard who shall have the right to take up disorderly persons and all persons committing or attempting to commit a crime, and to commit them, are constitutional, and will justify an arrest on view for disorderly conduct. *Johnson v. Americus*, 46 Ga. 80.

But the lapse of five hours will render the arrest illegal, and the officer arresting will be liable in false imprisonment for making an arrest for disorderly conduct in violation of an ordinance. It must be made at the time, under Minn. Gen. Stat. 1878, chap. 105, § 11, providing that a peace officer may without a warrant arrest a person for a public offense committed or attempted in his presence. *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. In this case the court said: "The statute seems to be a re-enactment of the common-law rule, with this change; that the first subdivision enlarges the class of cases in which a peace officer may arrest where the offense is committed in his presence, so that such arrest may be made for any public offense,—felony or misdemeanor,—though not amounting to a breach of the peace. But there is no reason to suppose that it was intended to change in any other respect the conditions on which the arrest may be made. The power to arrest without warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it ought not, therefore, to be enlarged."

But under the charter of the city of Louisville, § 40, providing that a policeman may, with or without a warrant, arrest persons guilty of offenses against the law or ordinance of the city, a policeman is liable in damages for assault in arresting or attempting to arrest a party who has not committed a breach of the peace or any misdemeanor in the officer's presence, and where the officer had no reasonable ground to believe that he had committed a felony. Ky. Crim. Code Pr. § 33, subd. 2, defines the power of a peace officer to make an arrest without a warrant where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony. The statute

should be construed to give no greater authority. *Jamison v. Gaernett*, 10 Bush, 221.

2. Where an ordinance authorizes arrests on view.

Where an ordinance authorizes an arrest on view for violation of city ordinances, a number of cases exonerate the officer and hold that he is not liable in false imprisonment. But an examination of these cases will bring nearly all of them under the classification of breaches of the peace or quasi breaches of the peace, such as keeping a disorderly house.

Under a city ordinance, authorizing the marshal to arrest on view persons guilty of drunkenness or disturbers of the peace, it was held that the powers of cities and their officers were not changed by the new Constitution, and the officer was not liable in false imprisonment for arresting on view without a warrant a party drunk, noisy, violent, and guilty of profane and offensive language calculated to provoke a breach of the peace. *Bryan v. Bates*, 15 Ill. 87. In this case the court said: "The ordinance set forth in the plea expressly authorizes the marshal to arrest, without warrant, any offender, for violations of the ordinances committed in his view. And this is in conformity to the general law in relation to the police of the state."

Under a city ordinance authorizing a summary arrest of anyone in the act of violating any of the general laws or any city ordinance, under an ordinance authorizing punishment of anyone being an inmate, visitor, or found in any "disorderly house or place," or a house of ill fame, or a place resorted to for the purpose of prostitution, a police officer is not liable for making an arrest where he hears from the sidewalk loud, profane, and indecent language coming from the house. It is not necessary to justify that he must show that the house was a house of prostitution. *Hawkins v. Lutton*, 95 Wis. 492, 70 N. W. 453. In this case the court said: "The evidence tends to show that the alleged violation of the ordinance may fairly be said to have been committed in the presence of the defendants. They had heard the disturbance and disorderly conduct from the outside of the house, and the evidence tends to show that they had been summoned there, or their attention had been attracted to it. The chief of police arrived in time to become aware of the conduct in progress within, and, acting in apparent good faith and on what appeared to be reasonable ground, ordered the house to be pulled."

A city ordinance providing a fine of \$50 for failure to obey orders at a fire, and that "any member of the common council or any fire warden may arrest and detain such person until the fire is extinguished," is unconstitutional as to the latter clause. *Judson v. Reardon*, 16 Minn. 431, 111. 387.

As to unconstitutional ordinance, see *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, *supra*, § 1. a.

3. Other arrests made on view.

It is doubtful if an officer can be justified in making an arrest for a breach of an ordinance committed on view that is not in the nature of a breach of the peace, in the absence of statute or charter authority. It is true that some cases exonerate the officer for making an arrest on view for a breach of ordinance. In some of these cases the offense charged was in the nature of a breach of the peace, and the Maryland cases assert that the right to make an arrest on view for an offense existed at common law, without stating that such an offense must be a breach of the peace. Where the penalty is to

be recovered by action, and not by arrest, the officer will be liable.

An officer was held not liable in trespass for assault and battery and false imprisonment, where the plaintiff was guilty of using profane, indecent, and abusive language in a public street in the presence of the officer who arrested him and made a complaint against him, and the city attorney failed to prosecute under a city ordinance providing a fine and imprisonment for using indecent language in any public place in the city. *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540. In this case the court said: "It can make no difference that the officer was made the subject of the offender's wrong acts and conduct on the occasion. Officers are entitled to the same protection as other persons. It was the offense against the public which the people could punish, and the officer only acted for them in making the arrest. He had no personal interest in the matter. If the people failed to prosecute further, it was not the officer's fault; and if the plaintiff was guilty of the offense for which he was arrested, he cannot have suffered from the failure to prosecute." This arrest may be sustained on the ground that it was a breach of the peace.

And an officer was held not liable for arresting on view a party found violating the ordinance under Md. Code Pub. Local Laws, art. 4, § 797, and act 1867, chap. 367, and ordinances of Baltimore, making it the duty of the police force to enforce the orders and regulations of the board of health prohibiting deposit of night soil, or cleaning vaults, without permits, and Code Pub. Local Laws, art. 4, § 808, Supp., making it the duty of the police board to prevent crime and arrest offenders, and to enforce ordinances. *Mitchell v. Lemon*, 34 Md. 176. In this case the court said: "And as to the power of arrest and detention without warrant, under the circumstances, we think there can be no question. Express power is conferred upon the police force to prevent crime and arrest offenders. It is true, the statute does not say without warrant; but that is necessarily implied in all cases where constables and police officers can make arrests, without first obtaining a warrant at the common law. Such officers, by the common law, have full power to arrest and detain the offender, where the offense is committed in their view, and this, whether the offense be one at the common law or created by statute or police regulation. Indeed, without such power it would be impossible to execute the various police regulations of a prohibitory or preventive character. For it is obvious if it were necessary before arresting an offender caught in the act of offending, that a magistrate's warrant should be obtained, many offenses and violations of the police regulations would be accomplished, and the offender, if transient and unknown, would escape altogether. This is not contemplated either by the statute conferring the police power or the common law."

And a police officer was held not liable in trespass where he arrested on view a party who ordered hay to be placed in his stable window, and violated a city ordinance by driving a team upon the sidewalk. *Roddy v. Finnegan*, 43 Md. 490. In this case it was said: "Finding the parties in the act of violating the ordinance, Roddy was not only justified in making the arrest and detention of the offenders for hearing, but his duty required him to do so, upon his responsibility as a police officer, without obtaining a warrant from any other quarter. The consequent delay in the procurement of a warrant might have enabled the parties to make their escape—such narrow construction of his duty would be unreasonable and is utterly unwarranted. The board of police commis-

sioners, and the police officers appointed by their authority, are state officers; but they exercise the police power of the city, and it is their duty to enforce all the laws and ordinances of the city, which can be enforced by the police. They have the power to prevent the commission of crime, and to arrest and detain offenders for hearing, without warrant, wherever other police officers can do so by the common law,—that is, where the offense, whether by the common law, by statute, ordinances of the city, or police regulation, is committed within their view, it is their duty to do so."

And in *Dlicher v. Raap*, 73 Ill. 266, it was held that an officer called upon to assist in the arrest of a party by another officer will not be liable in false imprisonment if he acts upon information and under the honest belief that the party is arrested for a breach of an ordinance, and has just escaped from the other officer's custody. But in this case it was held that the officer would be liable if the first officer had only a private quarrel with the accused, and the other police officer, who assisted in the arrest, espoused the cause of a brother officer, and was not acting in the honest discharge of official duty. It was claimed by the defense that the first arrest was made for a breach of the peace.

And in *Shanley v. Wells*, 71 Ill. 78, it was held that a policeman sued in trespass for arresting a party as a vagrant under an ordinance without a warrant should establish that the offense was committed in his presence. It was not claimed that a policeman had any greater rights than constables who were authorized by 1 Gross (Ill.) Stat. 406, § 112, to make an arrest for "any felony or breach of the peace . . . committed in their presence." The court said: "It may well be questioned whether, from the peculiar elements which are essential to constitute the offense of vagrancy, it belongs to the class of offenses for which an arrest may be made without a warrant; but, even conceding that it does, it was certainly incumbent on the defendant to show that the offense was in fact committed in his presence."

In *Quinn v. Heisel*, 40 Mich. 576, where a recovery was had against the officer for making an arrest under a city ordinance for alleged disorderly conduct of plaintiff toward laborers working in front of plaintiff's house, the court said: "The court certainly charged the jury as to the right of an officer to make arrests without warrant for breaches of the peace, as favorably as common-law rules would warrant, and we are not at present prepared to say that an ordinance of the city of Grand Rapids could authorize arrests without process in cases not justified by common-law principles." The justification in this case appears to be on common-law principles, and it does not clearly show that the ordinance authorized an arrest on view although this may be inferred, and the whole discussion of the case was on the common-law right of an officer to make an arrest for a threatened breach of the peace or a past offense. The evidence was conflicting as to whether there was a breach of the peace or not "on view."

In *Kelly v. Barton*, 26 Ont. Rep. 608, affirmed in 22 Ont. App. Rep. 522, an officer was held liable for arresting a party on view for violating a city ordinance by driving an omnibus without a license. In this case the court said: "In the present case the officer was not bound or required, as a matter of duty, to arrest the plaintiff, although he was violating the provisions of a city by-law in that he was driving an omnibus without having a license so to do. The conduct was merely the infraction of a police regulation, which falls far short of being a crime. There was no state of law or of facts

which did exist that could justify this summary arrest, though the officer may have bona fide believed that he had such a legal right, and that such was his official duty."

A policeman has no authority to make an arrest without warrant on view for the violation of an ordinance prohibiting the obstruction of a bridge in the city, and providing a forfeiture of a penalty of \$5 for each offense, under a charter providing that the penalty must be collected by a justice of the peace, or other court, and the first process may be by civil warrant or summons. *Hennessy v. Connolly*, 13 Hun. 173. In this case *Butolph v. Blust*, 5 Lans. 84, was distinguished, as in that case the charter expressly conferred power on a policeman to arrest a person found committing a violation of any ordinance. In this case the policeman had no authority to arrest the defendant unless such misdemeanor was accompanied by a breach of the peace at common law. The court further said: "It may be that a policeman should have authority to arrest without warrant, and on view, any person engaged in the violation of a city ordinance, and we presume this authority is conferred by most city charters, but it is a matter which rests with the legislature, and, until the power is conferred, an arrest by a constable without warrant, in case of a misdemeanor can only take place where it is accompanied by a breach of the peace."

And a marshal was held liable in false imprisonment for arresting a drunkard disturbing the peace on the Sabbath and taking him to jail and imprisoning him for five hours, under Ind. act 1857, p. 52, § 38, providing that a penalty for violation of ordinances may be recovered in an action at law. *Low v. Evans*, 18 Ind. 486. In this case the court said that if the officer has the power to arrest on view it is his duty to take the person forthwith before a tribunal and prefer a complaint.

For arrest on view for violation of city ordinance, see *Butolph v. Blust*, 41 How. Pr. 481, 5 Lans. 84, *infra*, III. b.

4. Arrests not made on view.

An officer will be liable for an arrest not made on view for the violation of a city ordinance. It is doubtful whether any ordinance would justify an arrest in such a case, and if a statute conferred such power, except in felony cases, there would be a serious contention as to its validity.

Where the plaintiff had a quarrel on the street, and was boisterous, and shortly thereafter a policeman arrested him, the latter cannot justify under a city ordinance authorizing such an arrest with or without a warrant, or authorizing an arrest whenever a misdemeanor is committed in his presence, or whenever the commission of a misdemeanor shall be otherwise brought to his knowledge. This ordinance contravenes Tenn. Code, §§ 5032, 5037, providing that an officer may arrest for a public offense or breach of the peace committed in his presence or for a felony under certain circumstances. *Pesterfield v. Vickers*, 3 Coldw. 205.

An arrest without a warrant of an alleged prostitute or street walker by a police officer, who is authorized by ordinance to arrest, upon view, any person found in the act of committing any offense against the laws of the state, on mere suspicion that she is plying her vocation upon the street, no act being committed in his presence indicating that she is there for that purpose, is illegal. *Pinkerton v. Verberg*, 78 Mich. 573, 7 L. R. A. 407, 44 N. W. 579. In this case the court said: "The officer had no right to arrest the plaintiff, without

warrant, upon mere suspicion that she was upon the street for the purpose of plying her vocation as a common prostitute, even under the provisions of the city ordinances above cited. Our statute gives no such right, and at the common law no such right existed. Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable without a justice's warrant; and there is no distinction, in this respect, between one kind of misdemeanor and another. . . . It is true that an officer, as a conservator of the peace, may arrest street-walkers or common prostitutes who are on the street plying their vocation; but a mere suspicion that they are doing so where there is no act indicating that the party is there for that purpose will not justify the arrest without warrant."

And a policeman is liable in trespass, assault, and false imprisonment for arresting a person without a warrant, where he is peacefully passing on the street, although some time during the day, previous thereto, he had been on the street in a state of intoxication. *Newton v. Locklin*, 77 Ill. 103.

Where a police officer arrested plaintiff, who had followed the officer to the station for the purpose of bailing a prisoner arrested for congregating with other persons on the street, the officer was held liable to the plaintiff for false arrest and imprisonment, where he had no warrant, and where no violation of law had been done in the actual presence of the officer by him. *Flinn v. Graham*, 3 Pittsb. 195.

An officer cannot arrest for a misdemeanor not committed in his presence. *Parke v. Gilligan*, 14 Misc. 121, 35 N. Y. Supp. 477.

And an ordinance authorizing an arrest for a misdemeanor not "on view" must be pleaded. *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536.

c. For other misdemeanors.

1. Past offenses.

An officer in the absence of statutory authority, making an arrest without a warrant, for a misdemeanor not on view, is liable in damages for trespass and false imprisonment. *Bright v. Patton*, 5 Mackey, 534; *Griffin v. Coleman*, 4 Hurlst. & N. 265, 28 L. J. Exch. N. S. 134; *Scott v. Eldridge*, 154 Mass. 25, 12 L. R. A. 379, 27 N. E. 677; *Malcolmson v. Gibbons*, 56 Mich. 459, 23 N. W. 166; *Kennedy v. Favor*, 14 Gray, 200; *Bowditch v. Balchin*, 5 Exch. 378, 19 L. J. Exch. N. S. 337; *Lamb v. Stone*, 95 Wis. 254, 70 N. W. 72.

An officer has no right to arrest without a warrant after the offense has been committed in any case, where the punishment attached to that offense is only a fine or imprisonment in jail in the District of Columbia, or both, and the officer is liable for damages in making such arrest. *Bright v. Patton*, 5 Mackey, 534.

A police constable imprisoned plaintiff in a cell on a charge of aiding another person in assaulting him in the execution of his duty. A chief constable arrived at the station some hours afterwards, and on the report of another constable, without inquiring into the facts, handcuffed the plaintiff and took him before the magistrate, who dismissed the charge. It was held that the chief constable, and all the other persons concerned in the imprisonment of the plaintiff, were liable in trespass. *Griffin v. Coleman*, 4 Hurlst. & N. 265, 28 L. J. Exch. N. S. 134. In this case *Martin, B.*, said: "I am of the same opinion. The question of law is clear. *Simmons*, a constable had taken the plaintiff into custody unlawfully. The other constables knowing nothing of the facts, imprisoned and detained him. Every person who

takes part in an unlawful imprisonment acts at his peril. Suppose a constable is told that a misdemeanor has been committed; he has no power to arrest. The power to apprehend on suspicion is confined to cases of felony."

And in Massachusetts a police officer is liable for an arrest and detention without a warrant for a past misdemeanor committed in another state. *Scott v. Eldridge*, 154 Mass. 25, 12 L. R. A. 379, 27 N. E. 677. In this case the plaintiff was arrested on a letter from the police of Philadelphia charging him with conspiracy to commit an abortion. It was held that by the common law such a conspiracy is not a felony. The court said: "Even if the plaintiff had committed the offense of conspiracy in Massachusetts, the defendants would have had no right to arrest him without a warrant. On reasonable suspicion of felony, a peace officer may make an arrest without a warrant, even though it turns out that in fact no felony has been committed; but he may not without a warrant make an arrest for a past misdemeanor, though the offense has been committed, unless he is specially authorized by statute to do so."

An officer was held liable in trespass for arresting and detaining a party on information by letter, without warrant, where the crime alleged did not constitute a crime in the state where arrested, and it was not shown that any complaint under oath or extradition proceedings under the act of Congress had been taken in the state where the alleged crime was committed. In an action of trespass it may be shown that the custody of the plaintiff was shifted so as to evade the execution of a writ of habeas corpus. *Malcolmson v. Gibbons*, 56 Mich. 459, 23 N. W. 166. In this case the court said: "The habit of making needless night arrests, and of doing so on the eve of Sunday, when the ordinary resources for immediate delivery are not at hand, is without any decent support;" and further: "The habit, which is by a very singular abuse of language called official courtesy, of making illegal arrests in one jurisdiction in the hope that similar violations of law may be reciprocated, is one which cannot be tolerated."

In an action for assault and false imprisonment the officer cannot justify an arrest without a warrant for illegally transporting liquor without showing that he had reasonable proof at the time of the arrest that such crime was being committed. *Kennedy v. Favor*, 14 Gray, 200. The court said: "The charge, therefore, that if the defendants had 'reasonable cause to suspect,' etc., was not equivalent to an instruction that if they had any reasonable proof, and was not correct law. They should have instructed that, if the defendants had any reasonable proof, etc., it was a justification."

In *Bowditch v. Balchin*, 5 Exch. 378, 19 L. J. Exch. N. S. 337, it was held that a police officer was liable in trespass for arresting a party on a charge of perjury and complaint made to the officer by another party in plaintiff's presence. 2 and 3 Vict. chap. 94, § 9, conferring all the powers on police constables possessed by constables at common law, and § 8, authorizing the police to take into custody without warrant all "loose, idle, disorderly persons" disturbing the public peace, or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanor, or breach of the peace, limited the power to arrest to "loose, idle, disorderly persons." This was a *per curiam* opinion, and it seems that the crime charged in this case was a misdemeanor.

And under Wis. Stat., authorizing game protectors to arrest without warrant persons shooting game in the "night-time" the game protector is liable in false imprisonment where he

arrests the party in daylight. *Lamb v. Stone*, 95 Wis. 254, 70 N. W. 72. In this case the court said: "Arrest without a warrant for a felony may be justified upon reasonable grounds of belief; not so for a mere trespass or misdemeanor, except when so provided by statute." It was further held that the fact that plaintiff was constructively guilty of a trespass in floating in a boat over the lands of third parties, which were under the water, could not be shown in mitigation of damages.

But in *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423, it was held that an officer making an arrest of an actual offender on sufficient information without a warrant would not be liable at common law although the offense was not committed in his presence.

2. For offenses "on view" under statutory authority.

An officer will not be liable for making an arrest on view, without a warrant, for misdemeanors, under statutes authorizing such an arrest. *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136; *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96; *Galney v. Parkman*, 100 Mass. 316; *Johnson v. Americus*, 46 Ga. 80; *Mason v. Lothrop*, 7 Gray, 354; *Holcomb v. Cornish*, 8 Conn. 375; *Sheets v. Atherton*, 62 Vt. 229, 19 Atl. 926; *Weser v. Welty*, 18 Ind. App. 664, 47 N. E. 639.

A police officer was held not liable for an illegal arrest where he found the plaintiff drunk and noisy and arrested him, and retained him in custody until the following morning, when he was charged with the crime of drunkenness under Mass. Stat. 1891, chap. 427, § 1, providing that whoever is found in a state of intoxication in a public place, or is found in any place, in a state of intoxication, committing a breach of the peace or disturbing others by noise, may be arrested, by an officer, without a warrant. "Any place" may include a dwelling house. *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136.

And the same was held under Mass. Pub. Stat. chap. 207, § 25, providing as above, where the person arrested consented to his discharge from custody without a complaint being made against him, thereby intending to release any damages on account of failure to make a complaint. *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96.

The same was said to be the rule in *Phillips v. Fadden*, 125 Mass. 198, *infra*.

And an officer was held not liable in tort where he arrested a person found drunk, and procured another officer to make the complaint, and was present to testify at the trial, under Mass. Gen. Stat. chap. 86, § 40, providing that an officer who has without a warrant arrested a person who is found in a state of intoxication committing a breach of the peace or disturbing others by noise shall take him before a magistrate and make a complaint against him. *Galney v. Parkman*, 100 Mass. 316.

Under Vt. Rev. Laws, § 3871, authorizing the fish warden to arrest a person found violating a statute, a fish warden was held not liable in false imprisonment where he found plaintiff engaged in drawing a net and some fish in a basket, although he was arrested half a mile from the fish grounds, the pursuit having been continuous until the arrest was made, and the officer turned plaintiff over to the state attorney of the proper county for prosecution. *Sheets v. Atherton*, 62 Vt. 229, 19 Atl. 926. In this case the court said: "An offender cannot make an arrest illegal by endeavoring to escape by running away. But it is further contended that if the arrest is referred to the fishing ground, by the flight of the plaintiff and continuous pursuit of the defendant, it was not

made while the plaintiff was engaged in fishing in violation of law. The same statute which authorizes the arrest, authorizes a seizure of the nets. From the report of the referee it is apparent that the officers were fully and actively engaged in enforcing the law from the time they arrived on the ground and found the plaintiff violating the law, to the time of the arrest. The officers must have a reasonable time to execute the law. They were as much authorized to seize the nets as to arrest those found fishing in violation of the law. They were not bound to make the arrest before they seized the nets."

And a policeman is not liable in false imprisonment for arresting without a warrant a person violating a criminal statute of Indiana in his presence, where he takes the accused as soon as possible before a magistrate and files a complaint and has a warrant issued, under *Burns* (Ind.) Rev. Stat. 1894, § 1771, *Horne's Rev. Stat.* 1890, § 1702, authorizing a peace officer to arrest and detain any person found violating any law of this state until a legal warrant can be obtained. *Weser v. Welty*, 18 Ind. App. 664, 47 N. W. 639.

The arrest and detention of a disorderly person while in the commission of the act, by an officer without a warrant, and the detention until the next day, do not render the officer liable, under Ga. Code, §§ 4626, 4627, authorizing an arrest to be made by an officer without a warrant when the offense is committed in his presence and there is likely to be a failure of justice for want of an officer to issue a warrant. *Johnson v. Americus*, 46 Ga. 80.

In an action of assault and false imprisonment for arresting without a warrant it was held that the officer might prove declarations of the plaintiff made before the day of the arrest, tending to show that at the time of the arrest he was illegally transporting liquors, and the officer may also show that he was detained until the warrant could be procured, and that such warrant issued. *Mason v. Lothrop*, 7 Gray, 354. This action was under Mass. Stat. 1855, chap. 215, § 13, making it the duty of the officers to enforce the penalties of the act against every person guilty of any violation of which they can obtain reasonable proof. The court said: "The defendant was an officer, and he was authorized by the statute cited to arrest the person and seize the liquor without warrant, and it is made his duty to do so if he had reasonable proof of the criminal act."

And a justice was held not to be liable for ordering the plaintiff into custody of keepers, and trying him without a warrant, for the violation of Conn. Stat. 172, title 22, § 102, providing any justice of the peace having plain view or personal knowledge of any persons being guilty of profane swearing, cursing, or Sabbath breaking may make up a judgment against such person so offending, having first caused such person to be brought before him. "But no judgment shall be rendered by a justice of the peace against any person for any other offense, whether on confession or otherwise, without previous complaint and warrant." *Holcomb v. Cornish*, 8 Conn. 375.

But an officer who, without a warrant, arrests a person for being intoxicated, does so at his peril; and if it afterwards appears that the person so arrested was not in fact intoxicated within the meaning of the statute, at the time of the arrest, the officer is liable in trespass, notwithstanding he makes the arrest in good faith, and under a reasonable belief that the person arrested is intoxicated, under Mass. Stat. 1868, chap. 415, § 42, providing that if a person is found in a public place in a state of intoxication, committing a breach of the peace or disturbing others, any officer shall without

warrant take him into custody and detain him in some proper place until in the opinion of such officer he has recovered from his intoxication, and the officer shall then make a complaint against him for the crime of drunkenness. *Phillips v. Fadden*, 125 Mass. 198.

3. Arrests in other cases.

The officer will be liable for making an arrest on view, assuming to act under statutory authority, if the alleged offense is not within the statute, or if the penalty is to be recovered by action. He will also be liable for making an arrest on view without reasonable cause therefor, as in cases of arrest on suspicion.

And a policeman was held guilty of an assault where he seized a bicycle to ascertain the name of the rider and caused him to fall to the ground, under local government act 1888, § 85, providing that bicycles are carriages within the meaning of the highway act, and making it an offense to ride a bicycle without a light, within one hour after sunset and one hour before sunrise, under a penalty of 40 shillings. *Hatton v. Treeby* [1897] 2 Q. B. 452, 66 L. J. Q. B. N. S. 729. In this case the highway act of 1835, §§ 78, 79, provided penalties against drivers and owners of carriages, but did not include driving a carriage without a light, and authorized without warrant an apprehension by any person who shall see such offense committed. It was held that the act of 1888 did not give to the constable witnessing an offense against it any power to detain the offender. The court said: "The legislature, whether intentionally or not, has omitted to extend the power of detention to the new offenses created by the local government act."

And it was held to be no defense to an action of trespass, assault and battery and false imprisonment against a constable, that the plaintiff was arrested for being the servant of one A., where it turned out that T. had no valid claim on plaintiff. *Murphy v. Countiss*, 1 Harr. (Del.) 143.

A marshal who approaches a party in a loud, rough manner without any authority of law, handcuffs him, and confines him in the city prison, is liable in damages. *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490.

A policeman arresting the owner of a trunk, who resists the unlawful removal of the same, is liable in damages. *Isaacs v. Flahive*, 14 Misc. 249, 35 N. Y. Supp. 716. In this case the court said: "There being, at this time, no breach of the peace, but simply the question of the possession of the trunk, and he there without warrant or legal process, the plaintiff had a right to protect and defend her property or the possession of any property to which she claimed a right."

If a party be turning towards the wall in a street at night, for a particular occasion, a watchman is not justified in collaring him, to prevent his so doing. *Booth v. Hanley*, 2 Car. & P. 288. In this case Abbott, Ch. J. (in summing up the case to the jury), said: "The watchman certainly had no right to go up to a man and collar him for that which the plaintiff appears to have been doing. He might have gone up to him and remonstrated with him, or have asked him to go somewhere else, but he clearly had no right to assault him for that."

Constables and police officers were held liable in trespass for arresting upon view a party, on orders from the mayor, for placing obstructions in the street, claimed to be a nuisance, where the statute did not give the mayor and aldermen the power to prevent the erection of nuisances in the street. *Danovan v. Jones*, 86 N. H. 246.

51 L. R. A.

A marshal acting under orders from a mayor arresting an employee for not desisting work on a bridge in a city without a warrant on the charge of obstructing the highway could not justify in false imprisonment by showing that the contract for the bridge was void by reason of the contractor being an alderman, where the ground of interference was that the timber used was defective. *Maine Rev. Stat. chap. 133, § 4*, authorized the city marshal to arrest and detain persons found violating any law of the state, or any legal ordinance or by-law of a town, until a legal warrant could be obtained. *Moore v. Durgin*, 68 Me. 148.

A policeman of New York cannot arrest without a warrant for an act not tending to a breach of the peace and not committed on view. *Sternack v. Brooks*, 7 Daly, 142. In this case the alleged offense was "picketing."

A police constable in the city of London is guilty of trespass in assaulting plaintiff and conveying him to the police station merely on suspicion that he has committed a misdemeanor. Under 2 and 3 Vict. chap. 94, § 8, authorizing any man belonging to the police force to take into custody without warrant all "loose, idle, and disorderly persons" whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or intended to commit any felony, misdemeanor, or breach of the peace, or all persons whom he shall find between sunset and 8 o'clock in the forenoon, lying or loitering in any place and not giving a satisfactory account of themselves, a plea is bad which does not show that the plaintiff was a loose, idle, and disorderly person. *Bowditch v. Balchin*, 5 Exch. 378, 19 L. J. Exch. N. S. 337.

In an action against a police constable for assault it was held that he was not justified in laying hold of and pushing along the highway and ordering plaintiff to be off, where plaintiff was conversing in a crowd with another person known to be a reputed thief, under 10 Geo. IV. chap. 44, § 7, providing that it shall be lawful for a police officer on duty to apprehend all loose, idle, and disorderly persons whom he shall find disturbing the peace, or whom he shall have just cause to suspect of any evil designs. *Stocken v. Carter*, 4 Car. & P. 477.

A justice of the peace is liable in trespass for arresting on view a trespassing hunter, as *Nixon's Dig. (N. J.) 334*, providing that if any person shall carry a gun on any land not his own without a license in writing from the owner or legal possessor, he shall be convicted, either upon the view of any justice of the peace or by witnesses, and shall forfeit to the owner of the soil or tenant in possession \$5, does not make the act a criminal offense or breach of the peace. It was further held that the justice could not act where he was interested in the prosecution. *Schroder v. Ehlers*, 81 N. J. L. 44.

And drunkenness of a sheriff at the time of making an illegal arrest supposing he had a warrant is no defense, and may be regarded as an aggravation of the offense. *Hall v. O'Malley*, 49 Tex. 70. In this case the court said that if the sheriff desired to mitigate the damages by an instruction that he acted on a mistaken belief that he had a capias he should have asked such an instruction.

Where a constable was not empowered to act as such officer by virtue of any election authorized by law, he could not justify as an officer in the discharge of his duty a trespass in assaulting and arresting without a warrant, where he came up to where plaintiff was in conversation, and after cursing plaintiff for swearing assaulted him and took him to the mayor's office. *Shepherd v. Staten*, 5 Helsk. 79.

In an action against road officers and the

deputy sheriff for arresting plaintiff, through malice and without justifiable cause, it was held that the defendants under the general issue might show their official character and good faith to mitigate damages. *Richardson v. Houston*, 10 S. D. 484, 74 N. W. 234.

III. *Circumstances attending arrest.*

a. *Time.*

The liability of an officer for making an arrest on the Sabbath is now generally controlled by statutes. These usually prohibit service of legal process on the first day of the week except in cases of felony or breach of the peace, or except where such service is specially authorized by statute.

A policeman is liable for false imprisonment for making an arrest at night on a warrant for a misdemeanor, upon which the direction for such arrest is not indorsed by the magistrate, under N. Y. Code Crim. Proc. § 170, providing that if the crime charged be a felony the arrest may be made on any day and any time of the day or during any night; if it be a misdemeanor the arrest cannot be made on Sunday or at night unless by the direction of the magistrate and indorsed upon the warrant. *Murphy v. Kron*, 20 Abb. N. C. 259.

In *Pearce v. Atwood*, 13 Mass. 324, it was held that Mass. Stat. 1791, chap. 58, § 10, prohibiting unnecessary traveling on Sunday, did not authorize a justice of the peace to receive a complaint and issue a warrant on that day, for that offense, and the officer making the arrest on that day was a trespasser. This was on the ground that "the legislature did not intend that prosecutions for the violation of this law should be attended to on the Lord's day." The court held also that the justice had no jurisdiction being interested in the penalty as an inhabitant. It is true the court says: "But by our statute, the service of none but civil process is prohibited on the Lord's day; so that warrants against persons charged with any crimes whatever may be lawfully served on that day. Warrants may also be issued; for, if the arrest is authorized by law, the order to make such arrest must likewise be lawful."

In *Keith v. Tuttle*, 28 Me. 334, where it was said, referring to *Pearce v. Atwood*, 13 Mass. 324, that "persons charged with any crime whatever may lawfully be arrested on the Lord's day." An action of trespass and false imprisonment was brought against a constable and others aiding him for making an arrest on the Sabbath day, and it was held that a warrant issued on a complaint, under Me. Stat. 1846, chap. 205, restricting the sale of liquor, might be lawfully executed on that day. The question whether or not plaintiff could show on the trial that his arrest on the Lord's day was an unnecessary labor, was not decided.

In *Main v. McCarty*, 15 Ill. 441, it was held that officers were not liable for making an arrest on view for the violation of a city ordinance against keeping open a tippling house on the Sabbath, under an ordinance authorizing an arrest with or without warrant for offenses committed in the officer's presence. The city charter authorized the arrest with or without warrant for breaches of the peace or threats to break it without regard to the presence of conservators of the peace. In this case the plaintiff had interfered with the officers making the arrest, and he evidently was arrested for that act, and incidentally the court discussed the question of the right of the officers to arrest for keeping a saloon open on Sunday, which arrest was made at that time. The court did not discuss the propriety or validity of the arrest because it was on Sunday.

51 L. R. A.

An action of false imprisonment cannot be maintained for arresting a person on Sunday on a warrant for any indictable offense, under 29 Car. II. chap. 7, § 6, providing that no person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace). *Rawlins v. Ellis*, 16 Moe. & W. 172, 16 L. J. Exch. N. S. 5, 10 Jur. 1039. In this case the court said: "The meaning of the statute is that it authorizes the arrest on a Sunday for all persons who have been guilty of any indictable offense. How is the officer to know whether an actual or constructive breach of the peace has been committed?" The crime charged was conspiracy by false distresses to deprive a party of peaceable possession of premises.

In *Wilson v. Tucker*, 1 Salk. 78, it was held: "Arrest on a Sunday is a void arrest, inasmuch that the party may have an action on false imprisonment for it."

An arrest under an execution after its return day is a trespass, and confers no authority whatever upon the officer. *Stoyel v. Lawrence*, 3 Day, 1.

b. *Place of arrest.*

In the absence of statutory authority conferring power on a sheriff, constable, or policeman to act outside of the county, town, or city to which he belongs, such officer will be liable in false imprisonment for making an arrest out of his jurisdiction. *Butolph v. Blust*, 41 How. Pr. 481; *Lawson v. Busines*, 3 Harr. (Del.) 416; *Krug v. Ward*, 77 Ill. 603; *Kindred v. Stitt*, 51 Ill. 401; *Page v. Staples*, 13 R. I. 306; *Spencer v. Moore*, 19 N. C. (2 Dev. & B. L.) 284; *Moak v. De Forrest*, 5 Hill, 605.

And under the charter of the city of Syracuse (Laws 1857, chap. 63, title 4), providing that a violation of the ordinances of the common council is declared to be a misdemeanor, and Rev. Stat. par. 4, title 2, § 1, authorizing aldermen to execute the powers conferred in that title, an alderman or policeman cannot arrest, outside of the limits of the city of Syracuse, a person who may be found committing a violation of the ordinance within the city. *Butolph v. Blust*, 41 How. Pr. 481, 5 Lans. 84. In this case it was said that they may arrest, without a warrant, a person within the city found violating an ordinance, such as cruelly whipping a horse on a public street, and that the delay of half an hour in making the arrest would not deprive the officer of the right to make it.

And a constable of the city of W. was held liable for assault and battery and false imprisonment, where he arrested a party in a civil action under a writ, beyond the city limits. *Lawson v. Busines*, 3 Harr. (Del.) 416.

And unless a party against whom a warrant is issued for perjury has fled from the county, a constable of that county has no lawful authority to arrest him in another county, and if he does he will be liable in false imprisonment. *Krug v. Ward*, 77 Ill. 603.

A police constable of one county is liable in trespass and false imprisonment if he goes into another county, and there, without reasonable cause and without a warrant, arrests a person and conveys him out of the county in which the supposed crime was committed to the county where the constable resides, and detains him in jail for several days. *Kindred v. Stitt*, 51 Ill. 401.

In *Page v. Staples*, 13 R. I. 306, it was held that a sheriff was liable in trespass and false imprisonment where he made an arrest on a writ in an action of trover, and in conducting him to the county jail carried him through a part of another county. In this case the court

said: "In the absence of statutory provisions, the power of a sheriff is limited to his own county. He is to be adjudged a sheriff in his own county, and not elsewhere. He cannot, therefore, execute a writ out of his own county, and if he attempts to do so he becomes a trespasser."

And a sheriff is responsible for trespass and false imprisonment where his deputy makes an arrest in a ca. sa. and, after permitting the defendant to go at large, makes a second arrest out of his county by color of his office. *Spencer v. Moore*, 19 N. C. (2 Dev. & B. L.) 264.

And a warrant issued under N. Y. Sess. Laws 1831, p. 396 (1 Rev. Stat. 2d ed. 808), providing that a plaintiff who has commenced a suit may apply to a judge of the court in which the action is pending for a warrant against the defendants, and that upon requisite proof to the officer he shall issue a warrant directed to any sheriff, constable, or marshal within the county where the officer resides, commanding him to arrest, etc., will not confer upon the sheriff to whom the warrant may be directed the power of executing it beyond the territorial limits of his own county. Such warrant is not a criminal process. *Moak v. De Forrest*, 5 Hill, 606.

But a constable is not liable for an illegal arrest and false imprisonment for arresting a party outside of his town but in his county and within the jurisdiction of the court, on a capias issued by a district court in a criminal case under Mass. Pub. Stat. chap. 154, § 81, chap. 155, § 44, Stat. 1876, chap. 94, providing that warrants or other criminal process issued by a police court or by a trial justice may be directed to and served by a constable of any city or town within the county in which such trial justice or court has jurisdiction. *Sullivan v. Wentworth*, 187 Mass. 233.

And a sheriff of W. county was held not liable for arresting plaintiff in C. county under a warrant valid on its face, under Ill. Rev. Stat. 1874, p. 401, Crim. Code, § 352, providing that if a person against whom a warrant is issued escape from, or is out of, the county, the officer to whom such warrant is directed may pursue and apprehend the party charged in any county of this state. *Ressler v. Peats*, 86 Ill. 275.

And under Tex. Rev. Stat. art. 363, providing that a marshal in the prevention and suppression of crime and arrest of offenders shall have, possess, and execute like power, authority, and jurisdiction as the sheriff of the county under the laws of the state, a marshal may lawfully arrest one beyond the limits of the town for a felony committed within the town, and will not be liable therefor in false imprisonment. *Newburn v. Durham*, 10 Tex. Civ. App. 655, 32 S. W. 112, 88 Tex. 288, 31 S. W. 195.

See also III. d, 2, *infra*, *Place of detention or delivery*.

c. Manner of making arrest.

An officer has no right to kill a party attempting to escape whom he has arrested or is attempting to arrest for the crime of a misdemeanor and he will be liable in damages for such killing. As to whether the officer is liable on his bond for unlawful killing, there is some conflict in the absence of statute imposing liability. The officer is liable for the use of unnecessary violence in making the arrest.

An officer is liable for killing a party while attempting to escape after he had been arrested in a bastardy proceeding. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

And it was held to be no defense in an action of trespass for killing a slave by a constable - 51 L. R. A.

that he had a warrant and was endeavoring to arrest the slave on a misdemeanor charge, and that the slave fled from the constable. *Middleton v. Holmes*, 3 Port. (Ala.) 424.

In an action for damages on an officer's bond for the killing of a party by the officer's deputy, it is no defense that the party was charged with a misdemeanor, and killed to prevent his escape. *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 18 S. W. 854; *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 23 So. 388.

In the latter of these cases the court said: "In Mr. Bishop's New Criminal Law, 8th ed. § 647, par. 3, note 1, Mr. Bishop cites *Jackson v. State*, 76 Ga. 473, to the proposition that 'after an arrest, whether for felony or misdemeanor, or during an imprisonment, the life of the prisoner may be taken, if necessary to prevent the escape.' . . . If he means to say as we understand him, that an officer may kill a misdemeanor whom he has arrested, and who eludes the officer, and gets away from him without resisting the officer, and without employing any force, while such misdemeanor is effecting his escape merely by running away, then such doctrine is not sound in our judgment, and is unsupported by the authorities."

But in *Chandler v. Rutherford*, 101 Fed. Rep. 774, it was held that a marshal is not liable on his bond for the act of his deputy in wrongfully killing a party whom he is wrongfully attempting to arrest.

See VI., *infra*, *Liability on official bond*.

An officer making an arrest is liable for the use of unnecessary force, or for abusing his authority in making an arrest. He is held liable also in some cases for handcuffing a prisoner where he has no reasonable ground to apprehend that the same is necessary to prevent an escape. But in regard to handcuffing, the officer is allowed much latitude depending on the situation of the parties and the surrounding circumstances.

The officer will be held liable for the abuse of his authority, or for the use of unnecessary force. *Wright v. Court*, 4 Barn. & C. 596, 4 L. J. K. B. 17, 6 Dowl. & R. 623; *Osborn v. Velch*, 1 Fost. & F. 317; *Kreger v. Osborn*, 7 Blackf. 74; *Shanley v. Wells*, 71 Ill. 78; *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567; *Cash v. People*, 32 Ill. App. 252.

If a party is assaulted, beaten, and imprisoned by a police officer in arresting him without authority, he will be entitled to recover in an action of trespass. *Cash v. People*, 32 Ill. App. 252.

And probable cause of guilt is no justification. *Shanley v. Wells*, 71 Ill. 78.

In *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567, it was said that if, after an arrest upon civil or criminal process, the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by action at law against the officer.

And a justification of an arrest and imprisonment was held insufficient against a declaration in trespass charging that a constable as assaulted, seized, pulled, dragged about, struck, and imprisoned plaintiff, by virtue of legal process, where the plea did not show that the use of force was necessary on account of the resistance of plaintiff. *Kreger v. Osborn*, 7 Blackf. 74.

An officer not using more than necessary force in making an arrest is not liable for assault and battery. *Baker v. Barton*, 1 Colo. App. 183, 29 Pac. 88; *Finnell v. Bohannon*, 19 Ky. L. Rep. 1587, 44 S. W. 94; *Wright v. Keith*, 24 Me. 158; *Fulton v. Staats*, 41 N. Y. 498.

There must be some discretion reposed in a

sheriff or other officer making an arrest for a felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; and this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested and without any view to prevent the escape of such person. *Diers v. Mallon*, 48 Neb. 122, 64 N. W. 722.

The right of searching persons in custody must depend upon the circumstances of each particular case, and the mere fact of a person being drunk and disorderly will not justify a police officer searching his person, although the officer may have received general orders to search all persons in custody; but any person, whatever may be the nature of the charge, may so conduct himself, by reason of violence of language or conduct, that it may be prudent and right to search him, as well for his own protection as for those intrusted with the duty. The same rule applies to handcuffing persons in custody, and the right must depend upon the circumstances of each particular case, as, for instance, the nature of the charge and the conduct and temper of the person in custody. There cannot be any general rule that will justify a constable in resorting to the extreme measure of handcuffing a person, in custody for a misdemeanor, to a felon, and marching them through the public streets from the police station to the magistrate's office. *Leigh v. Cole*, 6 Cox Crim. Cas. 329.

In *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885, it was held that the sheriff making an arrest for a felony on reasonable grounds had the right to handcuff his prisoner while conveying him to a place of safety.

The right to handcuff a prisoner is a question for the jury. *Cochran v. Toher*, 14 Minn. 385, Gil. 203.

After an arrest which requires the prisoner to be committed, it is the duty of the officer to take the prisoner to jail as soon as he reasonably can. He is to judge of the hour at which he will start, and of the propriety of starting on account of the state of the weather, and of the personal restraint necessary to secure the prisoner. And he is not liable to the prisoner for any injury he may receive thereby, unless he needlessly exposes the prisoner's health, or does him an unnecessary personal injury. *Butler v. Waahburn*, 25 N. H. 251.

But a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be necessary in order to prevent his doing so. *Wright v. Court*, 4 Barn. & C. 596, 4 L. J. K. B. 17, 6 Dowl. & R. 623.

In *Osborn v. Velch*, 1 Fost. & F. 317, where a lawful arrest was made for a misdemeanor, it was held that "the handcuffing was utterly unlawful." A verdict was rendered for one farthing for plaintiff.

An officer's inquiring after stolen property, showing his shield, and directing the person to come with him, constitutes an arrest. *Callahan v. Searles*, 78 Hun, 238, 28 N. Y. Supp. 904.

The authority of an officer to break open outer doors to make an arrest seems to be confined to cases of treason or felony, or breach of the peace in his presence, or where he has made a lawful arrest and is in fresh pursuit. But in other cases the officer will be liable for forcing the outer door to make an arrest.

A constable is not justified without a warrant or previous demand in forcibly entering a shop Saturday midnight, and arresting the owner engaged in the unlawful sale of liquor or in

gambling. *McLennon v. Richardson*, 15 Gray, 74, 77 Am. Dec. 353.

And a sheriff is liable in trespass, where, having a writ of execution commanding him to arrest and commit to prison the body of the plaintiff, he forcibly breaks open the outer door of a dwelling house and arrests plaintiff and confines him in jail. *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679.

And an officer is liable in trespass for breaking open the outer door to arrest plaintiff under a ca. sa. *Kerby v. Denby*, 1 Mees. & W. 336, Tyrw. & G. 688, 2 Gale, 31, 5 L. J. Exch. 162.

A sheriff who has entered the house of another in direct violation of the law, for the purpose of arresting the owner or seizing his goods, cannot be justified in consummating the warrant by arresting his person or removing the goods, where it is all one continuous act. *Curtis v. Hubbard*, 4 Hill, 437, 40 Am. Dec. 292.

But a sheriff arresting plaintiff under a writ of execution was held not liable for forcing open an inner door connecting plaintiff's room with another tenant's room, where such door was of common use and passage by the two families from time to time. *Stedman v. Crane*, 11 Met. 295.

And where A. let a house, except one room, which he reserved for himself, and occupied separately; and, the outer door of the house being open, a constable broke open the door of the inner room, occupied by A., in order to arrest him, it was held that trespass would not lie against the constable. *Williams v. Spencer*, 5 Johns. 352.

"If a bailiff hath made a legal arrest in a street, and the prisoner escapes, bailiff may justify fresh pursuit, breaking open the door of the house, to retake the prisoner." *Anonymous*, Loft, 390.

An officer is not liable where, after arresting a party on execution, he is ejected from the house, and subsequently forces the outer door for the purpose of retaking him on the execution. *Allen v. Martin*, 10 Wend. 301, 25 Am. Dec. 564.

And a sheriff's officer was held not liable in false imprisonment where having a ca. sa. he put his hand in the debtor's house through a broken window and touched the debtor, and said, "You are my prisoner," and thereafter broke open the outer door and arrested the debtor. *Sandon v. Jervis*, El. Bl. & El. 935, 941, 28 L. J. Exch. N. S. 156, 5 Jur. N. S. 156, 7 Week. Rep. 290, Affirming 4 Jur. N. S. 737, 27 L. J. Q. B. N. S. 279.

In *Gordon v. Clifford*, 28 N. H. 402, it was held that a tax collector could lawfully break open the outer door to make the arrest, where the party arrested had moved to another town to the house of her son-in-law to avoid the payment of the tax. This was on the ground that the debtor had fraudulently sought refuge in the house of another, which was held to be no protection.

As to the right of a peace officer to enter a dwelling to make an arrest, see *Delafolle v. State* (N. J. L.) 16 L. R. A. 500, *note*.

d. Disposition of prisoner.

1. Unreasonable detention.

Generally it is the duty of an officer to take his prisoner before a magistrate "forthwith" or "immediately," and for any neglect in this particular the officer will be liable in damages. A detention for the purpose of extorting a confession by "sweat box" or compelling a settlement will render the officer liable.

In *LEGER v. WARREN* it was held that officers were liable in trespass and false imprisonment for unlawfully detaining a prisoner without al-

ing a complaint or taking him before a magistrate, under Ohio Rev. Stat. § 7130, authorizing the detention of a person until a legal warrant can be obtained where there is reasonable cause to believe that he has committed a felony. It was further held to be no defense that the defendants had reasonable grounds for the arrest, or that they delivered them at once to their superior officers. This is in accord with the authorities.

An officer failing to take a person arrested before a magistrate within a reasonable time will be liable. *Harris v. Atlanta*, 62 Ga. 291; *Schneider v. McLane*, 8 Keyes, 568, 4 Abb. App. Dec. 154; *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Cochran v. Toher*, 14 Minn. 383, Gil. 293; *Green v. Kennedy*, 48 N. Y. 653, affirming 46 Barb. 10; *Judson v. Reardon*, 16 Minn. 431, Gil. 387; *Pastor v. Regan*, 9 Misc. 547, 30 N. Y. Supp. 657; *Pratt v. Hill*, 16 Barb. 303; *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744; *Hynes v. Jungren*, 8 Kan. 391; *Wright v. Court*, 4 Barn. & C. 596, 4 L. J. K. B. 17, 6 Dowl. & R. 623; *Newby v. Gunn*, 74 Tex. 455, 12 S. W. 67.

A policeman arresting a person on suspicion that he is an escaped convict must take him before a magistrate within a reasonable time, or the officer will be liable. If it be shown that the person arrested is an escaped convict he cannot recover unless the detention was protracted unnecessarily and without reason. *Harris v. Atlanta*, 62 Ga. 291.

And an alderman and foreman of a fire company arresting plaintiff and detaining him under a city ordinance authorizing such a detention until the "fire is extinguished" was held liable as such clause in the ordinance is unconstitutional. *Judson v. Reardon*, 16 Minn. 431, Gil. 387.

The failure of an officer to take the prisoner before the court without delay renders him liable in false imprisonment, under N. Y. Code Crim. Proc. § 165, requiring the officer to take the party arrested, before a magistrate without unnecessary delay. *Pastor v. Regan*, 9 Misc. 547, 30 N. Y. Supp. 657.

And an arrest for a violation of a city ordinance punishable only by a fine does not authorize the detention of the accused at the station house until the opening of the court, under rules metropolitan police board, § 28, providing that a person accused of a "felony or misdemeanor" when the police courts are not open may be detained until the next morning on reasonable grounds. *Schneider v. McLane*, 8 Keyes, 568, 4 Abb. App. Dec. 154.

And a constable was held liable where he arrested a party on Saturday night on a warrant, upon which warrant before execution the magistrate indorsed, "commit the within named . . . till next Monday for examination," and the officer refused to take him before the magistrate forthwith as required by 2 N. Y. Rev. Stat. 707, § 3, requiring the warrant to command the officer to whom it shall be directed forthwith to take the person accused and bring him before the magistrate. *Pratt v. Hill*, 16 Barb. 303.

And where a warrant commands an officer to take and bring before the police court the body of the plaintiff to answer to the commonwealth on a complaint against him for selling liquor, if the officer has the right to keep the accused in jail during Sunday and Sunday night, he can be justified only by the necessity of the case, and so long only as that necessity exists, and he is bound to take the accused on Monday morning before a police court or show some legal reason for not so doing, or he will be liable in an action on the case for an assault and false

imprisonment. *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744.

A constable having an order of arrest in a civil case directing him to bring a party forthwith before the justice is liable in damages if he confines him in the jail a part of the day before taking him to the justice, although the party arrested may be intoxicated, as it is his duty to take his prisoner forthwith before the justice, and, if found to be in such condition as not to be able to protect his rights in court, the justice can make an order for safe keeping or for a postponement. *Hynes v. Jungren*, 8 Kan. 391.

A by-law of a town, providing that if any person shall be found intoxicated or brawling in the streets a police officer shall have power to commit such person to the house of correction, and to confine him for a space not exceeding forty-eight hours, was held contrary to Me. Rev. Stat. 1848, chap. 71, § 1, making it the duty of certain officers to arrest and detain, until a legal warrant for his apprehension can be obtained, any person found violating any law of the state or any legal ordinance or by-law of such city or town, and § 2, providing that if any officer shall detain any offender "without warrant longer than such time as was necessary to procure a legal warrant" such officer shall be liable in damages. *Burke v. Bell*, 38 Me. 317.

A plea in trespass and false imprisonment, justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held a bar on demurrer. *Wright v. Court*, 4 B. & C. 596, 4 L. J. K. B. 17, 6 Dowl. & R. 623.

And a sheriff was held liable where he failed to carry the accused before the magistrate as required by Tex. Code Crim. Proc. art. 231, providing that the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate, where the arrest was made without an order. *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656.

An officer was held liable in false imprisonment where he confined the person four days without taking him before a magistrate under Texas Code Crim. Proc. chap. 1, title 5, providing as in art. 231, *supra*. *Newby v. Gunn*, 74 Tex. 455, 12 S. W. 67.

The detention in a hotel, five days after arrest, without a warrant, for a felony, is unreasonable, and this is not a question for the jury, but one for the court. *Cochran v. Toher*, 14 Minn. 385, Gil. 293.

But in *Ralts v. Green*, 13 Ohio C. C. 455, *infra*, it was held that the question of reasonableness of detention was a question for the jury.

An officer arresting a party on a charge of felony is liable in false imprisonment where he uses his authority to frighten the prisoner into a settlement, and extort payment. *Bergeron v. Peyton*, 106 Wis. 377, 82 N. W. 201; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702. In the latter case the court said: "Had the constable performed his duty by taking the plaintiff before a magistrate he would have been justified, but having lent himself, according to the finding of the jury, to the unholy purpose of oppression, he lost the protection which the law would give him in the discharge of his official duty, and became a trespasser, and so did David Mix, who acted in concert with him."

A person decoyed into a city by false pretenses, illegally arrested, and unlawfully confined by detective officers to make him confess by "sweat box" is entitled to recover heavy

damages. *Pinkerton v. Martin*, 82 Ill. App. 589.

A general superintendent of the police department, directing the officer to take the prisoner back and lock him up for passing liquor to a prisoner, was held liable for assault and battery and false imprisonment where the plaintiff was imprisoned eight days, as it was the duty of defendant to have ordered plaintiff to be taken immediately before a magistrate. *Green v. Kennedy*, 48 N. Y. 653, Affirming 46 Barb. 16.

And where a person was arrested wrongfully without a warrant on a charge of felony by two police officers, and afterwards the marshal, believing him innocent, and the assistant marshal, sent him to the railroad station in care of another officer to be released on the train just as it started, it was held that the five officers were jointly liable for the imprisonment between the lockup and the train. *Bath v. Metcalf*, 145 Mass. 274, 14 N. E. 133. The court said: "As we have said, we think that, even if the arrest had been lawful, the officers would have had no right to prolong the imprisonment beyond the doors of the lockup for the purpose of sending the plaintiff out of town, and would have been liable, whether they had a right to release him without bringing him before a magistrate or not."

In *Gordon v. Denison*, 24 Ont. Rep. 576, the court was evenly divided, and a recovery against a police inspector affirmed, where a witness was arrested on a warrant requiring his presence, and, on being brought before the inspector, was searched and imprisoned for about twenty minutes, and was then brought before the magistrate, who released him on his own recognizance. On appeal (22 Ont. App. Rep. 315), this was reversed on the ground that judgment could not be entered upon answer to questions submitted to a jury, and that a finding in answer to a question of a certain amount of damages was not equivalent to a general verdict which must be given. The dissenting opinion, MacLennan, J. A., discusses the right of police to search and handcuff witnesses.

If the bailiff by precept of the sheriff arrests a man, and does not carry him to the sheriff, false imprisonment lies. *Kingsmill, J.*, 21 Hen. VII. 22.

A sheriff arresting a party under a state warrant, and refusing without a valid excuse a recognizance for the appearance at court of the accused, will be liable for wrongful imprisonment. *Berrer v. Moorhead*, 22 Neb. 687, 36 N. W. 118.

But a constable arresting a party on a justice's warrant has a right to detain the defendant for a reasonable time while making a bona fide effort to find a justice to hear the cause, and the warrant is not spent if the justice declares that he is unable to try the cause, and directs that the cause shall be tried before another justice. *Arnold v. Steeves*, 10 Wend. 514. In this case the court said: "The constable had a right to detain the defendant for a reasonable time, while making a bona fide effort to find a magistrate to hear the cause. There was not at that time any precise limitation to the period for which he might detain him; the Revised Statutes have since fixed it at twelve hours."

An arrest and detention without a warrant until the next day was held not unreasonable, under Ga. Code, § 4628, directing the officer in case of an arrest without warrant to bring the offender without unreasonable delay before the officer authorized to issue a warrant. *Johnson v. Americus*, 46 Ga. 80.

And where a warrant commanded a sheriff to have the plaintiff before the county court forthwith; it was held that the sheriff might detain

the party a reasonable time until he could ascertain whether it was possible to deliver him into court, if the court was not in session at the time of the arrest. *Kent v. Miles*, 65 Vt. 582, 27 Atl. 194.

And where a constable had a warrant to arrest the father of a bastard, and after the arrest the accused made his escape and the writ was returned, and subsequently the prisoner was captured and the officer held him twenty-four hours, a warrant not being in his hands, and during that time the affair was settled, it was held that the constable was not liable in false imprisonment, as it was his duty to have held the accused and to have delivered him to the court. *Strong v. Ives*, 1 Root, 388.

Although a constable was liable for false imprisonment, where, after lawfully arresting a person for violating proper rules regulating the use of a public bridge, he was held in custody for refusing to pay a penalty instead of taking him before a justice, it was held that, if the party arrested voluntarily paid the penalty, it would not be false imprisonment. *Twilley v. Perkins*, 77 Md. 252, 19 L. B. A. 632, 26 Atl. 286.

A chief of police, having reasonable cause to believe that a felony had been committed by the plaintiff, ordered her detention from Saturday night until Monday morning in order that the complaining witness and prosecuting attorney might file a complaint. He was suddenly called to suppress a riot which demanded his immediate attention, and was so engaged all that week, and in the meantime the party arrested was released on habeas corpus. It was held to be a question for the jury whether he had been guilty of unreasonable delay in making the affidavits charging a crime, or of any unreasonable delay in the omission of any duty which he was called upon to perform in regard to this matter, and it was error for the trial court to charge that he was guilty of unreasonable delay. *Raitz v. Green*, 13 Ohio C. C. 455. But see *Cochran v. Toher*, 14 Minn. 385, Gil. 293.

In an action against a sheriff for false imprisonment under statute 11 Geo. IV. and 1 Wm. IV., chap. 36, § 15, rule 5, providing that the plaintiff shall bring the defendant in chancery in actual custody under process of contempt to the bar in thirty days, and if the last of such thirty days, "be out of term then in the first four days of the ensuing term; otherwise the sheriff, etc., shall discharge defendant,"—the sheriff was held not liable for false imprisonment in trespass. It was also held that the action should have been in case, and if the sheriff held him over time he was not a trespasser *ab initio*; and that no action will lie for want of notice to the defendant of the facts bringing the case within the rule. *Smith v. Egginton*, 7 Ad. & El. 167, 2 Nev. & P. 143, 6 Dowl. P. C. 38, 6 L. J. K. B. 206.

For improper detention under an illegal ordinance, see *Burke v. Bell*, 36 Me. 317; *Judson v. Beardon*, 16 Minn. 481, Gil. 387, *supra*, II. d. 2.

2. Place of detention or delivery.

An officer committing the prisoner in the wrong county, or delivering him to the wrong court, or failing to comply with the statutory provisions regulating detention and delivery, will be liable in damages. It appears that the prisoner may waive his rights by requesting the detention to be made at a certain place. The officer may be justified in changing the place of detention, where the safety of the prisoner from mob violence requires such removal.

A constable is not protected in arresting a debtor under an execution regular upon its face, where he commits the debtor in the coun-

ty commanded in the execution, but not in the one in which the arrest is made, under Vt. Gen. Stat. chap. 33, § 59, providing that whenever any officer is required by law to commit any person to jail such commitment should be made in the county in which the arrest shall be made, unless otherwise directed by law. *Clayton v. Scott*, 45 Vt. 380.

An officer is liable in trespass where he arrests a party on a criminal warrant, and takes him before a justice of the peace for examination or trial, under Mass. Stat. 1850, chap. 314, taking away the jurisdiction of the justice of the peace in the examination and trial of persons charged with criminal offenses, and transferring the same to trial justices, limiting the authority of justices of the peace to receive complaints and issue warrants returnable before any trial justice. *Stetson v. Packer*, 7 Cush. 562.

A deputy sheriff arresting a man for drunkenness and taking him before a justice in an adjoining town is a trespasser, and liable for assault and false imprisonment, under Mass. Stat. 1869, chap. 415, § 42, providing that the officer shall take the person arrested before some justice of the peace or police court in the town where the arrest is made. *Papineau v. Bacon*, 110 Mass. 319.

And under Ga. Code, § 4721, making it the duty of a sheriff arresting under a magistrate's warrant in another county to carry the accused to the county in which the offense is alleged to have been committed, the sheriff will be liable if he detains the accused in jail until the arrival of an officer of the county in which the offense is alleged to have been committed. *Lamb v. Dillard*, 94 Ga. 206, 21 S. E. 463.

But a constable having a writ of attachment commanding him for want of goods to attach the plaintiff's body, is not liable in false imprisonment for not committing him to jail in the county in which the arrest is made, if the plaintiff solicits and requests that the detention be made in the county where the writ is returnable, as the plaintiff may waive his right to be committed in the county in which the arrest is made. *Ellis v. Cleveland*, 54 Vt. 437.

And a sheriff is not liable in an action of trespass for arresting a party under a capias pro fine in a county other than that from which it was issued, and taking him to the jail of the county whence it issued, as Ky. Gen. Stat. chap. 92, § 18, art. 11, providing that upon a judgment in the name and for the use of the commonwealth, a capias pro fine may issue until the judgment be satisfied, indicates that he should be placed in the jail of the county in which the judgment was rendered. *Long v. Wood*, 78 Ky. 392.

An officer arresting an absconding debtor upon a capias may place him in the county jail for safe keeping until he furnishes bail or is taken upon proper request before a magistrate signing the writ for examination in discharge, but the custody cannot be transferred to the jailor until commitment on the writ, under Vt. Gen. Stat. chap. 33, § 78, providing that the defendant in an attachment at the time of service on his body may notify the officer that he will appear for examination, and § 80, making it the duty of the officer to convey the debtor before the authority designated. Pending this application the officer has no right to commit to jail. *Kenerson v. Bacon*, 41 Vt. 573. In this case it was further held that the refusal of the sheriff to comply with the request makes him a trespasser *ab initio*.

An officer is not liable who arrests a prisoner and carries him to the magistrate of another district on account of the danger of a riot. *Wiggins v. Norton*, 83 Ga. 148, 9 S. E. 607. In 51 L. R. A.

this case the court said: "It is the duty of an arresting officer, when he arrests a prisoner, to carry him without delay before some officer authorized to inquire into the accusation; and if he wilfully or negligently fails to do this, and detains the prisoner for an unreasonable length of time without carrying him before the magistrate, he would be guilty of false imprisonment, and would be liable to damages therefor."

See also III. b, *supra*, *Place of arrest*.

IV. Arrest of wrong party, or by wrong name.

a. Name unknown.

A warrant describing the defendant by a fictitious name will not enable the officer executing the same to justify the arrest in the absence of statutory provisions to that effect.

In an action of trespass against a sheriff for false imprisonment he cannot justify that the plaintiff was arrested under a warrant describing him as "a person whose name is unknown, but whose person is well known, of Vassalboro in the county of Kennebec." *Harwood v. Siphers*, 70 Me. 464.

And an officer cannot justify an arrest of the plaintiff as "John Doe," although he is the person intended to be arrested, unless it is shown that he was known by one name as well as the other. *Mead v. Haws*, 7 Cow. 332. In this case the plaintiff, Levi Mead, while carrying off a cannon, was arrested under a warrant to "take the body of John Doe, the person carrying off the cannon."

A warrant against John Doe for a felony does not protect the constable in arresting any person other than John Doe, although it is subsequently altered by inserting the name of the proper party. *Holley v. Mix*, 8 Wend. 350, 20 Am. Dec. 702. In this case it was said that after the warrant had been corrected it was a justification for all subsequent regular acts of all concerned in its execution.

Since this case a statute was passed authorizing warrants to be issued in fictitious names, if the right name of the accused is unknown. See *Gurnsey v. Lovell*, 9 Wend. 319, *infra*.

Where a United States marshal made an arrest under a warrant, of the right person designated by a fictitious name, it was held that he was not liable in false imprisonment, under U. S. Rev. Stat. § 1014, conferring power on United States commissioners to issue warrants, and Arizona Comp. Laws, chap. 2, § 89. *Williams v. Tidball* (Ariz.) 8 Pac. 351. In this case the United States commissioner who issued the warrant did not reside in the judicial district where the offense was committed. This statute was construed to confer upon the commissioners jurisdiction coextensive with the limits of the territory or state. Ariz. Rev. Stat., Penal Code, § 1274, provides that if the defendant's name is unknown he may be designated by any name.

b. Arresting wrong man.

An officer arresting the wrong person will be liable in damages therefor. The mistake of the officer will not be a justification, but may reduce the damages and show want of malice. It seems that the only difference in making an arrest of an innocent person on reasonable suspicion of having committed a felony, and arresting an innocent person on reasonable suspicion of being the guilty party, is that, in the first case the officer takes the man that he is after and in the other case he takes a different person. But the liability seems to be about the same. He is liable if he fails to take proper precaution to ascertain the right person, or if he refuses information offered that would have

disclosed his mistake, or if he detains the person an undue length of time without taking proper steps to establish his identity.

An officer making an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances only act, if he acts at all, upon photograph or description or both, should be excused, if he acts honestly and prudently, making such inquiry and examination as the circumstances of each particular case afford him an opportunity to make. He is bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent man. An officer is not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph, if there are within easy reach means of identification. *Flier v. Smith*, 96 Mich. 347, 55 N. W. 999.

And the sheriff and his sureties were held liable for placing a warrant in the hands of a constable, and causing the arrest of, and refusing to release, the wrong person by the same name answering the description of the accused where an investigation would have disclosed the fact of his innocence. *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915. In this case the court said: "There were no facts surrounding the case which tended to make it probable that he was the person named in the writ, but every circumstance except the similarity of name and description indicated that he was not."

An officer is liable in trespass and false imprisonment where he arrests the wrong person by mistake. *Formwalt v. Hylton*, 66 Tex. 288, 1 S. W. 376. In this case the court said "that such mistake could be considered in mitigation of damages, and on the question of malice, but that it would not justify the imprisonment, unless the mistake was caused or contributed to by the plaintiff's words or acts." The defense was that plaintiff had been arrested through mistake for one of his sons for whom the defendant had warrants, and that it was necessary to arrest him to keep him from notifying other parties for whom the defendant also held warrants, and thereby enable them to escape, and that as soon as the mistake was discovered plaintiff was released, and his sons were guilty, which was known to the plaintiff. The court said: "In the case before this court, no person engaged in the arrest of the plaintiff is shown to have entertained any suspicion whatsoever against him."

And where it is the duty of the sheriff to arrest a man on a capias from another county, and deliver him to the county from which the capias issued, if he arrests the wrong man and delivers him to a deputy from the other county, he will be liable for the wrongful detention of such deputy, as he makes him his agent in transferring the prisoner to the other county. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772. In this case the sheriff was informed by the plaintiff that he had never been in the county of the crime, and gave reference to several reliable persons accessible for information, and the sheriff declined to investigate whether he had the right man. The court said: "The defendants had time and opportunity to investigate as to the legality and reasonable grounds of holding appellant as a felon. They failed to investigate, or, if they investigated, they disregarded the plain, evident truth, and still on speculation held him." The plaintiff was of the same name as the party for whom the warrant for murder had been issued, and, while he had never been in the county of the crime, had frequently boasted that he had killed a negro.

And a sheriff was held liable for false imprisonment where his deputy arrested the wrong person, and kept him confined for some nine

days under a warrant for the arrest of another person. *Ryburn v. Moore*, 72 Tex. 85, 10 S. W. 393. In this case the court said: "He may have been a notorious offender against the law, but neither the law nor its officers could call him to account for the crimes of another. Nor do the scales of justice weigh against him his offenses against others when vindicating his own rights against their invasion by the defendant." The general liability of a sheriff seems to have been admitted, and the only point on appeal was the sufficiency of the affidavit of poverty used instead of bond for cost, and the refusal of the trial court to allow defendant to prove the general bad character of plaintiff.

Under Tex. Rev. Stat. art. 4521, providing that the sheriff shall be responsible for the official acts of his deputies, a sheriff is liable for false imprisonment committed by his deputy in arresting the wrong person through mistake on a capias. *Hays v. Creary*, 80 Tex. 445. In this case the court said: "It seems that the defense relied upon was that the officers had arrested the wrong person through an honest mistake. While evidence of such mistake is admissible in mitigation of damages, and as disproving malice, ordinarily it is not a defense that will defeat the action. . . . After he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth." The sheriff himself examined and recommitted the plaintiff to jail.

In *Aaron v. Alexander*, 3 Campb. 35, which was an action of trespass and false imprisonment against the officers and constables keeping the watch house for arresting plaintiff by mistake as to the identity of the individual named in the warrant, a verdict was rendered against the officers arresting the plaintiff. The main question in this case seems to have been as to the liability of the prison keeper, and as the acts principally complained of did not relate to him a verdict was directed in his favor.

A sheriff arresting the wrong person without a warrant on the ground that he is an escaped convict, and detaining him longer than a reasonable time for suing out a warrant, handcuffing him, carrying him out of the county, and incarcerating him for days without a warrant, is liable for false imprisonment, if not for kidnapping, and \$25 is no compensation for the injury. *Potter v. Swindle*, 77 Ga. 419, 3 S. E. 94. The court said: "It is plain that, although this arrest may have been justifiable, the sheriff deliberately, and apparently thoughtfully, declined to observe the law, which commanded him, if not expressly, by clear implication, to obtain a warrant within a reasonable time."

A sheriff requested by letter from the authorities of another county to arrest a person named for murder is liable in damages for arresting the wrong person. If the sheriff is honestly mistaken it will mitigate the damages, but will not defeat a recovery. *Mitchell v. Malone*, 77 Ga. 301. In this case the sheriff was informed by persons who had known plaintiff many years that his name was not John but William, and that the sheriff had made a mistake and was arresting the wrong person.

The good faith of an officer in arresting, on a warrant for a felony, the wrong party, will not exempt the officer from liability for actual damages. *Holmes v. Blyler*, 80 Iowa, 365, 45 N. W. 756. In this case it was held that evidence tending to show reasonable grounds for an arrest without a warrant for a felony was properly excluded, as the officer claimed to have been acting under the warrant. The court said:

"That he might have made the arrest by authority other than that under which he claimed to act, is wholly immaterial."

In *Wells v. Johnston*, 52 La. Ann. 713, 27 So. 185, the supreme court set aside a verdict for defendant, and reversed the judgment, and rendered a judgment for \$300 for false imprisonment, where the sheriff, without process, arrested the wrong party on a charge of murder at the request of a sheriff from another state. The court said: "We are of the opinion that there was no reasonable ground in this case for summarily arresting and imprisoning the plaintiff, at the instance of Broadway and upon the mere suspicion which he entertained as to the plaintiff and Ben Franklin being one and the same person. He confessedly had never seen him, and even if he had knowledge of any facts on which such a suspicion rested, they do not seem to have been communicated to either the sheriff or his deputy. The whole matter seems to have been recklessly turned over to the judgment of Broadway, upon whose ood the deputy sheriff acted."

And an officer was held liable in false imprisonment for arresting the wrong person, although he acknowledged to the officer that he was the party named in the writ. *Cote v. Lighworth*, F. Moore, 457; *Dunston v. Pater-son*, 2 C. B. N. S. 495, 26 L. J. C. P. N. S. 267, 3 Jur. N. S. 982.

In the latter case it was held that although the plaintiff might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party.

In *Akin v. Newell*, 32 Ark. 605, it was said: "An officer, without a particle of malice or ill-will, may arrest by mistake an innocent man and imprison him as a supposed felon, for which he may be sued for false imprisonment."

"If I bring a writ of debt against J. A., on which a *capias* issues, if the sheriff, by colour of that writ, takes a man named B. C., he (B. C.) shall have a writ of false imprisonment against the sheriff, and not against me; but if I come to the sheriff with that writ, and inform him that B. C. is the person against whom the writ is sued, and by reason of this assertion the sheriff takes him, he may have a writ of false imprisonment against the sheriff and me, or against the sheriff alone, per *Hankford* (J. of C. P.) to which *Thirling* (C. J. of C. P.) agreed, and said that that was law. M. 13 H. IV. fo. 2, pl. 5." *Hoye v. Bush*, 1 Mann. & G. 775, note, 2 Scott N. R. 86, 1 Drinkw. 15, 10 L. J. M. C. N. S. 168.

But the satisfaction of a judgment against the plaintiff in a writ for causing the arrest of a wrong person is a bar to a subsequent action against the officer who made the arrest. *Luce v. Dexter*, 135 Mass. 23.

c. Arresting right man under wrong name.

In the absence of a statute, an officer cannot justify under a warrant an arrest of plaintiff by the wrong name, although he is the person intended to be arrested, unless it is shown that he was known by one name as well as the other. *Gurnsey v. Lovell*, 9 Wend. 319; *Mead v. Haws*, 7 Cow. 332; *Griswold v. Sedgwick*, 6 Cow. 456, 1 Wend. 126; *Shadgett v. Clipson*, 8 East, 328; *Hoye v. Bush*, 1 Mann. & G. 775, 2 Scott N. R. 86, 1 Drinkw. 15, 10 L. J. M. C. N. S. 168; *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752.

The case of *Gurnsey v. Lovell*, 9 Wend. 319, was prior to N. Y. act April 20, 1830 (Sess. Laws 1830, p. 395, § 282), providing that when the name of any defendant shall not be known §1 L. R. A.

to the plaintiff he may be described in the summons or warrant by a fictitious name.

In *Griswold v. Sedgwick*, 6 Cow. 456, 1 Wend. 126, the arrest was by a United States marshal on an order in a civil case commanding him to take the body of "S. S. G." The clerk by mistake inserted the wrong name when it should have been "D. S. G."

In *Hoye v. Bush*, 1 Mann. & G. 775, 2 Scott N. R. 86, 1 Drinkw. 15, 10 L. J. M. C. N. S. 168, it was held that the demand of a perusal and copy of the warrant was unnecessary, under 24 Geo. II. chap. 44, § 6, providing that no action shall be brought against any constable or other officer for anything done in obedience to any warrant until demand hath been made of the perusal and copy of such warrant. The court said that in this case the defendant was not acting in obedience to the warrant.

In *Newburn v. Durham*, 10 Tex. Civ. App. 655, 32 S. W. 112, 88 Tex. 288, 31 S. W. 195, where a robbery occurred fifty days prior to an arrest, and the plaintiff was pointed out as the guilty party a day before the arrest, a warrant procured by the marshal for his arrest issued in the wrong name, and afterwards altered by inserting the true name, did not protect the marshal. It was held that the marshal could not justify under Tex. Code Crim. Proc. art. 229, providing that a peace officer, upon the representation of a credible person that a felony has been committed and the offender is about to escape, may without a warrant pursue and arrest the accused. The defendant could not justify, as there was no evidence showing that he was informed by anyone that the plaintiff was about to escape.

And a Federal marshal was held liable for arresting a person with a name differing from that in the warrant, under Texas Penal Code, arts. 233, 236, and 247, providing that a warrant must specify the name of the person whose arrest is ordered if it be known, and, if not known, then some reasonably definite description must be given of him, although the party arrested in this case was the man for whose arrest the commissioner issued the warrant. *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752. In this case the court said: "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, this is only manslaughter in the person whose liberty is invaded."

If an action be brought against J. N., son of W. N., and the sheriff by *capias* arrests J. N., son of I. N., an action of false imprisonment lies, though the party who is arrested be the same person against whom the sheriff has cause of action. 10 Edw. IV. 12.

In *Wilks v. Lorck*, 2 Taunt. 400, it was said: "Cases go the length of showing that if the sheriff arrests a man who is named in a writ by another name than his true name the sheriff will be a trespasser, and is liable to an action of false imprisonment, and perhaps the plaintiff is so likewise; and they are equally liable whether the court summarily interfere or not."

In *Scandover v. Warne*, 2 Campb. 270, it was said: "It was lately decided that a justification in an action for false imprisonment under a writ issued against the plaintiff by a wrong name could not be supported." Citing *Shadgett v. Clipson*, 8 East, 328.

d. Arrest after judgment taken against wrong party.

In some cases the sheriff was held not liable in false imprisonment for making an arrest

where a party allowed judgment to be taken against himself by a wrong name, and upon which an order of arrest issued. But on this the cases do not all agree.

Where a judgment was taken against John O'S., sued by the name of John S., a name by which he was commonly known, on a note which the plaintiff in that case knew was not made by him, and afterwards execution was delivered to an officer, the latter was held not liable in an action for assault and false imprisonment, although he knew before making the arrest that O'S. was not the person who signed the note. *O'Shaughnessy v. Baxter*, 121 Mass. 515. In this case the court said: "The fact that this plaintiff was commonly known by the name by which he was sued and arrested distinguishes the case from those in which one man has been arrested upon a writ against another of a different name. See *Cole v. Hindson*, 6 T. R. 234; *Finch v. Cocken*, 5 Tyrw. 774, 785, 3 Dowl. P. C. 678, 686, 2 Crompt. M. & R. 196, 1 Gale, 130; *Grissold v. Sedgwick*, 1 Wend. 126, 132; *Langmaid v. Puffer*, 7 Gray, 378;" and further: "The officer, acting in good faith, had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and to assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned upon the execution."

And when an action of trespass and false imprisonment was brought by Archibald —, and the defendant justified under a ca. sa. on a judgment against Arthur —, and averred that the plaintiff in this action was the same person who was sued by the name of Arthur, it was held to be a good plea. *Crawford v. Satchwell*, 2 Strange, 1218. This was on the ground that the defendant missed his time for taking advantage of the misnomer, which should have been by pleading it in the first action. The court said: "In the case of a bond given in a wrong name, he must be sued by that wrong name, and the execution must pursue it."

And in an action against a sheriff for false imprisonment for taking the party on a ca. sa. it was held that where a party was sued by a wrong name, and suffered judgment to go against him, without attempting to rectify the mistake, he could not in an action against the sheriff complain of an execution issued against him by that name. *Fisher v. Magnay*, 6 Scott N. R. 588, 1 Dowl. & L. 40, 5 Mann. & G. 779, 12 L. J. C. P. N. S. 276.

But a sheriff was held liable in trespass where the summons against A was served on B, who told the person serving the same that his name was B and not A, and that he was not the person against whom the writ issued, and after judgment by default he was taken on a writ of ca. sa. *Kelly v. Lawrence*, 3 Hurlst & C. 1, 33 L. J. Exch. N. S. 197, 10 Jur. N. S. 636, 10 L. T. N. S. 195, 12 Week. Rep. 413.

The case of *Fisher v. Magnay*, 6 Scott N. R. 588, 1 Dowl. & L. 40, 5 Mann. & G. 779, 12 L. J. C. P. N. S. 276, was cited by counsel, but not noticed in the opinion. The judgment was based on *Walley v. McConnell*, 13 Q. B. 903, 19 L. J. Q. B. N. S. 162, 14 Jur. 193.

In this latter case the action was against the party who caused the arrest. The original summons and capias against J. were served on W., and judgment taken against J., and the plea and trespass that the defendant issued the summons against the plaintiff was not true. The court said: "Whatever force there may be in the argument used as to the proper course to be pursued by one who is wrongfully served

with process in an action, not being the intended defendant, the allegation in question is material, indeed it is the foundation of the plea, and, the foundation failing, the superstructure falls also, and the distinction between mesne process and final process does not arise in this case, as *Walley* never became the defendant, and never held himself out as Ireland. Upon this ground we distinguish the present case from that of *Fisher v. Magnay*, as we gather that the plaintiff *Fisher* had, notwithstanding the misnomer, assumed to be the defendant in the first action; and if a defendant so acts as to be concluded from denying that he is the defendant, final process against him may be valid, although not against him by his real name, but by the name that he must be taken to have adopted."

V. Joinder.

The officer and magistrate sued in trespass for a wrongful arrest and joining in a plea of justification must plead a defense good as to both parties, or it will not be good as to either. *Pouik v. Slocum*, 3 Blackf. 421.

In *Smith v. Bouchier*, 2 Strange, 993, 2 Barnard, K. B. 331, Cun. 89, 127, Cas. t. Hardw. 62, Kelynge, 144, in an action of false imprisonment, it was claimed under act of Parliament, 13 Eliz. that by custom the plaintiff making oath that he "believes" the defendant will run away, the judge may award the warrant to arrest him. This defense was held insufficient where the oath was "he suspects," and the court said, "and though some of the defendants, as the officer and gaoler, might have been excused if they had justified . . . [alone] . . . that by joining with them as to whom the process was no justification, they have forfeited their justification."

In *Andrews v. Marria*, 1 Q. B. 3, the court said: "*Morse v. James*, Willes, 122, was cited; but in that case the officers of the court chose to join in pleading with the party, and set out the whole proceedings; having done that, unnecessarily for them, they were, of course, bound by the defects apparent on their plea. *Phillips v. Biron*, 1 Strange, 509, and *Smith v. Bouchier*, 2 Strange, 993, are authorities to show that, where an officer for whom the writ or warrant alone would have been a justification joins in pleading with the party for whom it would not, and who can only defend himself on the validity of the judgment or proceeding, he foregoes the benefit of the warrant. *Morse v. James* is, therefore, not in contradiction to the general course of authorities; and, as the subject-matter of the suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued, we think *Whitham* was well defended by it, no such point having been made as in the two cases cited from *Strange*, to deprive him of its protection."

In an action against a city and city marshal jointly for arresting and confining the prisoner in a calaboose, where the action falls as to the city it must fail as to the constable, and a separate action against the actual misdoer only, or against each, must be brought. *Blake v. Pontiac*, 49 Ill. App. 543.

VI. Liability on official bond.

The general rule is that an action may be maintained on the officer's bond for trespass and false imprisonment in making an unlawful arrest, if the wrongful acts are done by virtue of his office. There is a conflict of authority as to the liability on the bond for wrongful acts done by color of his office. In some cases the liability is controlled by statute.

In the case of *LEGER v. WARREN* a recovery

was had upon an officer's bond for false imprisonment, where the officers failed to obtain a warrant and take the accused before the magistrate within a reasonable time. The bond provided: "Shall pay any and all damages that may be adjudged against him by any tribunal for the illegal arrest, imprisonment, or injury by him of any person while he shall hold said office." No objection seems to have been made to the joinder of the sureties in the action.

In *Hodgson v. Millward*, 3 Grant Cas. 418, it was said that an officer acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under color of authority, whether his superior transgresses his power or the warrant be irregular or not.

"The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is this: Acts done *virtute officii* are when they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." (Pratt, J., dissenting opinion.) *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 173.

An action may be maintained upon the official bond of a sheriff for arresting and injuring the wrong party, where such acts are done *virtute officii*. *Huffman v. Koppelkom*, 8 Neb. 344, 12 Neb. 95, 10 N. W. 577. The petition in this case stated that such sheriff, acting under said writ and under color of his said office, did carelessly, unfaithfully, forcibly, and wrongfully, unlawfully and violently seize, arrest, and lay hold of plaintiff, and then and there did shoot, wound, and injure plaintiff. The words "and under color of his said office" were rejected as surplusage.

A sheriff's bond is liable for official acts done within his state by the sheriff after he has fraudulently brought a party from another state under a warrant, as the acts that occur within the state are done by virtue of his office. *Kendall v. Aleshire*, 28 Neb. 707, 45 N. W. 167.

Under N. C. Code, § 1883, providing that every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue and under color of his office, an action will lie on a sheriff's bond for an arrest and imprisonment, where the complaint alleges that it was done under color of office and "without legal process or color thereof," and "was in wanton and reckless disregard of the rights of the relator." *State ex rel. Warren v. Boyd*, 120 N. C. 56, 28 S. E. 700.

The wrongful shooting by a deputy sheriff of a prisoner attempting to escape from an arrest for a misdemeanor is an official act which creates a liability on the sheriff's bond under Miss. Code, § 4144, providing that the sheriff and his sureties shall be liable for any misconduct of his deputy. *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 23 So. 388.

And in *Clancy v. Kenworthy*, 74 Iowa, 740, 85 N. W. 427, it was held that an action could be maintained upon a constable's bond for unlawfully, maliciously, and oppressively arresting, imprisoning, and prosecuting the plaintiff, where the bond was to "faithfully and impartially, without favor, fraud, or oppression, discharge all the duties . . . of his office," although the acts were instigated by private malice, and not connected with the duties of the 51 L. R. A.

constable. In this case the court said: "If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

And a marshal and his sureties were held liable in damages for arresting a person for a felony without reasonable grounds for such arrest. *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114. In this case the court said: "It is suggested in the argument for appellees that no breach of the conditions of the bond sued upon was shown, and that, therefore, the court properly directed a verdict for defendants. This contention is fully answered in *Clancy v. Kenworthy*, 74 Iowa, 743, 85 N. W. 427, wherein the bond was conditioned the same as this. It was therein insisted that, as the constable had no lawful authority to arrest the plaintiff, his act was not in the line of his duty, and not a breach of the conditions of the bond. It was held that the arrest, being in the line of his official duty, though illegal because in excess of the duty, was a breach of the conditions of his bond. See also *Strunk v. Ocheltree*, 11 Iowa, 158; *Charles v. Haskins*, 11 Iowa, 329."

And the sureties on an official bond of a constable were held liable for illegal acts on his part while engaged in making an arrest, and for an unnecessary and wilful assault. *Cash v. People*, 32 Ill. App. 252. In this case the declaration alleged that the constable arrested plaintiff for violating one of the village ordinances, and that, instead of taking him to the place of trial, he unnecessarily, brutally, and wilfully assaulted and beat him.

In *Spencer v. Moore*, 19 N. C. (2 Dev. & B. L.) 264, it was held that a sheriff liable in false imprisonment could maintain an action upon his deputy's bond covenanting to refrain from all acts that shall be by law forbidden, so that the said sheriff shall not, by any act or omission of said deputy, become liable to be complained of or sued, where the deputy suffered an escape, and afterwards went to another county and arrested the party. In this case the court said that the deputy was acting by color of his office when he went to N. county to return the writ, and then believed that he had the power after what had happened to arrest J. anywhere before the return day of the writ, and the surrender of the debtor and the return of record by the deputy in the name of the high sheriff could not be disowned by him.

And in *State ex rel. Meriwether v. Walford*, 11 Ind. App. 392, 39 N. E. 162, it was held that an action will lie on a constable's bond for wrongfully killing a party in executing a warrant of arrest. In this case the court said: "In this state, however, it is settled that a public officer and his sureties are liable upon his official bond for wrongful acts done by color of his office, as well as by virtue of his office."

In *Mitchell v. Malone*, 77 Ga. 301, it was held that the sheriff and his sureties on his bond were liable in damages for false imprisonment where the sheriff was mistaken as to the identity of the person, and arrested the wrong man without a warrant.

And the same was held in *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915, where the arrest was made under a warrant.

In *Thomas v. Kinkade*, 53 Ark. 502, 15 L. R. A. 558, 18 S. W. 854, it was held that an action

would lie on a constable's bond for damages for wrongfully killing a party arrested for a misdemeanor and killed to prevent his escape. The court does not discuss the question of liability of bondsmen.

And in *Newburn v. Durham*, 10 Tex. Civ. App. 655, 32 S. W. 112, the sureties on the official bond of a city marshal were held liable for an illegal arrest made by the marshal. In this case fifty days after a felony was committed the marshal procured a warrant for the arrest of A. C., and before he made the arrest changed the warrant to B. C. and arrested B. C. It was held that, under Tex. Crim. Code, art. 229, providing that on satisfactory proof to a peace officer upon the representation of a credible person that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without a warrant, arrest the person accused. The marshal could not be heard to say he had not time to procure a warrant.

In *Finnell v. Bohannon*, 19 Ky. L. Rep. 1587, 44 S. W. 94, which was an action on a policeman's bond for an assault committed while making an arrest, it was held that the officer had the right to use all reasonable and necessary force to compel the party arrested to submit. Ky. Stat. § 3497, provides that every policeman shall give a bond in the sum of \$1,000 for the faithful performance of the duties of his office, and for any unlawful arrest, or the unnecessary or cruel beating or assault in making an arrest, he and his bondsmen shall be liable to the person injured, on said bond.

But in *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157, it was held that an action on a marshal's bond for false imprisonment would not lie where the averment was that the marshal and his alleged deputy were acting illegally but under color of office, and did not show that any writ had issued to either of them, or that the offense had been committed against the Federal laws, or that they claimed such to be the case. It was further held that an action would not lie upon a marshal's bond for the acts of his special election deputies where he exercised due care in their selection.

And in *Chandler v. Rutherford*, 101 Fed. Rep. 774, it was held that no liability attached to a marshal and the sureties on his bond for the acts of his deputy in shooting the wrong party, against whom he had no warrant, and where he had no reasonable grounds to believe that such party had committed felony, as such acts were entirely outside of the line of his duty and authority.

An action could not be maintained upon the official bond of the chief of police "for the faithful performance of his duties" where the petition charged, "without warrant or authority of law as chief of police, and, by virtue of, and under color of his office, wrongfully and maliciously arrested the relator." State use of *Goodin v. McDonough*, 9 Mo. App. 63. In this case the court said: "Here, assuming what is stated to be true, the defendant, not in the manner of doing what it was his duty to do, but in taking any action, went outside of and beyond his duties. The act done was not within the scope of the bond. Thus, though it was done *colore officii*, the sureties are not liable."

And in an action upon the official bond of a marshal charging false imprisonment and cruelty, it was held that the action was in form *ex contractu* but in effect *ex delicto* charging upon contract and claiming damages for a tort, and could not be maintained. *Clinton v. Nelson*, 2 Utah, 284. In this case the court said: "Sureties on official bonds may be guilty of aiding or participating in torts, but the simple fact that they are sureties on the bond does not show

this. Here there is nothing to show that the sureties knew anything whatever of this alleged tort, and of course they could neither aid nor abet the trespass to the person of the appellant."

And a sheriff was held not liable on his bond for acts done in another state by misrepresenting that he had a warrant, and for bringing the party into this state. *Kendall v. Aleashire*, 28 Neb. 707, 45 N. W. 187.

In *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749, it was held that an action could not be maintained upon a sheriff's bond for the wrongful act of his deputy, who unlawfully killed another in attempting to escape from arrest, under Tex. Rev. Stat. art. 2899, subd. 2, giving a cause of action where the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another. It was held that this section of the statute did not render ordinary persons liable for the act of their agents, that the mention of "agents" in subd. 1, and the omission of "agents" in subd. 2, indicated that no right of action was given against principals for the tort of their agents.

VII. Arresting for one offense and justifying for another.

An arrest cannot be made for one purpose and justified for another. *Malcolmson v. Gibbons*, 56 Mich. 459, 23 N. W. 186; *Holmes v. Blyler*, 80 Iowa, 365, 45 N. W. 756; *Elwell v. Reynolds*, 6 Kan. App. 545, 51 Pac. 578; *Boaz v. Tate*, 43 Ind. 60; *Snead v. Bonnell*, 49 App. Div. 330, 63 N. Y. Supp. 553.

In *Snead v. Bonnell*, 49 App. Div. 330, 63 N. Y. Supp. 553, it was said: "The justification cannot be separated from the cause assigned for the arrest, and applied to an unassigned cause. The right to arrest without a warrant depends upon the relation of the attendant circumstances to the specific accusation. There can be no general right to arrest a citizen for an undisclosed offense. The statute requires the officer to inform the arrested person of his authority and the cause of the arrest, except when the person arrested is in the actual commission of a crime. Code Crim. Proc. § 180. The latter exception relates to an open and visible crime, or to one brought to light at the time of the arrest. Where there is no overt act of criminality, or visible offense committed in the immediate presence of the officer, he must inform the arrested person of the cause of the arrest. He cannot arrest a man for one cause, and, when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of police officers, and a dangerous extension of their sufficiently great powers. They cannot be too firmly told that there is no such lawful thing as an arrest without an apparent or disclosed cause, to be justified thereafter by whatever may turn up. If the arrest here had been upon a void warrant the defendant's position with regard to the misdemeanor would have been substantially the same as it now is. He could with equal propriety have said 'I arrested the plaintiff on the warrant for the felony. I did not arrest him without a warrant for the misdemeanor committed in my presence. Had I known, however, that he was carrying a pistol, I might have arrested him therefore. The plain answer would be, 'But you did not do it. You cannot arrest a man merely because, if all were known, he would be arrestable. You arrest him for some specified cause, and you must justify for that cause.'"

An officer changing a warrant as to the name before making an arrest cannot then justify that he had then probable cause to arrest for a

felony without a warrant, under Tex. Code Crim. Proc. § 229, providing that on the representation of a credible person that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest. *Newburn v. Durham*, 10 Tex. Civ. App. 655, 32 S. W. 112. In this case the officer had time to procure the warrant, and there was no representation that the offender was about to escape.

In an action against a deputy sheriff for assault and false imprisonment, an answer that what he did was done in the performance of his duty as such was held not to be a justification, in the absence of an averment that he acted under and in pursuance of process duly issued by a proper court or officer, or for the purpose of preventing or suppressing a breach of the peace, or of arresting a person whom he had reason to believe to be a felon, in a case where a felony had actually been committed. *Moore v. Devoy*, 37 How. Pr. 18. The case does not show what the arrest was made for.

But in *Grenville v. College of Physicians*, 12 Mod. 387, it was said: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification."

As to justification for that offense, see *Meeds v. Carver*, 30 N. C. (8 Ired. L.) 298, *supra*, I. g.

VIII. Question of probable cause.

It seems that the question of probable cause justifying an officer in making an arrest is one for the court if there is no conflict of evidence; otherwise it is a question for the jury. A pleading justifying an arrest for probable cause should state the facts, and show on what grounds the arrest was made.

A plea justifying an arrest on suspicion of felony without a warrant should set forth the grounds of the suspicion, so that the court may judge of them, and determine whether they afford probable cause or not. *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *Wasson v. Canfield*, 6 Blackf. 406.

And the same rule was stated where the arrest was not made by an officer. *Mure v. Kaye*, 4 Taunt. 84; *Boynton v. Tidwell*, 19 Tex. 118.

And the question whether officers have probable cause for an arrest upon undisputed facts is a question for the court, and not for the jury. *Hawley v. Butler*, 54 Barb. 490.

The question of probable cause or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting; in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts. *Burns v. Erben*, 40 N. Y. 463.

If the facts are not disputed, the question of "reasonable time" to procure a warrant after an arrest for a felony is one for the court. *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722.

But if there is a conflict of evidence as to "reasonable suspicion" it is a question for the jury; otherwise one for the court. *Ibid.*

In *Cochran v. Toher*, 14 Minn. 385, Gil. 293, it was held to be a question for the jury whether the officer had reasonable grounds for making an arrest for a felony and for placing irons on plaintiff. In this case the court said: 61 L. R. A.

"Hence it follows that the test for deciding whether such general inference as to reasonable time, probable cause, etc., be one of law or of fact is this: If the court in the particular case can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one . . . But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury."

And the question as to whether the plaintiff was guilty of such a breach of the peace as would justify an arrest, was held to be one for the jury, where an officer arrested a person on view for noisy and violent conduct. *Lewis v. Kahn*, 15 Daly, 326, 5 N. Y. Supp. 661; *McIntyre v. Raduns*, 14 Jones & S. 123.

In *Wasson v. Canfield*, 6 Blackf. 406, it was held that a constable making an arrest on a defective warrant, and pleading a reasonable suspicion of a felony, must state the facts on which he based his belief.

In *McCloughan v. Clayton*, Holt, 478, it was said: "In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant."

Cases in regard to authority to make an arrest where the officer is not sued for damages, and cases relating to custody under a mittimus, are not intended to be included in this note.

As to what information an accused person is entitled to at the time of his arrest, see *State v. Taylor* (Vt.) 42 L. R. A. 673, *note*.

IX. Summary.

It may be said that an officer is not liable in trespass and false imprisonment for making an arrest under a warrant where it is valid on its face and the court has jurisdiction, or where the warrant is only irregular. He is not liable for making an arrest without a warrant where he has reasonable grounds to believe that a felony has been committed, or where a breach of the peace is committed "on view;" or where he arrests on view for a breach of a city ordinance and a statute authorizes such an arrest; or where he makes an arrest for other misdemeanors on view under statutory authority. He will not be liable for the use of ordinary force to restrain the prisoner.

But an officer will be liable where he makes an arrest under a warrant that is invalid or void; or where the court has no jurisdiction; or where he arrests for a felony without a warrant on suspicion; or where he makes an arrest without a warrant for a breach of the peace not committed in his presence; or where he arrests not "on view" without warrant under a city ordinance. He will be liable where he arrests without warrant for a past misdemeanor; or where he makes an arrest outside of his local jurisdiction; or where he unreasonably detains and fails to take the prisoner before the proper court; or where he takes him before an improper court. He will be liable where he arrests the wrong party; or where he arrests the right party under a warrant in the wrong name. He cannot arrest for one offense and justify for another.

There is some conflict as to liability for making an arrest where the warrant is not in possession of the officer; or where an arrest is made on a writ issued in an action after judgment where the defendant did not plead misnomer. There is some conflict as to the liability on an official bond.

NEW HAMPSHIRE SUPREME COURT.

George J. OTT
v.
Samuel HENTALL.

F. A. HUTSON
v.
SAME.

C. F. WALKER
v.
SAME.

Jennie HARRIS
v.
SAME.

(.....N. H.....)

1. A wife's financial ability to provide for herself does not deprive her of the right to pledge her husband's credit for necessities, when she is living apart from him on account of his misconduct.
2. Statutes enabling married women to hold property to their own use, and enlarging their rights and liabilities, do not change the rule which gives a wife power to pledge her husband's credit for necessities.
3. One who attempted to obtain a deposition, and began to take it, but did not get it completed because the witness refused to go on with the testimony, is not chargeable with costs, under Pub. Stat. chap. 225, § 12, on the ground that he neglected or refused to take a deposition after giving notice of it, where he in fact desired to have the deposition completed, but understood that he could not compel the witness to proceed, while the other party was present and had the same means and opportunity of enforcing the examination.

(March 16, 1900.)

PRESERVATION by the Supreme Court for Grafton County for the opinion of the full court of actions brought to hold a man liable for services rendered to his wife after she had left him. *Judgment for plaintiffs.*

The court found that defendant so treated his wife as seriously to injure her health. In consequence she left him in December, 1896. In January, 1897, she engaged the services of plaintiff Ott as a physician, and those of plaintiff Hutson as nurse. In December she employed plaintiff Walker as physician, and took board with plaintiff Harris. When she employed the plaintiffs she pledged the credit of her husband. Each of the plaintiffs knew that she was living apart from her husband. The services which she received, and which they rendered, were necessary for her recovery or condition. At the time of the separation the wife had \$700 or \$800 in money, but she had a son who was in part dependent on her for support.

The nurse's bill was made out to the wife, but when it was presented the nurse was in-

formed that the husband was liable for the support.

The question arose in the case as to the costs of taking a deposition in Massachusetts, agreeably to a notice given by plaintiff Hutson, it appearing that after the testimony had been partially given the witness refused to complete the deposition.

Further facts appear in the opinion.

Messrs. Burleigh & Adams, for plaintiffs:

The defendant is chargeable in these cases on the elementary principle of law that where one party owes another a legal duty which he neglects, or refuses to discharge, and such duty is in good faith performed by a third person at request of the party injured, there is an implied promise on the part of the delinquent to pay for such performance.

Rumney v. Keyes, 7 N. H. 571.

A husband is bound to maintain his wife suitably and according to his condition and circumstances in life.

Reed v. Morse, 5 Car. & P. 200; *Dennys v. Sergeant*, 6 Car. & P. 419.

If a husband by his improper conduct compels a wife to leave his house, he gives her authority to pledge his credit for necessities.

Pidgin v. Cram, 8 N. H. 351; *Harwood v. Heffer*, 3 Taunt. 421; *Montague v. Espinasse*, 1 Car. & P. 502; *Houlston v. Smith*, 3 Bing. 127; *Liddlow v. Wilmot*, 2 Starkie, 86.

If a husband abandons his wife, or if they separate by consent, without any provision for her support, or if he sends her away, or by his improper conduct compels her to leave his house, he is liable for necessities furnished her during the separation; but not so if she leaves without sufficient cause and against his consent.

Allen v. Aldrich, 29 N. H. 63; 2 Kent, Com. 124.

The husband is bound to pay for necessities furnished to the wife, unless he has made other suitable provision for her; and the burden of proof is on him to show that he has made such provision.

Tebbetts v. Hapgood, 34 N. H. 420; *Morris v. Palmer*, 39 N. H. 126; *Williams v. Fowler*, McCl. & Y. 269; *Shepherd v. Mackoul*, 3 Campb. 326; *Turner v. Rookes*, 10 Ad. & El. 47.

So imperative is the obligation sometimes upon a party to pay for the necessities furnished that the law will imply a promise against his express declaration where a positive legal duty is imposed upon him.

Kelley v. Davis, 49 N. H. 187.

The fact that there was no actual contract between the defendant and any of the plaintiffs is without legal significance.

Scova v. True, 53 N. H. 627; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77; *Baker v. Carter*, 83 Me. 132, 21 Atl. 834; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Walker v. Loughton*, 31 N. H. 111.

NOTE.—As to right of wife living apart from her husband to pledge his credit when she has means of her own, see also *Hunt v. Hayes* (Vt.) 15 L. R. A. 661.
51 L. R. A.

Messrs. Dearborn & Chase also for plaintiffs.

Mr. L. W. Fling, for defendant:

Under the common law, if obliged to leave her husband, a woman could contract no debts so as to bind herself or property, and was not entitled to her own earnings, and might starve for lack of the necessities of life; hence the rule that she might pledge the credit of her husband under such circumstances, for necessities.

During cohabitation the husband is bound to support his wife. There is a presumption of law arising from that fact, that the husband assents to contracts made by his wife. It is an implied agency arising from the married relation during cohabitation, but when the parties cease to live together, then a new state of things arises, and with it new rules of law. The implied agency to contract debts for necessities arising from cohabitation no longer exists. But if by cruelty he compels her to leave him, she carries his credit to the extent of supplying her necessary wants provided she has no means of support.

This rule does not obtain for the protection of parties dealing with the wife. Such parties are required to make inquiries, for by living apart public notice is given (*Saunders v. Richards*, 65 N. H. 185, 23 Atl. 150) of the actual state of things, but the rule is for the protection of the wife.

If the wife, though living apart from her husband for just cause, has the means of support, however derived, the husband is not liable except upon a special promise to pay.

Litson v. Brown, 26 Ind. 489; *Hunt v. Hayes*, 64 Vt. 89, 15 L. R. A. 661, 23 Atl. 920; *Boardman v. Silver*, 100 Mass. 330.

If the credit was given to the wife,—that is, if the plaintiffs looked to the wife for payment in the first instance,—the defendant is not liable. No matter whether she was justified in leaving her husband, or was driven away, or had means to supply her wants or otherwise, the husband is not liable.

Chitty, Contr. 8th ed. pp. 156-171; *Weisker v. Lowenthal*, 31 Md. 418; *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792; *Hill v. Goodrich*, 46 N. H. 41; *Stammers v. Macomb*, 2 Wend. 454; *Pearson v. Darrington*, 32 Ala. 227.

If credit is given to the wife, and not to the husband, the latter cannot be held liable if the contract is for necessities.

Carter v. Howard, 39 Vt. 106; *Taylor v. Shelton*, 30 Conn. 122.

If the wife is neither in fact nor in law the agent of the husband, he is not liable.

Kowing v. Manly, 49 N. Y. 192, 10 Am. Rep. 346; *Andrews v. Ormsbee*, 11 Mo. 400.

Neither in law nor in equity is the husband liable for money borrowed by a wife living separate from her husband for cause, with which to purchase necessities.

Skinner v. Tirrell, 159 Mass. 474, 21 L. R. A. 673, 34 N. E. 692.

Mr. Alvin F. Wentworth also for defendant.
51 L. R. A.

Chase, J., delivered the opinion of the court:

"Marital rights and duties are established by law." Among them is the obligation of the husband to suitably maintain his wife according to his circumstances in life. He cannot relieve himself of the duty by his own misconduct. If he compels his wife to leave him, and does not make suitable provision for her support, she carries with her authority to obtain upon his credit necessities of life adapted to her condition and his circumstances. *Rumney v. Keyes*, 7 N. H. 571; *Pidgin v. Cram*, 8 N. H. 350; *Allen v. Aldrich*, 29 N. H. 63; *Walker v. Lighton*, 31 N. H. 111; *Tobbits v. Hapgood*, 34 N. H. 420; *Morris v. Palmer*, 39 N. H. 123, 126; *Ray v. Adden*, 50 N. H. 82, 83, 9 Am. Rep. 175; *Sceva v. True*, 53 N. H. 627, 631; *Ferren v. Moore*, 59 N. H. 106. Accurately speaking this authority is not referable to the law of agency. It may be exercised against the will of the husband. It is not revoked by his insanity. The law gives it "by force of the relation of husband and wife." *Read v. Legard*, 6 Exch. 636. It has been designated "authority from necessity." *Johnston v. Sumner*, 3 Hurlst. & N. 261. And the agency has been termed "agency in law" or "agency of necessity." *Eastland v. Burchell*, L. R. 3 Q. B. Div. 432, 435, 436; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77. It is authority to do for the husband "what law and duty require him to do, and which he neglects or refuses to do for himself, and is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her." Accordingly it was decided in *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670, that the husband was liable for the reasonable funeral expenses of his wife, whom he had compelled by cruelty to leave him, and who had died while living apart from him. *Raynes v. Bennett*, 114 Mass. 424, 428; *Alley v. Winn*, 134 Mass. 77, 79, 45 Am. Rep. 297. See also *Staples's Appeal*, 52 Conn. 425, in which it was held that a husband could not charge his wife's estate for her funeral expenses. There are authorities which hold that where necessities are furnished a wife living apart from her husband without her fault, and she has funds of her own, the liability of the husband depends upon the question of fact whether her means are adequate to her support. *Liddlow v. Wilnot*, 2 Starkie, 86; *Dixon v. Hurrell*, 8 Car. & P. 717. The defendant relies upon *Hunt v. Hayes*, 64 Vt. 89, 15 L. R. A. 661, 23 Atl. 920, and *Litson v. Brown*, 26 Ind. 489, in support of this proposition. In the first-named case the plaintiff, who was the father of the defendant's wife, sought to recover for necessities furnished her while living apart from the defendant under such circumstances as would enable her to pledge his credit unless she was prevented from doing so by the fact that she received \$2,000 annually from him by virtue of an antenuptial contract. The decision, which was not unanimous,—Munson,

J., dissenting,—was founded largely upon the authority of *War v. Huntly*, 1 Salk. 118, *Liddlow v. Wilmot*, and *Litson v. Brown*. The entire report of *War v. Huntly* is as follows: "The case was: An ordinary workingman married a woman of the like condition, and after cohabitation for some time the husband left her, and during his absence the wife worked; and, this action being brought for her diet, it was held that the money she earned should go to keep her." These statements are so general that the case is not a very satisfactory authority, especially in view of the fact that on the same page of the report there is another case (*Etherington v. Parrot*) in which the same judge (Holt, Ch. J.,) in the course of the opinion, said: "If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her"—and on the following page still another case (*Robinson v. Greinold*), in which he said: "Though the wife be ever so lewd, yet while she cohabits with her husband he is bound to find her necessaries, and pay for them; for he took her for better, for worse. So, if he runs away from her, or turns her away." In *Liddlow v. Wilmot* it appeared that the wife had £100 a year and some plate, but it did not appear from what source she obtained them. Lord Ellenborough submitted to the jury the question whether she was provided with resources adequate to her situation, with the instructions that "if so, and particularly if she has derived that provision from him, the action cannot be maintained. . . . The only credit given to the husband is an implied one, which arises from his situation and the inadequacy of the funds of the wife. . . . If so [she was adequately provided for], the circumstance repels all idea of implied credit." If the husband actually provides his wife with resources sufficient for her support, he performs his duty, and there is no ground upon which an implied promise to pay for necessaries can arise. But, if he does not provide the resources, it is difficult to understand why the wife's marital right and the husband's marital duty do not remain unsatisfied. The right and correlative duty do not depend upon the inadequacy of the wife's means, but upon the marriage relation. In *Hunt v. Hayes* the court, in referring to the agency arising from necessity, mentioned in some of the cases, says: "It logically follows that when there is no necessity there can be no agency, for *cessante ratione legis, cessat ipsa lex*; and there can be no necessity when the wife has means of her own with which she can supply herself." But the necessity referred to in these cases is not so narrow in its scope as seems to be here indicated. It comprehends the wife's need that the husband's duty shall be performed. The husband's obligation creates the necessity for the agency, if it be so termed, not the fact that she would otherwise be destitute. In *Litson v. Brown*, two months after the defendant's wife left him because of his improper conduct, he induced her to sign

51 L. R. A.

a deed of real estate by causing the purchaser to pay her one third of the purchase money. The plaintiff boarded her both before and after this transaction. It was held that the defendant was liable for the board furnished prior to the wife's receipt of the money, but was not liable for that furnished afterwards, because the wife was possessed of means sufficient to supply her reasonable wants and necessities. The decision is based upon *Liddlow v. Wilmot* and *Dixon v. Hurrell*, and text-books citing these cases. It will also be noticed that the wife's means came from the husband. See also *Eiler v. Crul*, 99 Ind. 375; *Arnold v. Brandt*, 16 Ind. App. 169, 44 N. E. 936; *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. 389. Concerning the reasons given for the decisions in these cases, it is sufficient to say that they seem to be inconsistent with the character of the obligation which the law imposes upon the husband as a part of the marriage relation. Marriage is founded on the idea that the parties will establish a home and rear a family. The husband is by nature, as well as by law, the leading and responsible party in the undertaking. Among other things, he takes upon himself the duty of providing a home and suitably maintaining the wife and children. The wife's ability to provide herself with the necessities of life does not relieve him from the duty while they live together, and no good reason is perceived why it should do so while she is living apart from him in consequence of his misconduct. The duty is taken into consideration in awarding alimony to the wife in connection with or after a divorce. *Morrison v. Morrison*, 49 N. H. 69, 73; *Janvrin v. Janvrin*, 59 N. H. 23. If the wife does not desire a divorce, or the husband's misconduct has not continued a sufficient length of time to constitute a cause for divorce, the court, upon petition of the wife, "may make to her reasonable allowance out of the estate of the husband for the support of herself and children." Pub. Stat. chap. 176, § 4. The fact that the wife has means of her own does not deprive her of the right to alimony in the one case, or to an allowance in the other. So far as her right and the husband's correlative duty are concerned, the necessity for clothing her with authority to obtain necessaries upon the husband's credit exists when she has means the same as when she has none. This is the necessity upon which the law bases the husband's implied promise when he fails in the performance of his duty.

It follows from the foregoing considerations that the statutes of the state enabling married women to hold to their own use property acquired by them, and enlarging their rights and liabilities, do not affect this question. These statutes have not taken away the right of either party to the marital contract to have the affection, society, and aid of the other. *Cross v. Grant*, 62 N. H. 675; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776. While the wife is at liberty to provide herself, her husband, or her children with the necessities of life at her own expense or up-

on her own credit, the duty of supplying them rests by law upon the husband. *Parsons v. McLane*, 64 N. H. 478, 479, 13 Atl. 588. The circumstances disclosed in this case were such that the defendant's wife had authority to pledge his credit for the necessities which she obtained from the plaintiffs. Whether she did so was a question of fact which has been determined in the plaintiffs' favor. Hutson's bill against the wife was not conclusive evidence upon the question. *Walker v. Richards*, 41 N. H. 388. The plaintiffs are entitled to judgments.

"If any party after giving notice to the adverse party neglects or refuses to take a deposition, the adverse party may be allowed as costs such amount as the court may deem equitable, not exceeding twenty-five cents a mile for actual travel of himself or his attorney to attend the same, and may have judgment and execution therefor unless notice in writing that the deposition will not be taken, signed by the party giving the original notice, is seasonably given to such adverse party." Pub. Stat. chap. 225, § 12. Under the previous statutes on the subject, the remedy of a party aggrieved by a failure to take a deposition was an action on the case. Rev. Stat. chap. 188, § 22; Gen. Laws, chap. 229, § 10; *Powers v. Hale*, 25 N. H. 145. Now he is not required to bring a separate action, but may be allowed as costs an equitable sum for actual travel, and have judgment therefor in the action in

which the deposition was to be taken. The provision was designed to afford the party compensation for expenditures resulting in no benefit to himself, because of the neglect or refusal of the adverse party to take depositions agreeably to notice. *Wilson v. Knox*, 12 N. H. 347, 350. In construing the earlier statutes it was held that the party giving the notice was liable, although he used diligence in attempting to procure the attendance of the witness but without success. *Voght v. Ticknor*, 47 N. H. 543; *Robertson v. Northern R. Co.* 63 N. H. 544, 3 Atl. 621. In this case the witness attended the caption, and submitted to examination in part. So far as appears, the magistrate had jurisdiction of the matter of taking the deposition and of the witness. The defendant had the same opportunity and means of compelling the witness to complete the deposition that Hutson had. Hutson neither neglected nor refused to take the deposition, but began the taking, and was desirous of completing it. One party was as much in fault for not having it completed as the other. It would seem to be grossly inequitable to require Hutson to pay costs on account of the failure. The defendant's exception must be overruled.

Judgments for the plaintiffs.

Pike, J., did not sit. The others concurred.

NEVADA SUPREME COURT.

STATE of Nevada *ex rel.* W. E. WINNIE
v.
A. B. STODDARD *et al.*
(.....Nev.....)

Mandamus to compel the issuance of election notices under the Nevada apportionment act of 1891, instead of that of 1899, on the ground that the later act is unconstitutional, must be denied for the reason that the prior act is subject to substantially the same constitutional objections as the later, while there are insuperable obstacles of the same character against acting under still earlier statutes, and the case is therefore within the rule that the court will not pass upon a constitutional question unless it is clearly involved and a decision thereon necessary to a determination of the case, and also that mandamus will not be issued unless the right to be protected is clear and undoubted.

(September 21, 1900.)

APPLICATION for a writ of mandamus to compel respondents to cause notices for an approaching election to be issued under the act of 1891, and not under that of

1899, on the ground that the later act was unconstitutional. *Denied.*

The facts are stated in the opinion.

Mr. W. E. Winnie, in propria persona:

Relator not having any plain, speedy, or adequate remedy in the ordinary course of law, mandamus is the proper remedy.

Nev. Comp. Laws, § 3542; *State ex rel. Coffin v. Atherton*, 19 Nev. 336, 10 Pac. 901.

It is incumbent upon the board of county commissioners to give notice to the great body of the electors as to the offices they are expected to fill, and that notice must be correct and properly given, so that the voters may not be misled.

Nev. Comp. Laws, § 1588; McCrary, Elections, §§ 142-145.

The act of 1899 is unconstitutional and void, in that the apportionment of senators and assemblymen made therein was not based upon an enumeration of the inhabitants of this state taken under the direction of the legislature thereof, nor upon any census taken under the direction of the Congress of the United States, as required by the provisions of § 13 of article XV. of the Consti-

NOTE.—As to the validity of prior apportionment acts as affecting proceedings to declare a later apportionment act void, see also *State ex rel. Lamb v. Cunningham* (Wis.) 17 L. R. A. 51 L. R. A.

145; *Giddings v. Blacker* (Mich.) 16 L. R. A. 402; *People ex rel. Carter v. Rice* (N. Y.) 16 L. R. A. 836; and *Houghton County Supers. v. Blacker* (Mich.) 16 L. R. A. 432.

tution of this state, and violates § 13 of the Declaration of Rights in said Constitution.

Stat. 1899, p. 121; Const. art. 15, § 13 (§ 177, Nev. Comp. Laws); Declaration of Rights, § 13 (§ 38, Nev. Comp. Laws).

The act of 1899 being unconstitutional and void, the act of 1891 is still of full force and effect.

State v. McClear, 11 Nev. 69; *State v. Hartley*, 28 L. R. A. 33, 22 Nev. 351, 40 Pac. 372; 3 Am. & Eng. Enc. Law, p. 678.

A political right of the electors of Storey county is affected by the making of an erroneous election proclamation, calling for the election of a smaller representation in the legislature than that to which they are legally entitled, when, by such erroneous proclamation, they may be misled to their prejudice.

The making of a correct election proclamation is the performance of an act which the law especially enjoins as a duty upon the board of county commissioners.

Giddings v. Blacker, 93 Mich. 1, 16 L. R. A. 402, 52 N. W. 944; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L. R. A. 145, 53 N. W. 48; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307; *State ex rel. Coffin v. Atherton*, 19 Nev. 336, 10 Pac. 901; *Sutherland*, Stat. Constr. § 65.

The last official census of Nevada, taken prior to the passage of the act of 1899, was taken in 1890, under the direction of the Congress of the United States. The apportionment act of 1891 was passed at the next session of the legislature following the taking of this census. It is conclusively presumed that this act was based upon that census; that all of the constitutional prerequisites were complied with and the act properly passed.

State ex rel. Osburn v. Beck (Nev.) 56 Pac. 1008.

Messrs. E. L. Williams, Frank Monamee, Thomas Wren, and A. E. Cheney, for interveners:

The writ of mandate is only granted when, in the exercise of discretion, it can be seen that the right sought to be protected is clear and undoubted. No other remedy exists, and the writ, if issued, will be effectual.

High, Extr. Legal Rem. 3d ed. § 9; *State ex rel. Pyne v. La Grave*, 22 Nev. 417, 41 Pac. 115; 13 Enc. Pl. & Pr. 493, 494.

The right to vote does not depend upon notice being given by the respondent. Where the time, place, and offices to be filled are fixed by law, the law itself is notice, and the failure of officials to give notice does not invalidate the election.

State ex rel. Hubbard v. Gorin, 6 Nev. 276; 10 Am. & Eng. Enc. Law, 2d ed. p. 625.

Under the Australian ballot law only candidates for offices for which nominations are made as required by that act are placed on the ballot, or can be voted for. But nominations for any office to be filled by election may be made either by convention or petition, and all nominations filed must be put upon the ticket.

tion, and all nominations filed must be put upon the ticket.

Comp. Laws 1900, §§ 1694, 1701, 1703.

There is no constitutional mandate in this state as to when or how often the legislature shall apportion the representation.

It possesses every legislative power not expressly denied. With the exercise of its discretion courts will never interfere unless there has been a plain, flagrant, and intentional disregard of the Constitution.

People ex rel. Carter v. Rice, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921; *Re Baird*, 142 N. Y. 527, 37 N. E. 619; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307; *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 27 N. E. 884; *Prouty v. Stover*, 11 Kan. 235; *Opinion of Justices*, 18 Me. 458; *State ex rel. Fletcher v. Ruhe* (Nev.) 52 Pac. 275.

The act of 1899 is more equal and just under existing conditions than that of 1891.

If the act of 1899 is unconstitutional, that of 1891 also is, and the relator is not entitled to a writ to enforce a right claimed under an unconstitutional act.

People ex rel. Woodyatt v. Thompson, 155 Ill. 451, 40 N. E. 307; *Parker v. State ex rel. Powell*, 133 Ind. 201, 18 L. R. A. 567, 32 N. E. 836, 33 N. E. 119.

If the act of 1899 is invalid the court must go back until it finds a valid one.

Houghton County Supers. v. Blacker, 92 Mich. 638, 16 L. R. A. 432, 52 N. W. 951.

The system of apportioning at least one assemblyman and senator to each county has been so long continued and generally acquiesced in by all departments of the government, and by the people, that the courts will give great weight to the practical construction which has been put upon the Constitution.

State ex rel. Torreyson v. Grey, 21 Nev. 387, 19 L. R. A. 134, 32 Pac. 190; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307.

Massey, J., delivered the opinion of the court:

This is an action by the state, on the relation of W. E. Winnie, the district attorney and an elector of Storey county, against the respondents, the board of county commissioners of said county, to compel them, as such board, to cause their clerk, by proper order, to issue the necessary notice of the ensuing general election for members of the state senate and members of the assembly under the apportionment act of 1891. The relator contends that the subsequent act of 1899 is not based upon the population as shown by the census taken under the act of Congress in 1890, and is therefore unconstitutional and void. It is shown by the petition, among other things, that the respondents on the 6th day of August, 1900, refused the request and demand of the relator to make the order for the election under the act of 1891, and did at that time make an order for the notice of election of senators and assemblymen as provided for by the act of

1899. Upon this petition the alternative writ was issued. The respondents, by answer, practically admit all the facts alleged in the petition. By permission of court, Washoe and Lincoln counties have intervened, and contest the relator's right to the peremptory writ. The interveners, among other matters, contend that the act of 1899 is valid, or, if invalid for the reason assigned by the relator, the act of 1891, upon which relator bases his right of representation in the legislature, and all other prior acts, contain the same or greater infirmities and inequalities, and are for like reasons invalid, and therefore, under settled rules, the court should deny the peremptory writ.

In 1891 the legislature passed "An Act for the Reapportionment of Senators and Assemblymen in the Several Counties of This State," by which Storey county was given a representation in the senate of two senators and a representation in the assembly of six assemblymen. By the same act Washoe county was given a representation of one senator and four assemblymen; Elko county, one senator and three assemblymen; Lincoln county, one senator and one assemblyman; and Humboldt county, one senator and two assemblymen. Stat. 1891, p. 23. In 1899 the legislature amended the above act, by which the representation of Storey county was reduced to one senator and four assemblymen. This amended act gave to Washoe county two senators, to Elko county four assemblymen, to Humboldt county three assemblymen, and to Lincoln county two assemblymen. Stat. 1899, p. 121. The representation provided for the other counties of the state will be referred to as it may become necessary in the discussion of the question presented. It is made the duty of the several boards of county commissioners, by § 4 of the act relating to elections, to cause their clerks to make out and send by mail to the registry agents of their respective counties, at least twenty days before any general election, notices of such election, the prescribed form of which, with other matters, requires that the names of the offices to be filled shall be set out therein. Comp. Laws 1900, § 1588. The jurisdiction of this court to declare, in a proper case, an apportionment act invalid and unconstitutional is not questioned by the interveners, and is, as we believe, so well established as not to require discussion or citation of authorities to support it. The relator rests his contention as to the invalidity of the act of 1899 upon the declaration of § 13, art. 1, of the Constitution, that "representation shall be apportioned according to population," and upon the further provision of § 13, art. 15, of the same instrument, which requires that the enumeration of the inhabitants of the state shall be taken under the direction of the legislature, if deemed necessary, in 1865, 1867, and 1875, and every ten years thereafter, and these enumerations, together with the census that may be taken under the direction of the Congress of the United States in 1870, and every subsequent ten years, § 1 L. R. A.

shall serve as the basis of representation in both houses of the legislature. These provisions of our organic law were intended to secure to the citizen an equal representation in making the laws of the state,—one of the most sacred rights of citizenship; a right to be enjoyed equally by all of the citizens of the state. It is fundamental that every law passed by the legislature and approved by the governor is presumed to be constitutional. Every intendment is in its favor, and it should be sustained unless there are specific constitutional restrictions upon the power of the legislature, and the law is shown to be within those restrictions.

The relator urges that under the provisions of our Constitution above cited, making the population ascertained by the census of 1890 (no census having been taken in 1895 under the authority of the legislature for that purpose) the basis of representation in making apportionments, and under the rule announced by the courts of other states with constitutional provisions similar to those found in our Constitution (holding that, in making representative apportionments, numerical equality of population, so far as practicable, is imposed by these provisions upon the legislature), if, in making representative apportionments under these provisions, there should be such a wide and bold departure from this rule that it could not be justified by the exercise of any judgment or discretion, and that shows an intention on the part of the legislature to ignore and disregard the rule in order to promote some other object than a constitutional apportionment, then it becomes our duty to declare the act making such apportionment unconstitutional and void. The following cases are cited in support of this contention: *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 402, 52 N. W. 944; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L. R. A. 145, 53 N. W. 48; *Id.* 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307. And, if our investigation were limited in these proceedings to ascertaining whether said act of 1899 is constitutional or not, then it might become necessary to say how far and to what extent the rule relied upon should apply; but the relator asks us to direct the respondents to make an order for the notice of election under the apportionment act of 1891, basing his right thereto upon the claim that the last-named act was founded upon the census of 1891, and is therefore valid. As against this contention, the interveners claim that said act of 1891, under which the relator, as an elector, bases his rights, contains grosser inequalities than the act of 1899, by which other citizens and electors of the state are deprived of their right of representation. If we are limited in our investigation to the act of 1899, and the destruction thereby of the rights of the relator and the other citizens of Storey county, then is the relator's contention tenable. In the discussion of this question it is well to note at this time that there are not found in the

articles of our Constitution above cited, or in any of the other articles constituting that instrument, any restrictive or mandatory provisions whatever as to the time when, and how often, the legislature may make the representative apportionment; and it is too well established even to require discussion that, in the absence of such restrictive or mandatory provisions, the legislature may, in its discretion, make such apportionments as often as it so wills.

Returning, then, to the question as to how far and to what extent the court will go in its investigation of the acts of 1891 and 1899, and for what purpose, in proceedings of this kind, we find that the question is not entirely new, and there are well-considered opinions of the courts of other states which throw much light, and greatly assist in its correct determination. In the case of *Parker v. State ex rel. Powell*, 133 Ind. 178, 18 L. R. A. 567, 32 N. E. 836, 33 N. E. 119,—an action in mandamus to compel certain officers to take the necessary steps to hold the election of 1892 for senators and representatives under the apportionment act of 1879, and enjoin them from proceeding under the later act of 1891,—Mr. Justice Coffey, of the supreme court of Indiana, discussing the precise question, uses the following language: "The chief object of this suit is to secure a decision upon the question of the constitutionality of the several acts of the general assembly referred to in the complaint. The question is presented in the same manner as the question was presented in the case of *Giddings v. Blacker*, 93 Mich. 1, 10 L. R. A. 402, 52 N. W. 944, and in the case of *People ex rel. Carter v. Rice*, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921. The case of *Giddings v. Blacker* was an action to enjoin the secretary of state of the state of Michigan from taking the necessary steps to hold an election for state senators under an apportionment act approved in the year 1891, upon the ground that such act was unconstitutional, and to compel him by mandamus to proceed under an apportionment act approved in the year 1885. The case of *People ex rel. Carter v. Rice* was an action to enjoin the proper officers of the state of New York from proceeding to the election of senators and representatives under an apportionment act approved in the year 1892, upon the ground that such apportionment act was unconstitutional, and to compel them by mandamus to proceed to such election under an apportionment act approved in the year 1879. In each of these cases it seems not to have been doubted that the question of the validity of these several acts was presented in such a form as to require a decision upon that point. So in this case we are unable to perceive how the merits of the controversy are to be determined without a decision upon the question of the validity of the apportionment law of this state passed in the year 1891. Should we reach the conclusion that this act is not unconstitutional, it will not be necessary to pass upon the validity of the other acts; 51 L. R. A.

but, should we decide it invalid, then, in determining whether the appellee was entitled to the relief demanded, it would become necessary to pass upon the validity of the act of 1879, and, if that is found valid, the question of the constitutionality of the act of 1885 arises. If the act of 1891 and the act of 1879 are both unconstitutional, the appellee was not entitled to the relief sought, and the question of the validity of the act of 1885 is not involved in such a way as to require a decision upon the question of its constitutionality." Mr. Justice Elliott, in a separate opinion, uses the following language, which seems to us to be based upon sound reason: "The relator's complaint rests entirely upon the theory that the act of 1879 is valid, but, if he is right in the grounds upon which he assails the subsequent acts, that act is as bad as any of the others. Hence he has no standing in court, as he himself makes evidence; and, when we have adjudged that he has no standing in court, we have decided all questions properly in the case, except jurisdictional ones, so that we cannot properly or authoritatively give judgment upon the validity of subsequent legislative enactments. The relator is involved in a fatal dilemma. If the acts of 1885 and 1891 are valid, he can have no relief. If they are void, so, also, is that of 1879. So that, whether the acts of 1885 and 1891 are valid or void, he can have no relief, and in either event he must utterly fail. The act of 1879 being void according to the relator's own theory, he has, as he himself demonstrates, no fulcrum capable of supporting a lever for the overthrow of subsequent legislative enactments; and hence all that we can decide, beyond jurisdictional questions, without transgressing settled principles, is that by his own averments his case is foundationless. Such a decision ends the case, and we cannot with propriety consider other questions, except jurisdictional ones, and certainly not high and grave constitutional questions. If the system which the relator avers is in conflict with the Constitution is to be smitten to its death by the courts, it must be at the suit of one who assails all the legislative acts founded on that system; for it cannot be done at the suit of a party who demands that one of the acts resting on that system be upheld, and the others destroyed. The relator is the actor, and is bound to make a case rendering it imperatively necessary to decide the constitutional questions he assumes to present; and he must succeed upon the strength of his own case or fail, for he cannot succeed upon the weakness of his adversaries. The act of 1879 is, according to his own theory, as full of evil as those he assaults, so that, if one goes down, so must all; and with the fall of the act of 1879 ends the relator's case. It would be strange indeed if one of several acts resting upon the same system should be upheld, and the others cast down, and stranger still if that should be done where the one rescued from condemnation contains more of evil than those condemned. One

who secures or demands a benefit under an unconstitutional act is estopped to assert its invalidity." *Parker v. State ex rel. Powell*, 133 Ind. 178, 18 L. R. A. 567, 32 N. E. 836, 33 N. E. 119. In the case of *Giddings v. Blacker*,—an action in mandamus to restrain the giving notice of election of senators under the apportionment act of 1891, and to compel such notice to be given under the prior act of 1885,—Mr. Justice Grant, of the supreme court of Michigan, says: "The petition prays that the respondent be directed to give notice of the election under the apportionment act of 1885. The constitutionality of this act is therefore directly involved in the controversy, unless it be held to be removed from question by the fact that the people have acquiesced in its validity by acting under it for three elections. It must be conceded that this act is affected with the same constitutional infirmity as the act of 1891. It is unnecessary to determine whether such infirmity exists to an equal or a greater or less degree. It is sufficient to say that it is not in accord with the Constitution, and for the same reasons which apply to the act of 1891. It is therefore insisted with great force by the attorney general that no election should be ordered under the former act, and he also urges in consequence that no relief can be granted. It is also said by him that, so far as he has examined other apportionment acts, they are all subject to the same objection. Under this reasoning, it would follow that, if the act of 1891 is held to be void, there is no remedy, except the executive of the state decides to call a special session of the legislature. In such case there would be no apportionment law under which the people might elect a legislature. While the Constitution requires the legislature to rearrange the districts at the next session after each enumeration, yet we are of the opinion that each apportionment act remains in force until it is supplanted by a subsequent valid act. It was my opinion that the respondent should be directed to give notice under the act of 1885, inasmuch as the people have acquiesced in its validity by so long acting under it. But I yield my opinion to that of my brethren, who are of the opinion that the notice should be given under the law of 1881, the validity of which is not here brought in controversy, unless the executive shall call a special session of the legislature." *Giddings v. Blacker*, 93 Mich. 9, 16 L. R. A. 405, 52 N. W. 947. In the same case Mr. Chief Justice Morse uses the following language: "We have been obliged, under the issue here made, to investigate but two apportionments,—those of 1891 and 1885. Both are tarred with the same stick. We do not care to go further, since there is a remedy in the hands of the executive and legislature." *Giddings v. Blacker*, 93 Mich. 13, 16 L. R. A. 407, 52 N. W. 948. The court in the above case declared both acts unconstitutional, and ordered the notice of election to be given under the act of 1885; but, as we shall pres-

ently show, the conditions of legislation in this state are such as to preclude us from going as far as the supreme court of Michigan. In a prior case the same court held the act apportioning representatives in 1891 void, and the act of 1885 also void; and, upon an examination of the act of 1881, the same was held to be valid, and notice of election ordered given under that act. *Houghton County Supers. v. Blacker*, 92 Mich. 638, 16 L. R. A. 432, 52 N. W. 951. In the case of *People ex rel. Woodyatt v. Thompson*,—an action involving the constitutionality of an act making an apportionment of the state into senatorial districts, approved June 15, 1893, and to compel the issuance of notices of election under the apportionment act of 1882,—Mr. Justice Carter, of the supreme court of Illinois, says: "Counsel for appellants say that the only question involved is the constitutionality of the apportionment act of 1893, while counsel for appellees insist that the validity of the act of 1882 is equally involved. As the relator seeks relief under the act of 1882 on the assumption that it is still in force as a valid and constitutional act, it seems clear that, if the act of 1893 be found invalid, the act of 1882 must be subjected to the same constitutional test, and if it, also, be found invalid, judgment must go against the relator to the same extent as if the act of 1893 should be found to be valid. Indeed, a plausible argument is made by counsel for appellee on the theory that it clearly appears that both acts are subject to the same vice, and that this court should proceed no further, but affirm the judgment on the ground that, if one act be void, both are, and that, even if relator should succeed in having the act of 1893 set aside, he must still fail in his suit to establish the legal existence of the alleged nineteenth district formed by the act of 1882; that the court can be called upon to determine the constitutionality of a statute only when such determination is necessary in the decision of a cause; and that it is unnecessary in this case, because, whether the relator succeeds or fails in his attack on the act of 1893, he must lose his case,—both acts, if either should fall, going down together before the same onset. This view was taken by Mr. Justice Elliott of the supreme court of Indiana, in a separate opinion in a similar cause in that court; but a majority of the court held that the constitutionality of the apportionment acts there brought in question was fairly presented for decision. *Parker v. State ex rel. Powell*, 133 Ind. 178, 18 L. R. A. 567, 32 N. E. 836, 33 N. E. 119. While we recognize the well-settled and long-established rule that courts will not go out of their way to pass upon the constitutionality of a statute assailed, but will decide the case on other grounds, when other grounds exist, and the cause can be properly determined without considering whether the act be valid or invalid, we are of the opinion that the question of the validity of the apportionment act of 1893 is not only fairly presented, but is

necessarily involved in the decision of the case, and that, if that act is found to be invalid, the question whether or not the act of 1882 is unrepealed and constitutional would then arise." *People ex rel. Woodyatt v. Thompson*, 155 Ill. 460, 40 N. E. 308. In the above case, after an exhaustive discussion of the constitutional questions involved, the court determined that the act of 1893 was constitutional. The following additional cases may also be consulted, as throwing some light upon the question: *People ex rel. Carter v. Rice*, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921; *Re Baird*, 142 N. Y. 527, 37 N. E. 619; *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 27 N. E. 884; *Prouty v. Stover*, 11 Kan. 235; *Opinion of Justices*, 18 Me. 468.

We come now to a consideration of the alleged inequalities in the apportionment acts of 1891 and 1899, and in this connection we deem it advisable to say that it is unnecessary to express any opinion upon the suggested question as to whether our legislature has the power or authority, under the constitutional provisions cited, to determine the population from the number of votes cast at an election based upon so-called established ratio of votes to population, and to use the same as the basis of representation in making apportionments. By the census taken under the act of Congress of the United States in 1890, the entire population of the state was 45,761. Under the act of 1891, 3,000 of the population, as shown by the census of 1890, is approximately the unit of senatorial representation, and 1,500 is approximately the unit of representation in the assembly. By that act, Churchill county, with a population of 703, has one senator, while Elko county, with a population of 4,794, and Washoe county with a population of 6,437, and Ormsby county, with a population of 4,843, are each given but one senator. Nye county, with a population of 1,290, is given the same senatorial representation as Washoe, Elko, and Ormsby counties. Churchill county, with the population above stated, has the same representation in the senate and assembly as Lincoln county, with a population of 2,446. Lyon county, with a population of 1,987, has the same senatorial representation as Elko, Washoe, and Ormsby, and one more member of the assembly than Lincoln county, with its population of 2,446. White Pine county has the same representation in senate and assembly, with a population of 1,721, as Lincoln, with the population above stated. Other inequalities might be pointed out, but we deem these sufficient for the purposes of the case. Without pointing out the specific inequalities under the amended act of 1899 based upon the same census, it is sufficient to say that, no matter upon what reasonable basis the unit of representation is estimated, nearly all of the infirmities of the act of 1891 are re-enacted in the amended act of 1899. The equalization of representation

of the counties of Elko, Washoe, and Lincoln resulted in an injustice to Storey county, and carried with it many of the grossest vices of the act of 1891. The right of representation in the legislative department, under the Constitution, is just as sacred to the electors of Lincoln or Washoe as to the electors of Storey; and, if the act of 1899 must fall because it deprives the electors of Storey county of that right, so must the act of 1891 fall because it deprives the electors of Washoe, Lincoln, and other counties of the same high and sacred right. If we could find some prior act containing the elements of that legislative equality contemplated by the rule upon which to base a judgment, as was found by the court in Michigan, and under like legislative conditions, the question would be easy of solution; but in looking back of the act of 1891, under the contention of the interveners, we are confronted with the proposition that there is no act of that date which could be based upon the census of 1890, and, so far as we have investigated, the act of 1881, in the language above quoted, "is tarred with the same stick." We are also met with the further obstacle that if we undertake to rest our decision upon acts prior to 1881, or even upon the constitutional apportionment, some counties would be entirely deprived of representation. Further, if we declare these acts unconstitutional, with the near approach of the general election, at which all members of the assembly are to be elected, and a part of the members of the senate, we are again confronted with the question whether our decision might not, under certain other provisions of the Constitution, fixing the term of office of senators and assemblymen, deprive the state of all legislative action at the time fixed by the Constitution. Under these circumstances, and facing these conditions, we must rely upon general rules announced by this court,—that it will never pass upon a constitutional question unless it is clearly involved, and a decision thereon is necessary to a determination of the case, and that this court, in the exercise of its discretion in proceedings in mandamus, will grant the peremptory writ only when the right sought to be protected is clear and undoubted. *State ex rel. Pyne v. La Grave*, 22 Nev. 417, 41 Pac. 115; *State ex rel. Guinan v. Meder*, 22 Nev. 265, 38 Pac. 668; *State v. Wheeler*, 23 Nev. 143, 44 Pac. 430. The act of 1891, upon which relator rests his right, is subject to the same objection as the act of 1899, which affects the rights of others, and is, according to his own theory, invalid; and, as said by Mr. Justice Elliott, as above quoted, "By his own averments, his case is foundationless." Therefore, upon the showing made, and for the reasons given, the peremptory writ will be denied.

Bonnifield, Ch. J., and Belknap, J., concur.

NEW YORK COURT OF APPEALS.

Re Petition of Clara MEEKIN, Admr., etc., of Laurie Meekin, Deceased, *Resp.*, For Continuance of an Action against the BROOKLYN HEIGHTS RAILROAD COMPANY, *Appt.*

(164 N. Y. 145.)

An action for causing the death of a person, brought under Code Civ. Proc. § 1902, by an administrator who is also the father and sole next of kin of the deceased and the sole beneficiary of the action, is an action to recover damages, not for injury to the person of the decedent, but for wrongs done to the property rights or interests of the beneficiary, and therefore survives to his estate on his death, although there are other persons living who would have been next of kin of the deceased, and for whose benefit the action might have been maintained if the father had not been living when the right of action accrued.

(October 2, 1900.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a Special Term for Kings County granting petitioner permission to continue an action which had been begun against defendant by the administrator of Laurie Meekin, deceased. *Affirmed.*

Statement by Vann, J.:

On the 5th of October, 1899, an action was brought by Charles Meekin, as administrator of his deceased daughter, Laurie Meekin, against the Brooklyn Heights Railroad Company, to recover damages for negligently causing her death. After issue was joined and the action had been placed on the calendar for trial, Charles Meekin died, and the petitioner was appointed administratrix of his estate. Upon a petition showing the foregoing among other facts, she applied at special term, on notice, for an order to revive and continue the action in her name as plaintiff. The motion was opposed, and upon the hearing it appeared that Charles Meekin was the sole next of kin of Laurie Meekin, who, however, left her mother, five brothers, and six sisters, her surviving. From an order granting said motion, with costs, the railroad company appealed to the appellate division of the second department, which affirmed the order, after striking out the award of costs. Subsequently leave to appeal from the order of affirmance was granted, and the following question certified for decision: "Does an action to recover damages for negligently causing the death of his intestate survive the death of the administrator, who was also the father and sole next of kin of the deceased, where such intestate left, her surviving, other persons, who, had such father not survived said in-

testate, would have been next of kin of such deceased?"

Mr. John L. Wells, with Messrs. Sheehan & Collin, for appellant:

The cause of action abated upon the death of Charles Meekin, who, at the time of the death of Laurie Meekin, was her sole next of kin.

Mundt v. Glokner, 24 App. Div. 110, 48 N. Y. Supp. 940; *Hegerich v. Keddle*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787; *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403.

The courts of other states have decided that the cause of action abates on the death of the person for whose benefit the action is brought.

Tiffany, Death by Wrongful Act, pp. 231-344; *Woodward v. Chicago & N. W. R. Co.* 23 Wis. 400; *Harvey v. Baltimore & O. R. Co.* 70 Md. 319, 17 Atl. 88; *Taylor v. Western P. R. Co.* 45 Cal. 323; *Westcott v. Central Vermont R. Co.* 61 Vt. 438, 17 Atl. 745; *Harvey v. Baltimore & O. R. Co.* 70 Md. 319, 17 Atl. 88; *Loague v. Memphis & C. R. Co.* 91 Tenn. 458, 19 S. W. 430.

If the cause of action survives the death of the sole next of kin the measure of damages varies.

The measure of damages is the pecuniary loss to the next of kin.

Whitford v. Panama R. Co. 23 N. Y. 465; *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443; *Keenan v. Brooklyn City R. Co.* 145 N. Y. 348, 40 N. E. 15; *Medinger v. Brooklyn Heights R. Co.* 6 App. Div. 42, 39 N. Y. Supp. 613; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271.

If the deceased left only distant relatives the recovery must be much less than if a wife or children survived.

Mr. Isaac M. Kapper, for respondent:

If the statute has made the cause of action a property right, then the cause of action survived the death of the father in favor of those who, had the father not been living at the death of the intestate, would have been next of kin.

Mundt v. Glokner, 24 App. Div. 110, 48 N. Y. Supp. 940.

That such a cause of action as that at bar is a property right, and survives the death of the administrator, though he be sole next of kin, finds support in a number of cases.

Quin v. Moore, 15 N. Y. 432; *Green v. Hudson River R. Co.* 31 Barb. 280; *Pineo v. New York C. & H. R. Co.* 34 Hun. 80; *Cregin v. Brooklyn Crosstown R. Co.* 83 N. Y. 595, 38 Am. Rep. 474; *Stephen v. Woodruff*, 18 App. Div. 625, 45 N. Y. Supp. 712; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Keenan v. Brooklyn City R. Co.* 145 N. Y. 350, 40 N. E. 15.

NOTE.—As to how many distinct causes of action arise from injuries resulting in death, see *note* to *Louisville & N. R. Co. v. McElwain* (Ky.) 34 L. R. A. 788; *Hill v. Pennsylvania* 51 L. R. A.

R. Co. (Pa.) 35 L. R. A. 186; *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 43 L. R. A. 568; and *Brown v. Chicago & N. W. R. Co.* (Wis.) 44 L. R. A. 579.

Vann, J., delivered the opinion of the court:

By the act of 1847, now substantially embodied in the Code of Civil Procedure, a right of action unknown to the common law was created, which has since been perpetuated by the revised Constitution. Laws 1847, chap. 450; Const. art. 1, § 18. The personal representatives of a decedent who left a husband, wife, or next of kin are authorized to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." Code Civ. Proc. § 1902. The damages recovered in such an action "are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration." Id. § 1903. "The damages awarded to the plaintiff may be such a sum as the jury . . . deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought." Id. § 1904. The Revised Statutes, which are modified to some extent by these provisions of the Code, authorize an executor or administrator to maintain an action "for wrongs done to the property, rights, or interests of another," after his death, against the wrongdoer, and after his death "against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." This provision, however, does not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions "for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator." 2 Rev. Stat. 9th ed. p. 1907. The question, therefore, is whether the right of action created by the act of 1847, and continued by the Code of Civil Procedure, is to recover damages for wrongs done to the property rights or interests of another, or for injuries to the person of the decedent. Some confusion has arisen because the statute creates a property right out of an injury to the person, and confers it, not upon the one injured, but upon his representatives, for the benefit of his wife and next of kin. The theory of the statute is that damages should be recovered for injuries to the estate of the beneficiaries of the action, which injuries were caused by the death of the decedent. The beneficiaries named in the statute sustain such a legal relation to the deceased, by blood or marriage, that it is presumed they would have been pecuniarily benefited by his continuance in life, and hence damages are allowed for a wrongful act or omission causing his death. If he had lived, the support, education, or services required from him by law, as well as benefits in the nature of gifts conferred in the

past, might have been continued, to the pecuniary advantage of the beneficiary. So, the decedent, by continuing to live, might increase his estate, and thus increase the amount to be inherited from him upon his death in the course of nature. Hence the statute declares that the damages awarded shall be a fair and just compensation for the pecuniary injuries resulting from the death, not to the person injured, but to the person for whose benefit the action is brought. While a personal injury must cause the death, damages are allowed, not for an injury to the person deceased, but for an injury to the estate of the beneficiary. The statute thus contemplates the indirect, rather than the direct, effect of the wrongful act. This is evident from the well-settled law that nothing can be recovered for the pain or suffering of the deceased, if he lingers before dying, or for punitive damages, even when aggravating circumstances would warrant them, if the action were between the person injured and a person inflicting the injury. The amount of damages in this class of cases depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life by the decedent to the husband or wife and next of kin. This is a right of property which becomes vested in the beneficiaries at the moment of death, and can be converted into money through a statutory action brought for their benefit by the personal representatives, who are simply trustees for the purpose. *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458, 26 N. E. 1050. The damages bear interest from the date of the death, in accordance with the general rule relating to injuries to property, which is never applied in cases of injury to the person. When collected, the damages are distributed "as if they were unbequeathed assets." Thus the statute creates a right of action for damages to the estate of the beneficiaries caused by a wrongful act or omission which deprived them of some pecuniary benefit reasonably to be expected from the continuance in life of the decedent. That right of action was the property of the beneficiary, which was not forfeited by his death, but became a part of his estate. No order of revivor would have been necessary in this case if the beneficiary had not been the sole administrator.

The weight of authority is in accordance with these views, although the gradual development of the law upon the subject has resulted in some diversity of opinion. While the question was not up in one of the early cases, it was touched upon during the discussion. *Oldfield v. New York & H. R. Co.* 14 N. Y. 310, 316. In *Quin v. Moore*, 15 N. Y. 432, it was held that the interest of the beneficiary was capable of assignment, which is a test of the right to revive. In deciding the case the court said: "The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and de-

clares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. These would be the foundation of the action, and would furnish the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator, and through him of the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss, in being deprived of a life to them of greater or less value. For example, in the present case James Kerns was a minor. His mother was, by law, entitled to his services until he should come of age. Of these she was deprived by the wrongful or negligent act of the defendants, which destroyed his life. The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation. . . . The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the legislature have chosen to regard as a pecuniary right, a right having the essential attributes of property, so that, when it is taken away, compensation is due." In a later case it was said in a dissenting opinion, written by the same judge, that these views were, in some respects, not well considered. *Whitford v. Panama R. Co.* 23 N. Y. 465, 489. The cases must be read in connection with the statute in force at the time they arose, and hence *Dickens v. New York C. R. Co.* 23 N. Y. 158, has no significance, because the act did not include the husband as a beneficiary. When the *Tilley Case* was first before the court it was held that there could be no recovery for the expectancy of the children of a married woman from her earnings, because, as the law then stood, such earnings became the property of her husband as soon as realized. The question relating to the value of "probable succession" was discussed, with a strong intimation that it was the proper basis of damages. *Tilley v. Hudson River R. Co.* 24 N. Y. 471, 474. That case came before the court a second time in 29 N. Y. 252, 86 Am. Dec. 297, where it was held that, in an action for negligence resulting in the death of a mother, evidence of her capacity for business and to save money, and also to bestow upon her children such training, instruction, and education as would be pecuniarily serviceable to them in after life, is admissible on the question of damages. In the course of its opinion the court said with reference to these elements of damages that, "it is not essential to show that they necessarily result in direct pecuniary advantage. It is sufficient that they may do so, that they often do so, that it is possible and not improbable that such may be the result, and that therefore these items may be set forth and pre-

51 L. R. A.

sented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just." To the same effect are *McIntyre v. New York C. R. Co.* 37 N. Y. 287, 289; *O'Mara v. Hudson River R. Co.* 38 N. Y. 445, 98 Am. Dec. 61; and *McGovern v. New York C. & H. R. Co.* 67 N. Y. 417, 424. In *Cregin v. Brooklyn Crosstown R. Co.* 75 N. Y. 192, 194, 31 Am. Rep. 459, the court said: "The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered; and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished." That is, by diminishing his estate the value of the right of inheritance is diminished, and thus the beneficiaries are injured in their estate. In *Negrich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that an action cannot be maintained against his representatives. This is a necessary result from the fact that the Code modifies the Revised Statutes and the common law only as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury. In *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, it was held that "when one injured by the wrongful act, neglect, or default of another brings suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury his personal representatives cannot maintain an action under the act of 1847." As a matter of course, the beneficiaries, in the absence at least of express authority from the legislature, could not have in effect a double recovery—First, through the settlement with the intestate, and inheritance from him; and, second, through the action under the statute. It appears from an examination of the record in *Thomas v. Utica & B. R. Co.* 6 N. Y. Civ. Proc. Rep. 353, 34 Hun. 626, 98 N. Y. 649, that the trial court submitted to the jury the following question upon the subject of damages: "What was the reasonable expectation of pecuniary benefit to the next of kin, by inheritance or otherwise, from the continuance in life of the deceased, worth in money?" In that case the deceased was an unmarried man who left him surviving only brothers and sisters and children of deceased brothers or sisters; and it was held in all the courts that the question submitted to the jury embraced the correct measure of damages. So, in *Keenan v. Brooklyn City R. Co.* 145 N. Y. 348, 350, 40 N. E. 15, it was said: "The jury in determining the amount of damages that should be awarded was in duty bound to consider the various elements of pecuniary loss sustained by the father. First, the probable earnings of the son during his minority over and above his support, clothing, and education; next, the probability of his living and becoming of sufficient ability to support his father in case of his becoming aged, poor, and unable to support himself;

and then they had the right to consider the amount he would have brought to his next of kin while living and their prospect of inheriting from him after death. *Johnson v. Long Island R. Co.* 80 Hun. 306, 30 N. Y. Supp. 318, Affirmed in this court in 144 N. Y. 719, 39 N. E. 857." See also *Thompson, Neg.* 465; *Sedgw. Damages*, § 572; 3 *Sutherland, Damages*, 282; *Terry v. Jewett*, 78 N. Y. 338; *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 72; *Murphy v. New York C. & H. R. R. Co.* 88 N. Y. 445; *Houghkirk v. Delaware & N. Canal Co.* 92 N. Y. 219, 44 Am. Rep. 370; *Harlinger v. New York C. & H. R. R. Co.* 92 N. Y. 681; *Lockwood v. New York, L. E. & W. R. Co.* 98 N. Y. 523; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940.

Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries, but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from, and not a revivor of, the cause of action which, if he had survived, he would have had for his bodily injury. "Although the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages, nevertheless, are given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss, and in addition for his pain and suffering of mind and body, while under the statute it is not the recompense which would have belonged to him which is awarded to his personal representative, but the damages are to be estimated 'with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person.'" *Whitford v. Panama R. Co.* 23 N. Y. 465, 489. As, in the language of the statute, "the damages awarded to the plaintiff" are to be estimated on the basis of "a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought," we think the injury is for a wrong done "to the property, rights or interests" of the beneficiary, and that hence the cause of action survives; the recovery, if any, being a part of his estate, the same as it would have been if collected and paid over before his death.

The order appealed from should therefore be affirmed, with costs, and the question certified to us answered in the affirmative.

Parker, Ch. J., and O'Brien, Bartlett, Haight, Landon, and Cullen, JJ., concur.
51 L. R. A.

George SPENCE, Appt.,

v.

Albert W. HAM, Resp.

(163 N. Y. 220.)

1. A conclusive presumption that a judgment of reversal by the appellate division was not based upon a question of fact arises under Code Civ. Proc. § 1338, when the order of reversal is silent upon that subject, although the opinion in that court shows an intention to reverse upon the facts as well as the law.
2. The burden of proof as to the cost of performing certain items of a contract in accordance with its terms is upon the contractor, where the question at issue is with respect to the amount to be allowed to the owner for failure to make a full compliance with the contract.
3. Substantial performance of a building contract requiring girders of a certain length and properly placed, and a wooden partition on a brick wall in the cellar, for which recovery may be had on the allowance of compensation for defects, is not made where these things are not done, and their omission constitutes structural defects of so essential a character that they cannot be remedied without partial reconstruction of the building.

(June 5, 1900.)

A PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, Third Department, reversing a judgment entered in the office of the clerk of Rensselaer County, upon the report of the referee in plaintiff's favor in an action brought to recover an amount alleged to be due on a building contract. *Affirmed.*

Statement by Vann, J.:

This action was brought to recover a balance alleged to be due the plaintiff from the defendant upon a building contract entered into by them on the 15th of September, 1888. The plaintiff alleged performance, admitted the payment of \$2,500 on account, and sought to recover a balance of \$2,044.97, which included the sum of \$144.97 claimed to be due for extra work. The defendant, among other defenses, denied that the contract had been performed on the part of the plaintiff. The referee before whom the action was tried found generally that the contract had been substantially performed, but he also found specifically as follows: "There were slight omissions and deviations in the performance of the contract and specifications by the plaintiff from the strict letter of the contract, but such omissions and deviations were through inadvertence on the plaintiff's part, and were not wilful or intentional. Some of said omissions and deviations were at the request and with the consent of the defendant.

NOTE.—On the matter of substantial compliance with building contract, see also *Boettler v. Tendick* (Tex.) 5 L. R. A. 270, and note; and *Millott v. Caldwell* (Minn.) 9 L. R. A. 52, and note.

Other omissions and deviations were necessary or desirable if the building was to be properly constructed, and such omissions would be usual and customary in a house built on the plan of the house in question. Such omissions and deviations did not prevent a substantial performance of the contract, and were in no wise repugnant to it. Such omissions and deviations of the work, arising neither from the consent of the owner nor necessity, consisted chiefly as follows: Failure to place bridging in certain places provided by the contract; failure to supply certain collar braces; failure to have girders of certain length, and properly placed; failure to have trimmers and headers double instead of single according to the contract; failure to put drawers and shelves in closets, pursuant to plans and specifications; failure to place wooden partition on a brick wall in basement. Such defects and other small defects appearing in the building, proved to be due to any fault on the part of the plaintiff, could be remedied for \$50, which is an adequate allowance for the same under the evidence. The defendant might have been entitled to a greater allowance on account of the defective performance if he had proved and claimed what it would have cost to complete the contract strictly according to its terms. But he did not give such proof, and hence there is no basis for such allowance." He found, as a conclusion of law, that the plaintiff was entitled to recover the sum of \$202.32 for extra work, together with the balance unpaid upon the original contract, after deducting \$50 on account of "immaterial defects in the plaintiff's work." The judgment entered accordingly was reversed by the appellate division; the order of reversal being general in form, with no statement that the judgment was reversed or the new trial granted upon a question of fact.

Mr. G. B. Wellington, for appellant:

It must be presumed that the judgment was reversed because of an error of law, and not upon the facts.

Code Civ. Proc. § 1338; *Lewis v. Barton*, 106 N. Y. 70, 12 N. E. 437; *Riendeau v. Bullock*, 147 N. Y. 209, 41 N. E. 561; *Bomeisler v. Forster*, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046; *Canda v. Totten*, 157 N. Y. 281, 51 N. E. 989; *Petrie v. Hamilton College*, 158 N. Y. 458, 58 N. E. 216; *Lannon v. Lynch*, 160 N. Y. 483, 55 N. E. 5.

A literal performance in every detail was not a condition precedent to payment by defendant.

Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449, 67 N. Y. 563; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 213.

Whether a contract has been substantially performed is a question of fact dependent upon all the circumstances of the case, to be determined by the trial court.

Nolan v. Whitney, 88 N. Y. 648.

The rule which once prevailed, requiring literal performance, has been relaxed. Sub-
51 L. R. A.

stantial performance and good faith are all that are now required.

Crouch v. Gutmann, 134 N. Y. 50, 31 N. E. 271; *Nolan v. Whitney*, 88 N. Y. 648; *Phillip v. Gallant*, 62 N. Y. 257; *Woodward v. Fuller*, 80 N. Y. 312; *Johnson v. DePeyster*, 50 N. Y. 666; *Heckmann v. Pinkney*, 81 N. Y. 213; *Gustaveson v. McGay*, 12 Daly, 424; *Gibbons v. Russell*, 37 N. Y. S. R. 402, 13 N. Y. Supp. 879; *Oberties v. Bullinger*, 132 N. Y. 598, 30 N. E. 999; *Miller v. Benjamin*, 142 N. Y. 616, 37 N. E. 631.

Mr. Charles E. Patterson, for respondent:

In the case of a reversal by the appellate division of a judgment entered upon the verdict of a jury, unless the order of reversal affirms upon the facts and reverses upon questions of law only, this court cannot review the decision of the appellate division.

Harris v. Burdett, 73 N. Y. 136; *Cooke v. Underhill Mfg. Co.* 138 N. Y. 610, 33 N. E. 728; *Peil v. Reinhart*, 127 N. Y. 381, 12 L. R. A. 843, 27 N. E. 1077; *Williams v. Delaware, L. & W. R. Co.* 127 N. Y. 643, 27 N. E. 404; *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.

The order appealed from must be affirmed, if the record presents any error upon the part of the referee calling for a reversal of his report.

Cobb v. Hatfield, 46 N. Y. 533; *Caswell v. Hazard*, 121 N. Y. 484, 24 N. E. 707.

The plaintiff entirely failed to prove a case under his complaint, and was not entitled to recover at all, under the pleadings in the case.

If he wanted to show, as the referee permitted him to show, that details, variations, and deviations were excusable or waived, it was absolutely essential that he should plead the facts as he expected to prove them.

Oakley v. Morton, 11 N. Y. 30, 62 Am. Dec. 49; *O'Leary v. New York Bd. of Edu.* 9 Daly, 161; *Smith v. Brown*, 17 Barb. 431; *Clegg v. New York Newspaper Union*, 72 Hun, 395, 25 N. Y. Supp. 565; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Crane v. Knobel*, 2 Jones & S. 443; *La Chicotte v. Richmond R. & Electric Co.* 15 App. Div. 380, 44 N. Y. Supp. 75.

The uncontradicted evidence in the case shows that the plaintiff has not complied with the conditions of the contract alleged in his complaint. A performance of those conditions was not waived by the defendant, and therefore the plaintiff was not entitled to recover.

Smith v. Brady, 17 N. Y. 187, 72 Am. Dec. 442; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449, 67 N. Y. 563; *Flannery v. Sahagian*, 83 Hun, 109, 31 Am. Rep. 360; *Anderson v. Petercit*, 86 Hun, 600, 33 N. Y. Supp. 741.

Where by the terms of a contract the performance of certain specified work is a condition precedent to payment, a failure upon the part of the contractor to perform in any particular, if wilful and without excuse, will

prevent a recovery for the work done. In such case the comparative extent of the default will not be inquired into.

Crane v. Knubel, 61 N. Y. 645; *Nolan v. Whitney*, 88 N. Y. 648.

Such defects as the referee finds arose neither from the consent of the owner nor from necessity, were matters of importance, and constituted such material variations from the contract as to prevent a substantial performance thereof.

Vann, J., delivered the opinion of the court:

According to the opinion of the appellate division, it was the intention of that court to reverse the judgment upon the facts as well as the law; but, as the order of reversal is silent upon the subject, the statute compels us to presume that the judgment was not reversed upon a question of fact. Code Civ. Proc. § 1338; *Bomeisler v. Foster*, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534; *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. 1051. It is important for counsel, in preparing a judgment or order to carry into effect the decision of an appellate division, to see that it is so drawn as to properly express what the court actually decided. We have repeatedly called attention to the necessity, when the reversal is on the facts or when the affirmance is unanimous, of so stating in the order of judgment, yet cases are constantly coming before us in which the rights of parties are sacrificed by a disregard of the practice established by the legislature or the court.

The condition of the record leaves only three classes of errors open to our consideration: (1) Whether, upon the facts found by the referee, his conclusion of law is correct; (2) whether an essential fact was found without any evidence which, according to any reasonable view, would warrant it; (3) whether a material error was committed in receiving or rejecting evidence. *Gannon v. McGuire*, 160 N. Y. 476, 55 N. E. 7; *Petrie v. Hamilton College*, 158 N. Y. 458, 53 N. E. 216; *Edson v. Bartow*, 154 N. Y. 199, 48 N. E. 541; *Otten v. Manhattan R. Co.* 150 N. Y. 395, 44 N. E. 1033. If the referee committed one or more errors under this classification, the order of the appellate division reversing his judgment upon a question of law only should be affirmed; otherwise, it should be reversed.

The referee found that the contract in question had been substantially performed by the plaintiff, yet he also found certain omissions and defects for which he allowed compensation to the defendant, and certain other omissions and defects for which he allowed no compensation because the defendant did not prove what it would cost to complete the contract in this regard. Thus, upon the face of the report, the question arises whether the burden was upon the contractor or the owner to show what it would cost to remedy defects. The question, as presented by the record, is the same as if the plaintiff had alleged substantial instead of complete performance, because that is the

basis upon which he recovered. In order to recover at all, he was obliged to show either full or substantial performance. Upon showing full performance he could recover the full contract price, but upon showing substantial, which is but partial, performance, he could only recover the contract price after deducting the sum required to remedy the omissions which, when remedied, would make performance complete. Each party would thus get what he was equitably entitled to,—the plaintiff, payment for all that he did; and the defendant, compensation for all that the plaintiff omitted to do. Clearly, there should be no recovery for what the plaintiff agreed to do but did not do, yet such is the effect of the decision we are reviewing. Substantial performance is performance except as to unsubstantial omission, with compensation therefor. When the omission is slight and unintentional, in order to prevent the hardship of a failure to recover even for that which was well done, compensation is substituted, *pro tanto*, for performance. This is the modern rule, adopted upon the theory that the parties are presumed to have impliedly agreed to do what was reasonable under all the circumstances with reference to the subject of performance. Thus, it was said in *Woodward v. Fuller*, 80 N. Y. 312, 315: "If the plaintiff is to be held strictly to the terms of his contract, he must fail to recover thereon, and that he should be is the effect of the earlier cases in this state. See those cited in the opinion of Comstock, J., in *Smith v. Brady*, 17 N. Y. 185, 72 Am. Dec. 442. But there has been a relaxation of that rule, and now on such a contract there may be a recovery without a literal or exact performance of it. It is now the rule that where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects, caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects." So, in *Nolan v. Whitney*, 88 N. Y. 648, 649, the court announced that "it is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance, but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially; and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party." We quote from still another case as follows: "The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract, and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission. *Woodward v. Fuller*, 80 N. Y.

312; *Nolan v. Whitney*, 88 N. Y. 648; *Phil-
lip v. Gallant*, 62 N. Y. 256, 264; *Glacius
v. Black*, 50 N. Y. 145, 10 Am. Rep. 449,
a. c. 67 N. Y. 563, 566; *Johnson v. De Peys-
ter*, 50 N. Y. 666; *Sinclair v. Tallmadge*,
35 Barb. 602." *Van Clief v. Van Vechten*,
130 N. Y. 571, 579, 29 N. E. 1017.

He who relies upon substantial as con-
trasted with complete performance must
prove the expense of supplying the omis-
sions, or he fails in his proof; for he can-
not recover for full performance when a
part of the contract is still unperformed.
The doctrine of substantial performance nec-
essarily includes compensation for all de-
fects which are not so slight and insignifi-
cant as to be safely "overlooked on the prin-
ciple of *de minimis non curat lex*." *Van
Clief v. Van Vechten*, 130 N. Y. 571, 579,
29 N. E. 1017. Unsubstantial defects may
be cured, but at the expense of the contract-
or, not of the owner. The contractor cannot
recover the entire contract price when de-
fects or omissions appear; for he must show,
not only that they were unsubstantial and
unintentional, but also the amount needed
to make them good, so that it can be de-
ducted from the contract price, and a re-
covery had for the balance only. This is an
essential part of substantial performance,
and hence the proof should be furnished by
the one who claims substantial performance.
Zimmermann v. Jourgensen, 38 N. Y. S. R.
414, 14 N. Y. Supp. 548, Id. 70 Hun, 222,
228, 24 N. Y. Supp. 170, Affirmed in 144 N.
Y. 656, 39 N. E. 859; *Cutler v. Close*, 5 Car.
& P. 337; *Chitty*, Contr. 13th ed. 520; 1
Hudson, Bldg. Contr. p. 394. There was
nothing decided in *Heckmann v. Pinkney*, 81
N. Y. 211, which is relied upon by the plain-
tiff, that is in conflict with these views;
for in that case the referee found that the
"defendant had waived performance as to
the items wherein there was not perfect per-
formance." When the plaintiff shows that
he performed his contract, he is entitled to
judgment for the contract price; but when
he shows that he performed his contract,
except that through inadvertence he omitted
to do some unsubstantial things, he is not
entitled to recover anything until he shows
that the things omitted, if worthy of any at-
tention whatever, can be supplied for a com-
paratively small sum, in which event he can
recover the contract price after deducting
that sum. This rule is liberal to the con-
tractor, for it allows him to recover when
he has not fully performed, and it cannot
be extended without danger to the integrity
of the contract. As he does not show full
performance, it is not requiring too much of
him to show what it will cost to remedy the
defects, in order to permit him to recover
the contract price, less the sum allowed for
defective performance. It is for him to
show this; for otherwise the owner could
say, "Am I to pay according to my promise,
when the contractor does not perform ac-
cording to his?" The one who fails in fully
performing, and who invokes the doctrine
of substantial performance, must furnish
the evidence to measure the compensation

51 L. R. A.

for the defects, as that is the substitute for
his failure to do as he agreed. The learned
referee therefore inadvertently committed an
error of law when he found that the defend-
ant would have been entitled to a greater
allowance on account of defective perform-
ance if he had proved and claimed what it
would cost to complete the contract strictly
according to its terms, as it was for the
plaintiff, not for the defendant, to furnish
the evidence to measure the allowance for
omissions and defects.

We are also of the opinion that he fell
into further error when he found that the
defects "for which the plaintiff is held to
be responsible were not pervasive, and did
not constitute a deviation from the general
plan, and were not so essential that the ob-
jects of the parties in making the contract
and its purpose have not, without difficulty,
been accomplished." We find no evidence
which, according to any reasonable view,
supports this finding, so far as the "failure
to have girders of certain length and prop-
erly placed," and the "failure to place
wooden partition on a brick wall in base-
ment," are concerned. These were structur-
al defects, which affected the solidity of the
building, and tended to defeat the object of
the contract. They were deviations from
the general plan of so essential a character
that they cannot be remedied without par-
tially reconstructing the building, and hence
do not come within the rule of substantial
performance, with compensation for unsub-
stantial omissions. *Crouch v. Gutmann*,
134 N. Y. 45, 31 N. E. 271. The law is not
satisfied by allowing the expense of a new
girder, for instance, considered simply as a
stick of timber of the right size; for the
defective girder, which partially supports
the building, must be removed, and another
put in its place, in order to remedy the de-
fect. While it may be possible to make the
substitution, the process is difficult and apt
to injure the structure, and hence the defect
cannot be regarded as unsubstantial.

*The order appealed from should be af-
firmed*, and judgment absolute, with costs,
directed against the plaintiff, in accordance
with the stipulation given upon bringing the
appeal.

Parker, Ch. J., and O'Brien, Bartlett
(**Haight, J.**, on last ground stated in opin-
ion), and **Martin, JJ.**, concur. **Landon,**
J., not sitting.

Conrad WOLF, *Respt.*,
v.

John DOWNEY *et al.*, Impleaded, etc., with
American Tract Society, *Appts.*

(164 N. Y. 30.)

1. The mere presumption of negli-

NOTE.—On the question of liability for in-
juries caused by materials falling into street,
see note to *St. Louis, I. M. & S. R. Co. v. Hop-
kins* (Ark.) 12 L. R. A. 189; also *Reynolds v.*
Van Beuren (N. Y.) 42 L. R. A. 129; and *Det-*

gence, arising from the infliction of a personal injury by dropping a brick from a building in course of construction, is not sufficient to charge the contractor for either the carpenter or the mason work, in the absence of proof to show from what part of the building the brick came, or who set it in motion, where numerous employees of several other independent contractors were at the time at work upon the building.

2. Neither the contractor for the mason work on a building, nor the contractor for the carpenter work, has the burden of proving that a brick which fell from the building and caused an injury was not set in motion by his employee, when there were employees of other contractors also at work upon the building.

3. An agreement by a building contractor to indemnify the owner of the building against any loss resulting from injuries to others in the progress of the work will not sustain an action against the contractor by an injured person who was not a party to the contract, and for whose benefit it was not made.

(Haight, J., dissents.)

(October 2, 1900.)

APPEAL by defendants Downey and Weber from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for Kings County which dismissed the complaint in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Herbert C. Smyth and Edwin A. Jones, for appellants:

The dismissal of the complaint was proper as to the defendant Downey, because he had not been in any way connected with the happening of the accident.

The only ground upon which Downey could be made liable would be by an application of the doctrine of *respondet superior*. This is not possible in this case, because the essential elements are totally lacking. The rule of *respondet superior* is based upon the right which the employer has to select his servants, to discharge them if not competent or skilful or well behaved, and to direct and control them while in his employ. This power did not exist in Downey over the contractors, who were actually doing the work.

Slater v. Mersereau, 64 N. Y. 138; *Kelly v. New York*, 11 N. Y. 432; *Paak v. New York*, 8 N. Y. 222; *Charlook v. Freel*, 125 N. Y. 357, 26 N. E. 202; *Vogel v. New York*, 92 N. Y. 11, 44 Am. Rep. 349; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304.

Mere negligence or omission—for instance, failing to provide guards—would not make a person liable as agent.

Only misfeasance, not nonfeasance, on the part of an agent, constitutes actionable negligence.

Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; *Burns v. Pethall*, 75 Hun, 437, 27 N. Y. Supp. 499; *Smith, Mast. & S.* 415; *Lane v. Cotton*, 12 Mod. 488; *Perkins v. Smith*, 1 Wils. 328; *Bennett v. Bayes*, 5 Hurlst. & N. 391.

The complaint was properly dismissed as to the defendants L. and E. Weber, who were the mason contractors, because no negligence on their part was proved.

Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 90, 47 N. E. 971; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679; *Dougllass v. Northern C. R. Co.* 41 App. Div. 615, 58 N. Y. Supp. 73; *White v. Albany R. Co.* 35 App. Div. 23, 54 N. Y. Supp. 445; *Gray v. Metropolitan Street R. Co.* 39 App. Div. 536, 57 N. Y. Supp. 587; *Wieland v. Delaware & H. Canal Co.* 42 App. Div. 627, 59 N. Y. Supp. 1117; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Bauleo v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Wall v. Jones*, 45 N. Y. S. R. 687, 18 N. Y. Supp. 674; *Shields v. Robins*, 12 Misc. 332, 33 N. Y. Supp. 639; *Evans v. Voght & Bros. Mfg. Co.* 5 Misc. 330, 25 N. Y. Supp. 509.

Mr. J. Culbert Palmer, for respondent:

From the nature of the accident the presumption of negligence follows, and throws upon those in control of the work the burden of showing the use of due care.

Mullen v. St. John, 57 N. Y. 571, 15 Am. Rep. 530; *Hogan v. Manhattan R. Co.* 149 N. Y. 25, 43 N. E. 403; *Volkmar v. Manhattan R. Co.* 134 N. Y. 421, 31 N. E. 870.

If there was any evidence tending to show that any or all of these defendants were in charge of the work then in progress, it was error to dismiss the complaint as to such defendants.

Clemence v. Auburn, 66 N. Y. 338.

In addition to the liability of the defendants Weber for not taking proper precautions to protect passersby, they are directly liable for the negligence of one of their employees in letting fall the brick which injured the plaintiff.

Dohn v. Dawson, 90 Hun, 271, 35 N. Y. Supp. 984, 157 N. Y. 686, 51 N. E. 1090; *Guldseth v. Carlin*, 19 App. Div. 589, 46 N. Y. Supp. 357.

It is not necessary that negligence on the part of these defendants should be conclusively proved. Sufficient has been shown to throw upon them the burden of disproving it.

Wylde v. Northern R. Co. 53 N. Y. 164; *Dohn v. Dawson*, 84 Hun, 110, 32 N. Y. Supp. 59, 157 N. Y. 686, 51 N. E. 1090.

John Downey and the Webers are all liable, jointly and severally, in the absence of an explanation rebutting negligence.

zur v. B. Stroh Brewing Co. (Mich.) 44 L. R. A. 500.

As to presumption of negligence in case of falling objects, see note to *Barnowski v. Helson* (Mich.) 15 L. R. A. 38; also *Dixon v. Plums* (Cal.) 20 L. R. A. 698; *Ryder v. Kinsey* (Minn.) 51 L. R. A.

34 L. R. A. 557; *St. Louis, I. M. & S. R. Co. v. Neely* (Ark.) 37 L. R. A. 616; *Hower v. Cumberland & P. R. Co.* (Md.) 27 L. R. A. 154; and *Cleveland, C. C. & St. L. R. Co. v. Berry* (Ind.) 46 L. R. A. 38.

Slater v. Mersereau, 64 N. Y. 138; *Merritt v. Fitzgibbons*, 29 Hun, 634.

O'Brien, J., delivered the opinion of the court:

The plaintiff's action for damages resulting from personal injuries was dismissed at the trial, but the court below on appeal reversed this judgment as to all the defendants other than the tract society, and these defendants have appealed to this court from the judgment of reversal. The facts established at the trial, upon which the complaint was dismissed, briefly stated, were these: On the 25th of March, 1895, a large structural steel building, twenty-three stories in height, was in progress of construction by the American Tract Society near the corner of Nassau and Spruce streets, in the city of New York. The society owned the building, and had contracted for its erection with various contractors, who agreed to do each a special part of the work. It was shown that there were nineteen independent contractors, employing about 250 men in all. These contracts were made directly with the tract society, and bound the contractor in each case to do some particular part of the work; and in most, if not all of them, the contractor was bound to use due care, and to indemnify the owner of the building against any loss resulting from injuries to others in the progress of the work. The proof tended to show that on the day named the plaintiff was in the service of one of the contractors for furnishing the steam fitting for the building, and was sent there with a load of pipe upon a truck. The truck was stopped on the Spruce street side of the building, which is a narrow street. While the plaintiff was on the truck, attending to his duties, and without any negligence on his part, a brick fell from the building, which had then reached the ninth story, and struck him upon the head, inflicting a very serious injury. There were then in the building, it seems, not only masons and carpenters engaged in the work, but steam fitters and plumbers putting in pipes in recesses in the walls, elevator men, electric light people, and various workers doing work around the building. There was no proof whatever to show from what part of the building the brick came, or who dropped it or set it in motion. There was no proof to identify the person in or about the building as the immediate author of the wrong. Of all the numerous persons engaged in or about the work, the jury could not have imputed the accident to any one of them more than another. In this state of the proof, the trial judge dismissed the complaint. The learned appellate division sustained the trial judge so far as affected the tract society, the owner of the building; but since it appeared that the defendant Downey had charge of the carpenter work, and the defendants the two Webers had charge of the mason work, and that neither of them had shown conclusively that the brick was not set in motion by the act of some of their workmen, it was held 51 L. R. A.

that there was a case for the jury to find that some one of them, or all of them together, were chargeable with negligence, and so responsible to the plaintiff for the injury.

We agree with the court below that this is a case where the maxim, *Res ipsa loquitur*, applies. There is a presumption that the plaintiff's injury was the result of negligence. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Hogan v. Manhattan R. Co.* 149 N. Y. 23, 43 N. E. 403; *Kearney v. London, B. & S. Coast R. Co.* L. R. 5 Q. B. 411; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 31 N. E. 870. But that presumption did not complete the proof which it was incumbent upon the plaintiff to make before the case could be submitted to the jury. In a case like this, where the building in process of construction is in charge of numerous contractors and their workmen, each independent of the other, and none of them subject to the control or direction of the other, some proof must be given to enable the jury to point out or identify the author of the wrong. There is no principle that I am aware of that would make all of the contractors or all the workmen engaged in erecting this building liable *in solido*. And yet there is just as much reason for that as there is for holding two of these contractors for no other reason than that one of them had charge of the carpenter work and the other of the mason work. The plaintiff, we must assume, suffered injury from the negligence of someone; but I am not aware of any ground, in reason or law, for imputing the wrong to the two contractors who are defendants, or for selecting them from all the others as responsible to the plaintiff, unless they can conclusively show that they are not. When there is no proof where the brick came from, except that it came from the building, and nothing to identify the person who set it in motion, it cannot be said that the plaintiff has made out a case for the jury. The presumption does not go far enough, since the party chargeable with the act from which the injury resulted has not been identified, but that important fact is left entirely to conjecture. There is no principle of law that will permit the plaintiff to proceed upon the theory that anyone in any way connected with the work, or any one or more of them that he chooses to select, must respond to him in damages for the injury. If the plaintiff was unable to give proof pointing to the party responsible for the injury, that is no reason why the innocent and the guilty should be held in a body upon a presumption that some or all were negligent. Each of the nineteen contractors was responsible only for the negligence of his own servants or employees. He was not responsible for the negligence of the servants of the other contractors. The men employed in and about the building in the aggregate were the servants of nineteen different masters. As the person who caused the injury was not identified by the proof, it was, of course, impossible to identify the master responsible for his act. It follows that either the plain-

tiff's action must fail for want of proof, or we must hold, as the court below did, that any or all the contractors together may be held responsible for the injury. I am quite sure that such a proposition cannot be defended upon principle, and I am not aware of any authority that can possibly lend any support to it. Cases must occasionally happen where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in this case; and then it is far better and more consistent with reason and law that the injury should go without redress, than that innocent persons should be held responsible, upon some strained construction of the law developed for the occasion. The idea suggested in this case, that all or any of the nineteen contractors may be held, since the plaintiff is unable by proof to identify the real author of the wrong, is born of necessity, but embodies a principle so far-reaching and dangerous that it cannot receive the sanction of the courts. The liability of the owner to the plaintiff upon the facts presented by the record in this case is not a practical question upon this appeal, since the plaintiff has not appealed from that part of the order of the court below which discharged the tract society from liability absolutely; and the plaintiff cannot maintain this action upon the promise or covenant of the contractors with the owner, for the reason that he was not a party to that contract and it was not made for his benefit. *Reynolds v. Van Beur-* 155 N. Y. 120, 42 L. R. A. 129, 49 N. E. 763.

The sole question now before us is whether there was any case made out against the two contractors who were originally joined as defendants with the owner of the building, and we are of opinion that there was not.

The order appealed from should be reversed as to them, and that of the trial court affirmed, with costs.

Parker, Ch. J., and Gray, Martin, Landon, and Werner, JJ., concur.

Haight, J., dissenting:

The plaintiff was injured by a brick falling from a building twenty-three stories in height in process of construction, belonging to the defendant the American Tract Society. The appellants, Downey, Louis and Edward Weber, with others, were contractors, each agreeing to do a special part of the work. The question presented by the record is as to whether the plaintiff can recover of any of the defendants, without showing the particular person who dropped or caused the brick to fall. It appears to be conceded that if the society was constructing the building itself, through its own servants, the law would presume negligence from the fact that the brick fell, and the society would be liable. It also appears to be well settled that where the owner contracts with an individual to construct a building, the owner surrendering to the contractor the possession, control, and management of the property un-

til the building is completed, the contractor, and not the owner, would be presumed negligent for acts of this character, and consequently liable. But it is contended that, because there are many contractors, no presumption of negligence arises against any one, and consequently there is no liability unless the plaintiff can show who the particular individual was who dropped the brick. Injuries of this character are not uncommon, but it is seldom that the injured party is able to show who the negligent person was; and if the principle contended for is to be sustained in its entirety, without limitation, the public has little protection from the dangers liable to occur from the construction of high buildings upon the lines of streets in our large and populous cities. A person walking along a street, who is suddenly crushed to the earth by a brick falling from a high building filled with workmen, has but slight opportunity to ascertain who the person was who caused the brick to fall, and such person seldom confesses to his misconduct. It was owing to this difficulty that the rule of presumption of negligence to which we have alluded was established. It was a rule founded upon necessity, designed for the protection of the public, and, in my judgment, should not be abrogated because the owner sees fit to contract with two or more persons to construct his building.

While the liability of the owner is not now before us, it becomes important to understand the nature of his duties, in order to determine whether the contractors are liable. The owner, if constructing the building himself, is liable for the negligent acts of his servants. He is also liable for a failure to discharge a duty which he owes to the public. In constructing high buildings, objects are liable to fall. A sudden gust of wind or a slight accident may be sufficient to set in motion a stone, a brick, a board, or an iron tool, which might cause the death of a person passing along the sidewalk below. The owner is therefore charged with the duty of active vigilance to see that no harm is done to others. The nature and the amount of his vigilance depend largely upon the character and the extent of the dangers that he is required to guard against. In some instances he may be required to give notice of the danger by signs or barricades, and in others he may be required to erect covers over the sidewalks sufficiently strong to protect the people passing thereon from falling objects. When he has contracted to have the building constructed for him, ordinarily all of these duties devolve upon the contractor, but there are exceptions to this rule. A municipality charged with a duty by the statute of keeping its streets in a safe condition for travel cannot relieve itself from liability for damages occasioned by a person driving into an unguarded pit in the night-time by contracting with an individual to construct a sewer or repave a street. *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Brusso v. Buffalo*, 90 N. Y. 679; *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349. Another ex-

ception includes contracts that are unlawful, or which provide for acts which, when performed, will create a nuisance; and still another is where the thing contracted to be done is necessarily attended with danger, or is intrinsically dangerous. *Andrews, Ch. J.*, in delivering the opinion of the court in the case of *Engel v. Eureka Club*, 137 N. Y. 100, 104, 32 N. E. 1053, after stating the rule as to the liability of contractors, says: "There are well-understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which, when performed, will create a nuisance,—are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed from responsibility; and in those of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Hole v. Sittingbourne & S. R. Co.* 6 Hurlst. & N. 488; *Butler v. Hunter*, 7 Hurlst. & N. 826. There are cases of still another class where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is 'intrinsically dangerous' in which case it is held that the party who lets the contract to do the act cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful. 2 Dill. Mun. Corp. § 1029, and cases cited. But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Connors v. Hennessey*, 112 Mass. 96; *Butler v. Hunter*, 7 Hurlst. & N. 826." See also *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Burmeister v. New York Elev. R. Co.* 15 Jones & S. 264; *O'Rourke v. Hart*, 7 Bosw. 511; *Vanderpool v. Husson*, 28 Barb. 196; *Gardner v. Bennett*, 6 Jones & S. 197; *King v. Livermore*, 9 Hun, 298, Affirmed in 71 N. Y. 605; *Dohn v. Dawson*, 84 Hun, 110, 32 N. Y. Supp. 59.

It will be observed from an examination of the above cases that it is not every contract that relieves the owner from liability, or the duty of watching and protecting the public. He may contract to have a door constructed, a room plastered, or a chimney built, and still not part with the possession of the building, or with his right to control and manage the same while it is in process of construction. But in contracts in which the intent of the parties appears, either in express terms or by necessary implication, that the duties of the owner should be per-

formed by the contractor, he, and not the owner, is liable. Was the duty of the owner in this case transferred to the contractor Downey? The contract between them is in the form of letters consisting of a written offer by Downey and an acceptance by the American Tract Society. Downey's offer, so far as is material to the question under consideration, is as follows: "We submit to you a proposition to construct the proposed new building for the American Tract Society. We beg leave to state that we would agree to take entire charge of all the work necessitated by the removal of the old buildings from the premises, make all excavations, take charge of and be responsible for the protection of the adjoining property, and to erect a building, complete, in strict accordance with the architect's plans; . . . to make all contracts for the various departments of work required, subject to your confirmation; to superintend the work in each and every department, and to take all possible precautions for the avoidance of extra charges of said contracts, and to obtain the best possible competition in the various departments at the lowest possible cost to the owners; to furnish inspectors of unquestionable ability and honesty, whose duty it shall be, in conjunction with our personal superintendence, to see that the contracts entered into are honestly and faithfully kept; and to protect the owners against all imposition, by avoiding in every case the use of materials of a proprietary character, on which it would be impossible to get proper competition, only using such materials when we could purchase the same at prices proportionate with their actual value. We will be responsible for all loss or damage from accidents during the construction of the building, should such occur, and we will take all proper precautions for the avoidance of such accidents. We will do the carpentry, cabinet work, and all work in this department." It will be observed that Downey in express terms undertakes to remove the old building, make excavations for the new, protect the adjoining property, and erect a new building, complete. It is true that he subsequently proposes to make contracts with others for the various departments of the work, subject to the confirmation of the owner, with the exception of the carpentry and cabinet work and the work in that department. But he also agrees to furnish inspectors of unquestionable ability and honesty, whose duty it should be, in conjunction with his personal superintendence, to see that the contracts are honestly and faithfully kept. He also expressly agrees that he will be responsible for all loss or damage from accidents during the construction of the building, should such occur. It is possible that this clause, standing alone, would be construed as an indemnity to the owner, and not as creating a liability to injured persons, under the authority of *French v. Via*, 143 N. Y. 90, 37 N. E. 612; but the clause of the contract which follows seems to establish beyond question the clear purpose and intent

of the contracting parties. By it Downey agrees to "take all proper precautions for the avoidance of such accidents." By this clause he assumes all of the duties which devolved upon the owner to the public,—of watching, guarding, giving warning of danger, of barricading or covering the sidewalk, or of doing whatever else would be deemed proper precautions on the part of the owner for the avoidance of accidents. It thus appears to me that he stepped into the shoes of the owner, assumed his duty and liability, and that, under the evidence presented by the record, it became a question of fact as to whether he had fully discharged these duties to the public. *Clare v. National City Bank*, 8 Jones & S. 104, 1 Sweeney, 539; *Potter v. Seymour*, 4 Bosw. 140.

Are the defendants Weber liable? Downey had entered into a contract with them, which had been approved by the owner, to do the mason work, plastering, etc., which included the brick work. This work they agreed to do according to the directions of the architect and Downey. They agreed to save Downey and the owner from all liability or claim by reason of any accident, loss, or damage to life, limb, or property that may occur. They, however, did not agree to take proper precautions for the avoidance of accidents, so that they did not assume to

perform the duties of the owner or the duties assumed by Downey in this respect. They, however, did, as contractors, owe a duty to the public, which, if they neglected to perform, would render them liable for the damages resulting from such neglect. The brick work had already been laid up for eleven stories. It was their duty to guard and protect the loose bricks so that they could not fall and injure people passing upon the street. Did they do this? The bricks were under their control and management. One fell and caused the injury complained of. It appears to me that this fact raised a presumption of negligence against the Webers, which cast the burden upon them of showing that they were free from fault, and that the evidence in this case upon that subject should have been submitted to the jury. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Hogan v. Manhattan R. Co.* 149 N. Y. 23, 43 N. E. 403; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 31 N. E. 870; *Dohn v. Dawson*, 90 Hun, 271, 35 N. Y. Supp. 984, Affirmed in 157 N. Y. 686, 51 N. E. 1090; *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7; *Eccles v. Darragh*, 16 Jones & S. 523. The order of the appellate division should be affirmed, and judgment absolute ordered against the appellants, Downey and the Webers, under their stipulations.

OREGON SUPREME COURT.

STATE of Oregon, *Respt.*,
v.
Harry TUCKER, Jointly Indicted, etc.,
Appt.

(36 Or. 291.)

1. Prosecution upon an information filed by the district attorney, as provided by Sess. Laws 1899, p. 99, instead of upon indictment of a grand jury, is sufficient to constitute due process of law within the meaning of U. S. Const. 14th Amend., where all the rights and privileges of a regular trial are preserved to the accused.
2. An act providing for an information by the district attorney in place of an indictment by a grand jury, but that the circuit court may convene a grand jury whenever in its opinion it is deemed advisable to do so, is authorized by Const. art. 7, § 18, regulating the organization of grand juries, and giving the legislature power to modify or abolish them.
3. The equal protection of the laws is not denied by Sess. Laws 1899, p. 99, authorizing prosecutions to be commenced by informations filed by the district attorney except when the court deems it advisable to convene a grand jury, thereby leaving it to the district attorney and the court to determine which method the prosecution should follow.

NOTE.—As to what is an infamous crime within the constitutional provision requiring presentment or indictment by a grand jury, see *Butler, Petitioner (Me.)* 17 L. R. A. 764, 51 L. R. A.

4. There is sufficient evidence to justify a submission of defendant's guilt to the jury in a prosecution for burglary, where the stolen property was discovered soon after in the joint possession of defendant and another, and a letter addressed to defendant was found near the burglarized building in the line of horses' tracks leading therefrom directly to his home; and an instruction to return a verdict of not guilty is properly refused.
5. An instruction that, if two or more persons charged jointly with the crime of burglary were acting together for that purpose, and, while so acting, one of them actually broke and entered the building with intent to steal therefrom, all are guilty and any one of them may be prosecuted alone, is proper on a prosecution for burglary, where the breaking is proved, and there is evidence that two persons were engaged in it, and defendant and another were found shortly thereafter jointly engaged in disposing of the stolen property.
6. There is no error in refusing an instruction the effect of which was given in the general charge.

(July 16, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Union County convicting him of burglary. *Affirmed.*

The facts are stated in the opinion. *Messrs. T. H. Crawford and J. M. Carroll*, for appellant:

So long as the grand-jury system is not abolished, it is the constitutional right of

a defendant accused of a crime to demand that he be tried upon an indictment found by a constitutional grand jury.

Const. art. 7, § 18; *State v. Lawrence*, 12 Or. 297, 7 Pac. 116; *Re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489; *Jones v. Robbins*, 8 Gray, 342; 2 Kent, Com. 12; 1 Wharton, Crim. Law, 452; Story, Const. 1785; 3 Wilson's Works, 363, 364; *Charge to Grand Jury*, 2 Sawy. 668, 669, Fed. Cas. No. 18,255; Cooley, Const. Lim. 356; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

The act of the legislature approved February 17, 1899, is unconstitutional and void in that it attempts to supersede and replace the whole grand-jury system, as provided for in the Constitution and the laws of the state, without abolishing the grand jury, and in that it attempts to make the convening of a grand jury depend upon the discretion of the circuit court.

Sess. Laws 1899, p. 99; *Re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489.

Mere possession of goods stolen, without other evidence of guilt, is not to be regarded as prima facie evidence of burglary.

Wharton, Crim. Law, 8th ed. § 813; Wharton, Crim. Ev. 9th ed. § 736; 2 Am. & Eng. Enc. Law, p. 694; *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451.

Where, on the trial of two persons for burglary and larceny, the evidence shows a joint possession of the stolen property some time after the larceny, such joint possession is too remote to create a presumption that either of the defendants is guilty of the burglary.

State v. Warford, 106 Mo. 55, 16 S. W. 886.

To raise the presumption of guilt of either burglary or larceny from the possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant.

Field v. State, 24 Tex. App. 422, 6 S. W. 200; *Morgan v. State*, 25 Tex. App. 513, 8 S. W. 487; *Jackson v. State*, 28 Tex. App. 143, 12 S. W. 701; *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451; *White v. State*, 72 Ala. 195; *State v. Warford*, 106 Mo. 55, 16 S. W. 886; *State v. Castor*, 93 Mo. 250, 5 S. W. 906; 3 Greenl. Ev. § 33; *Gravelly v. Com.* 86 Va. 396, 10 S. E. 431.

Messrs. Samuel White and D. B. N. Blackburn, Attorney General, for respondent:

There is no such thing as a constitutional right of defendant accused of a crime to demand that he be tried upon an indictment found by a grand jury in this state. The Constitution of Oregon does not provide for prosecutions by indictment of any grand jury, but merely provides the manner in which grand juries may be selected or drawn.

Or. Const. art. 7, § 18, Hill's Anno. Laws, 103.

The change in the law providing for prosecutions by information instead of by indictment is not a change in any substantial 51 L. R. A.

right of a defendant, but is merely a change in the method of criminal procedure, and violates no constitutional right of the defendant.

Gordon v. State, 102 Ga. 673, 29 S. E. 444; *Bolln v. State*, 51 Neb. 581, 71 N. W. 444; *Territory v. Stroud*, 6 Okla. 106, 50 Pac. 265; *State v. Hoyt*, 4 Wash. 818, 30 Pac. 1060; *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 565.

The act is not unconstitutional or void in that it makes the calling of a grand jury at the will of the circuit judge or at his discretion, and is not local or special in its nature by reason thereof.

Bolln v. State, 51 Neb. 581, 71 N. W. 444; *Re Dolph*, 17 Colo. 35, 28 Pac. 470; *Re Boulter*, 5 Wyo. 329, 40 Pac. 520.

Neither does this information law violate the provisions of the Constitution providing that no persons shall be deprived of life, liberty, or property without due process of law.

Re Boulter, 5 Wyo. 329, 40 Pac. 520; *Re Dolph*, 17 Colo. 35, 28 Pac. 470; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 565; *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3.

Where two persons are jointly indicted in the breaking and entering, and charged as with the intent to commit larceny, the possession by the defendant, soon after the crime, of goods shown to have been stolen from the premises broken and entered is a circumstance which may be taken into consideration by the jury, tending to show that defendants are the ones who committed the burglary and would justify a verdict of guilty, unless such possession is in some way explained; and where two persons have such possession as implies control in them jointly they may each be said to have exclusive possession.

McClain, Crim. Law, §§ 514, 620; *Murphy v. State*, 86 Wis. 626, 57 N. W. 361; *People v. Arthur*, 93 Cal. 536, 29 Pac. 126; *Ryan v. State*, 83 Wis. 480, 53 N. W. 836; *State v. Raymond*, 46 Conn. 345; *Frasier v. State*, 135 Ind. 38, 34 N. E. 817; *State v. Pennyman*, 68 Iowa, 216, 26 N. W. 82; *State v. Harrison*, 66 Vt. 523, 29 Atl. 807.

The recent possession of goods stolen from a building burglarized is proper evidence to go to the jury tending to show that the party in whose possession the goods are found is the party having committed the burglary.

McClain, Crim. Law, §§ 514, 616, 620; *People v. Carroll*, 54 Mich. 334, 20 N. W. 576; *State v. Rivers*, 68 Iowa, 611, 27 N. W. 781; *People v. Mitchell*, 55 Cal. 236; *State v. Hodge*, 50 N. H. 510; *State v. Frahm*, 73 Iowa, 355, 35 N. W. 451; *Frank v. State*, 39 Miss. 705; *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *People v. Wood*, 99 Mich. 620, 58 N. W. 638; *People v. Jockinsky*, 106 Cal. 638, 39 Pac. 1077; *Hays v. State*, 30 Tex. App. 472, 17 S. W. 1063; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Harris v. State*, 61 Miss. 304; *Lundy v. State*, 71 Ga. 360; *State v. Warford*, 106 Mo. 55, 16 S. W. 886; *Gravelly v. Com.* 86 Va. 396, 10 S. E. 431; *Taliaferro*

v. Com. 77 Va. 411; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *People v. Carroll*, 54 Mich. 334, 20 N. W. 575; *People v. Beaver*, 49 Cal. 57.

Messrs. Charles F. Hyde and John McComb also for respondent.

Wolverton, J., delivered the opinion of the court:

The defendant Harry Tucker was accused, by an information filed by the district attorney, of the crime of "burglary, not in a dwelling house," jointly with one Wilbur Fruit, and, upon conviction thereof, judgment was entered against him, from which he appeals. He complains that he was unlawfully accused, and therefore not duly convicted. This is based upon the contention that the act of the legislative assembly of February 17, 1899 (Sess. Laws 1899, p. 99), is in violation of § 18, art. 7, Or. Constitution, which involves, also, the inquiry whether he has not been deprived of the privileges and immunities vouchsafed to every citizen of the land by the 14th Amendment to the Federal Constitution, whereby it is declared that no state shall deprive any person of life, liberty, or property without due process of law. The inquiry has received consideration at the hands of the Supreme Court of the United States, and has been decided adversely to the defendant's position. The question came up in the case of *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292, which involved the validity of a statute of California wherein it was made the duty of the district attorney, whenever a defendant was examined and committed as provided by the Criminal Code of that state, to file within thirty days thereafter in the superior court of the county an information charging the defendant with such offense; and it was distinctly announced, as a principle under the Constitution, that the phrase "due process of law," as used in the amendment, "refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." And further: "That any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." From these premises it was concluded that although the grand jury was a tribunal known to and sanctioned by the common law, whose duty it was to make presentment of crime to the court, yet the preservation of the system was not essential to the perpetuation of those underlying principles of our civil and political institutions; that it constituted a preliminary proceeding, formal in character 51 L. R. A.

only, which could result in no final judgment, except as a consequence of a regular judicial trial; and that, as the defendant was yet entitled to all the rights and privileges of a regular trial subsequently to be had, the guaranty of the Constitution had been amply conserved. This case has been subsequently cited by the same tribunal as authoritative, and has never, as we are aware, been departed from. See *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959. The significant trend of judicial utterance of the state courts is to the same purpose. Perhaps the leading case is *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559. The facts upon which it is founded illustrate very clearly the situation attending the present controversy. Originally it was declared by § 8, art. 1, of the Constitution of Wisconsin, that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." In 1870 the clause was amended so as to read: "No person shall be held to answer for a criminal offense without due process of law." The contention was that the amendment did not change the effect of the original clause, and that by the words "due process of law" there was still reserved the right to require an accusation by a lawfully constituted grand jury before the offender could be put upon his trial. Mr. Justice Cole, who announced the opinion of the court, considered the question in connection with the 14th Amendment of the Federal Constitution, and his cogent reasoning, although addressed more particularly to the bearing of the amendment, was intended to apply as well to the later declaration in the state Constitution. He says: "The historical origin of the 14th Amendment to the Constitution of the United States is familiar to all persons in this country. Prior to its adoption there was a class of persons in the states, which on account of the state of public sentiment, were particularly exposed to oppressive and unfriendly local legislation. They were liable to be despoiled of their property, or to be deprived of their rights, privileges, and immunities, in an arbitrary manner, and without 'due process of law.' And the object of this amendment was to protect this class especially from any arbitrary exercise of the powers of the state governments, and to secure for it equal and impartial justice in the administration of the law, civil and criminal. But its design was not to confine the states to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law' in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecution for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms

and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and, if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state Constitution as it now stands, and nothing in the 14th Amendment to the Constitution of the United States, which prevents them from doing so." So it was concluded that "due process of law" did not require the preservation and perpetuation of the grand-jury system, and that its abolishment was not an infraction of the sacred and inestimable rights, privileges, and immunities to which every citizen of the state or of the United States is entitled as of right. See also *Re Dolph*, 17 Colo. 35, 28 Pac. 470; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 565; *Re Boulter*, 5 Wyo. 329, 40 Pac. 520; *Bolin v. State*, 51 Neb. 581, 71 N. W. 444; *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675. The history and development of the grand-jury system will demonstrate that its functions have not been uniform; that while it is a body of very ancient origin, and has become inwrought as one of the permanent institutions of the common law, its offices were not always the same. At first it was a body which not only accused, but tried, public offenders. At a later period it became an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in special instances, be put upon trial. At times it stood in the country of its birth as a barrier against prosecution in the name of the sovereign, but at length it came to be regarded as an institution by which the subject was rendered sacred against oppression from unfounded prosecutions of the Crown. "The institution," says Mr. Justice Field, "was adopted in this country, and is continued, from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Charge to Grand Jury*, 2 Sawy. 667, Fed. Cas. No. 18,255. The insertion of the clause in the Federal Constitution expressly providing for a continuation of the grand-jury system in national jurisprudence is ascribed to such reasoning as this. The learned justice was still upon the bench, however, when *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292, was decided, and gave his unqualified assent to the doctrine thereof. It is evident, therefore, that, while the great jurist commended the wisdom of the system as adopted in the national Constitution, he did not deem its perpetuation essential to the reg-

ular and orderly administration of justice in obedience to the behests and requirements of the "law of the land" or "due process of law." The grand jury continues to be an accusing body, but the number of which it may be composed varies in the several states. Its sittings and deliberations are in secret, and usually *ex parte*; hence lacking even the primary essentials of due process of law,—the right of notice or a day in court. But this right is reserved to the accused upon his final trial by a jury of his peers.

The greater stress, however, is laid upon the question primarily stated,—whether the legislature of the state is empowered, under the state Constitution, to modify the grand-jury system, without abolishing it *in toto*. Section 18, art. 7, by which the matter is regulated, reads as follows: "The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand juries." The act complained of provides, among other things, that it shall be lawful for the district attorney of any judicial district in the state, and it is made his duty, to file in the proper circuit court an information charging any person or persons with the commission of any crime defined and made punishable by the laws of the state, and which shall have been committed in the county where the information is filed; that the information shall be substantially in the form prescribed in § 1269 of the Criminal Code, except the words "district attorney" shall be used instead of the words "grand jury" wherever the same shall occur, and the manner of stating the act constituting the crime shall be of like nature as required in the indictment. The act further provides that from the time the information is filed, and thereafter until and including judgment, it shall be construed to be in all respects an indictment, within the meaning of the present statutes of the state, and that the same proceeding shall be had, with like effect, as in cases where indictments are returned by a grand jury. It empowers the district attorney to subpoena witnesses to appear before him to testify concerning the commission of crime in like manner as before a grand jury, and requires the name of each witness examined under oath or affirmation to be inserted at the foot of the information or indorsed thereon, before the same is filed; otherwise, the testimony of such witnesses cannot be heard against the defendant at the trial. Section 7 provides: "This act shall not prevent the circuit court from convening a grand jury whenever in its opinion it is deemed advisable to do so." It is insisted that, so long as grand juries are not abolished, it is the constitutional right of every individual charged with crime to demand and require that the accusation against him be by indictment of a grand

jury. In support of this position the chief reliance is founded on the case of *Re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489. That case involved the question of the constitutionality of an act of the legislature which provides, among other things, for the organization and maintenance of criminal courts within certain counties, which were to be courts of record; and it was further provided that the district attorney of the judicial district in which they were established should be the prosecuting officer, thereof, that no grand jury should be summoned therein, but that the prosecution of all offenses should be by information, signed and verified by the district attorney, and filed therein. An information was filed against Lowrie, charging him with grand larceny under the statute, which he moved to quash upon the ground that a person charged with such an offense could only be prosecuted upon a presentment or indictment of the grand jury. The question presented had a twofold aspect or bearing, and was whether, in view of the Constitution then prevailing, it was competent for the legislature to abolish the grand-jury system as it pertained to the criminal courts, and leave it in force in the district courts, which were in the exercise of general jurisdiction, or whether the system could be abolished within the territory in which the criminal courts happened to be established, and continued in force in other portions of the state, within the limitations of the Federal and state Constitutions. The 14th Amendment of the Federal Constitution was alluded to, as were also §§ 8, 23, and 25 of article 2, and § 28, art. 6, of the state Constitution. Section 8 provides "that until otherwise provided by law no person shall for a felony be proceeded against criminally otherwise than by indictment;" § 23, among other things, that "hereafter a grand jury shall consist of twelve men, nine of whom concurring may find an indictment: provided, the general assembly may change, regulate, or abolish the grand-jury system;" and § 25, no person shall be deprived "of life, liberty, or property without due process of law." The court entertained the view, and so decided, that under these fundamental provisions it was competent for the legislature to change, regulate, or abolish grand juries, but that in view of § 28, art. 6, providing for uniform operation of the laws regulating courts, it must be so effectuated as to affect the whole community equally in respect to the same rights and immunities under similar circumstances; that is to say, it might abolish the entire system, or it might change it, but that whatever is done, in either event, must be so done as to operate uniformly over the entire state, and affect all classes of individuals alike, or otherwise many persons within the state may be deprived of the equal protection of the laws. Hence it was declared that the law providing for the prosecution of persons charged with a felony by information within certain prescribed portions of the state, and within certain courts of limited

and peculiar jurisdiction, was unconstitutional and therefore void. The doctrine of the case would seem to be, not as contended for by counsel, that the legislature must abolish *in toto*, or keep its hands off, but that whatever it does towards its abolishment, regulation, or change, the law promulgated for the purpose must have equal and uniform operation throughout the state. Such has been the interpretation thereof as distinguished in *Re Dolph*, 17 Colo. 35, 28 Pac. 470,—a later case from the same state, wherein it was held that "general laws providing for indictments and informations as concurrent remedies for the prosecution of criminal offenses throughout the state are not unconstitutional, when surrounded by proper regulations and safeguards, and made applicable to all persons and communities in the state, without discrimination." The above quotation is from the syllabus of the case. The doctrine as thus stated is supported by ample authority. See *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 566; *Re Boulter*, 5 Wyo. 329, 40 Pac. 520. The legislature by the late act has made prosecution by information concurrent with prosecution by indictment, which it was empowered to do by the authority vested in it under the Constitution to "modify grand juries." The significance of the word "modify," as used in this section, was determined in *State v. Lawrence*, 12 Or. 297, 7 Pac. 116. Mr. Justice Lord, speaking for the court, says: "In a general sense, to modify means to change or vary, to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary, and popular sense. A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally existing thing. . . . The legislature may modify in various ways, by limiting or regulating their powers, duties, qualifications," etc. A fault is attributed to the law, that it is left to the will and caprice of the court or prosecuting attorney whether to pursue the one or the other method of prosecution, and therefore that its operation will not be equal and uniform; that it will not affect all individuals alike, and therefore some may be deprived of the equal protection of the laws. This idea gained currency from the opinion in the case of *Re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489, but that portion of the opinion is mere *dictum*, and has never been followed as authoritative, even by the court that announced it. Indeed, the identical question, so far as the discretion of the court is concerned, was raised in the case of *Re Dolph*, 17 Colo. 35, 28 Pac. 470, and

expressly determined contrary to the criticism. In *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748, 27 Pac. 565,—a comparatively late case from Wyoming,—it was suggested that it was a dangerous procedure to permit a prosecution by information of the prosecuting officer alone, without preliminary examination before a magistrate, and the suggestion has since led to the amendment of the statute. But in a later case (*State v. Krohne*, 4 Wyo. 347, 34 Pac. 3), in an opinion rendered by the same justice, such an act was held to be valid, and not obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law. See also *Territory v. Stroud*, 6 Okla. 108, 50 Pac. 265. Section 11 of the Bill of Rights, embraced by article 1 of the Constitution of the state, has secured to the accused the right of public trial by an impartial jury; to be heard by himself and counsel; to demand the nature of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for requiring the attendance of witnesses in his favor. This constitutes the chief palladium of civil liberty under the Constitution. The manner of preferring the accusation is of preliminary import, and whether it shall be done by a grand jury or by a public prosecutor, or concurrently by both, has, whether wisely or not, been left to the wisdom of the legislature to determine. Such is the authority reserved to it under the power to abolish or modify grand juries; but it can never abridge the rights vouchsafed to every individual by the sacred and inestimable provisions of § 11 of the Bill of Rights, and in this is conserved to the accused very much of all there is of immunity from deprivation of life, liberty, or property without due process of law. He is entitled to bail, except he be guilty of murder or treason, and is protected against excessive bail and unnecessary rigor while in confinement. It may be a matter about which reasonable minds may differ, whether he should have a preliminary examination before being subjected to an accusation and public trial before a court of justice, or as to the appropriate steps to be taken before an information may be preferred. But these matters are legislative in their import,—made so necessarily, under the Constitution, by virtue of the power given to modify grand juries; and, while the wisdom of the law may be a subject of dispute, the authority to enact it cannot be gainsaid.

At the close of the state's testimony the defendant moved for an instruction to the jury to return a verdict of not guilty, which being overruled, he again asked a similar instruction when the evidence on both sides was concluded. This request was also denied, and such action of the court is assigned as error. Thus is presented the question whether the evidence produced at the trial was sufficient upon which to submit the case to the jury. It tended to show that the father of the defendant Harry

Tucker lived about 2 miles from the residence of H. W. Lee, the alleged owner of the property taken; that Harry resided with his father; that Lee had in his granary on the night of January 30, 1899, seven sacks of alfalfa seed, that he locked the door of the granary at 9:30 o'clock in the evening, by means of a padlock and heavy staple; that on the following morning he found the door had been opened and two sacks of the seed taken away. The staple appeared to have been broken from its fastenings by means of a punch secured from Lee's shop, some 50 feet distant. Tracks, apparently made by a person wearing boots with small, high heels, were traced to and from the shop, which was entered through a hole in the rear thereof, and the punch was bent, indicating its use. Other tracks, apparently made by the same person, were found leading to and from a gate in the barnyard fence to the granary, about 20 feet distant. From the gate the tracks of two horses were traced out through a field, thence into and along a road leading to a gate within 200 of 300 yards of the residence of the elder Tucker. Within about 50 yards of the gate by the granary, in the course of the horses' tracks, was found a letter, contained in a pocket, addressed to Harry Tucker; and at the outlet from the field to the road were found tracks of a person, similar to those discovered at the granary. A. W. Gellis testified, in effect, that in the latter part of January or the first of February the defendant and Wilbur Fruit tried to sell some alfalfa seed to him in Baker City, which they said had been raised on Lower Powder; that the boys gave their names; and that he talked directly with the defendant, but did not see the seed. Charles F. Palmer testified, in effect, that the defendant and Wilbur Fruit came over to his store, in Baker City, on the evening of February 1 and talked with him concerning the sale of some alfalfa seed contained in two sacks, which he purchased from them the next morning; that they said it was grown on Lower Powder, on the Fruit ranch. The sacks in which the seed was contained were positively identified as the property taken from his granary, and the seed was of the same character as that which he lost. The contention of the defendant is that there was no testimony connecting him with the commission of the crime of burglary, aside from the fact that the stolen property was recently found in the joint possession of himself and Wilbur Fruit, and that such possession was not sufficient to warrant the jury in drawing an inference of his guilt therefrom. The inference to be drawn from the possession of stolen property has been held by this court to be one of fact, which may be considered by the jury, in connection with all the other attending circumstances, in determining the guilt or innocence of the accused. Such inference is strong or weak according to the character of the property, the nature of the possession, and its proximity to the time of the theft. *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797. Both of

these parties were in possession of the seed, and both exercised ownership over it. The fact that such possession was not exclusive in the defendant could make but little, if any, difference in the weight of the circumstance, considered as an evidentiary fact. The rule touching the inference to be drawn from the fact of possession is the same in cases of burglary as in larceny, where the latter crime has been committed in connection with the former. *State v. Rivers*, 68 Iowa, 611, 27 N. W. 781; *State v. Frahm*, 73 Iowa, 355, 35 N. W. 451. And it should be, as in cases of larceny, considered by the jury in connection with all the other inculpatory as well as exculpatory facts adduced at the trial, in determining the guilt or innocence of the accused. The question for us to determine is whether the testimony adduced is sufficient from which the jury may reasonably infer the guilt of the defendant. His possession is not the only item of evidence inculcating him. The fact of the horses' tracks, leading directly from the granary towards the residence of the father, where the defendant lived, and the further fact of the letter addressed to him being found in the route on the line of the tracks, are circumstances of some weight to be considered in connection with the circumstances of his possession, and the exercise of ownership over the stolen property. 1 McClain, Crim. Law, § 514. The property could not have been stolen or carried away without the breaking, so that the testimony pertinent to the establishment of the larceny was also relevant to substantiate the crime of burglary; and, in our opinion, there was sufficient to go to the jury and hence the request to instruct otherwise was rightly refused.

An exception was taken to the following

instruction of the court: "Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that both of the defendants, or either one of them, when tried alone, actually broke and entered the building or took the property. It is sufficient if it be shown that the joint defendants were acting together for that purpose, and if either one of them, while so acting together for that purpose, actually broke and entered the building with the intention of stealing therein, then all of the said defendants would be guilty of the crime, and either one of them may be prosecuted alone therefor." The ground of the exception is that there was no evidence introduced at the trial upon which to base the instruction touching the joint breaking. But in this the counsel are in error. The breaking was proved, and there was evidence tending to show that two persons were engaged in it. Further than this, the defendant and Wilbur Fruit were found associating together shortly afterwards, and jointly engaged in disposing of the fruits of the burglary.

An exception was taken, also, to the court's instruction No. 9. But what we have heretofore said upon the sufficiency of the testimony to go to the jury applies with equal force to this exception and instruction, so that it is unnecessary to discuss the matter further.

An exception was also saved to the court's refusal to give defendant's instruction No. 4. The effect of the instruction was given in the general charge, and no error can, therefore, be predicated upon the refusal.

The judgment of the court below is affirmed.

TENNESSEE SUPREME COURT.

J. B. BROWN, Admr., etc., of Ernest Krallop, Deceased,
v.

SUN LIFE INSURANCE COMPANY,
Appt.

(.....Tenn.....)

A stipulation against liability for death from suicide, sane or insane, does not defeat recovery on a policy of insurance, although the insured died from an overdose of

NOTE.—As to what constitutes an accident within the meaning of an accident insurance policy, see note to *Fidelity & C. Co. v. Johnson* (Miss.) 30 L. R. A. 206; *Modern Woodmen Accl. Asso. v. Shryock* (Neb.) 39 L. R. A. 820; *Kasten v. Interstate Casualty Co.* (Wis.) 40 L. R. A. 651; *Western Commercial Travelers' Asso. v. Smith* (C. C. App. 8th C.) 40 L. R. A. 653; *Feder v. Iowa State Travelling Men's Asso.* (Iowa) 43 L. R. A. 693.

As to presumption in respect to suicide of an insured person, see *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258, and note on page 262; *Johns v. Northwestern Mut. Relief Asso.* (Wis.) 41 L. R. A. 587; and *Standard Life & Accl. Ins. Co. v. Thornton* (C. C. App. 6th C.) 49 L. R. A. 116.
51 L. R. A.

morphine taken by himself, where the company fails to establish by a preponderance of the evidence that the self-destruction was intentional.

(January 31, 1900.)

A PPEAL by defendant from a judgment of the Court of Chancery Appeals affirming a judgment of the Chancery Court for Davidson County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Affirmed.*

The facts are stated in the opinion of the court of chancery appeals delivered by **Wilson, J.**, as follows:

This bill was filed by the complainant, as the administrator of the estate of Ernest Krallop, to recover the amount of a policy of insurance issued on the life of his intestate by the defendant. The defendant admits the issuance of the policy, and that the insured paid all premiums due under the policy before his death. Its defense is that Krallop committed suicide by taking morphine, and that under the terms of the poli-

by the self-destruction of the assured within three years forfeited all rights under it, except to demand a return of the premiums paid. Krallop died April 7, 1898, from the result of an overdose of morphine. The policy was issued May 13, 1895. It contains the following clause: "In the event of the death of the insured from suicide, whether sane or insane, within three years from the date hereof, the liability of the company shall be limited to a return of the premiums paid on this policy." Proof was taken, and the chancellor decreed that the company was liable, and gave the complainant a recovery for the amount of the policy, to wit, \$150, and interest thereon, and costs. The defendant appealed, and has assigned the following errors: First. The court erred in not holding, under the facts, that Krallop committed suicide, and that, therefore, his administrator was not entitled to recover under the terms of the policy. Second. The court erred in not holding that the clause in the policy of insurance was valid which provides for a forfeiture of rights under it, except as to a return of premiums paid, when the insured commits suicide, whether sane or insane, within three years from the date of its issuance.

That Krallop died from an overdose of morphine is not disputed. That his death occurred within three years after the issuance of the policy is admitted. Whether the chancellor was of opinion that the suicide clause in the policy was valid or invalid is not disclosed by his decree. It is general in its terms, and simply finds that the defendant is liable.

The insistence of the company is that the decedent took his life by an overdose of morphine poison. The contention of complainant is that the overdose of morphine was taken by accident, mistake, oversight, or inadvertence, and not by design, and hence that the case is not within the suicide clause of the policy, conceding the clause to be valid. He does not, however, admit the validity or application of this clause, in the event the court comes to the conclusion, from the evidence, that the reason of the insured was so completely overthrown at the time of the taking of the morphine that he had no control over his actions, and did not know what he was doing. If the controverted fact that the deceased took the overdose of morphine through mistake, or accident, or oversight, and not designedly, be found in favor of complainant, it will be unnecessary to consider the validity or invalidity of the suicide clause in the policy.

It is a proposition of law supported by authority as well as reason that this and similar clauses in policies of insurance, conceding them to be valid, are not infringed by the accidental and mistaken taking of an overdose of medicine or poison or by the unintentional taking of his life by the insured. *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660; *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992, and cases cited; *Phadenhauer v. Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623, and 61 L. R. A.

The principle or rule, in cases of this character, is equally supported that suicide or intentional destruction by one's own hand is not presumed. The presumption is otherwise. The company interposing the defense of suicide, whether sane or insane, must overcome this presumption, and satisfy the jury or court trying the case, by a preponderance of evidence, that the self-destruction was intentional. *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 43 N. W. 731; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 31 N. W. 779; *Persons v. State*, 90 Tenn. 291, 295, 16 S. W. 726; *Accident Ins. Co. of N. A. v. Bennett*, 90 Tenn. 256, 16 S. W. 723.

Under these principles, the question in the case is, Did Krallop commit suicide by purposely taking an overdose of morphine? That his death was caused by morphine, taken by himself, is the natural, and, we think, the necessary, inference to be drawn from the evidence. There is no evidence that he was insane, and so insane at the time he took the drug that his reason was dethroned, and his mind so deranged that he was incapable of rational judgment in regard to what he was doing, and of resisting the impulse to kill himself. If this condition of mind existed, the company would be liable under some authorities, notwithstanding the clause in the policy. The evidence of the parties with him all day, and up until a few hours of the time when he was found in his room under the fatal influence of the poison, established that he was not insane. He bought the drug less than three hours before he was found under its deadly influence. He called for 12 grains. The druggist selling him the drug saw no evidence of derangement at the time. He asked him if he desired the drug put up in proper doses, and he replied that it was not necessary, as he knew how or in what quantity to take it. He was subject to rheumatic attacks, and was suffering from an attack on the day of taking this morphine. When suffering with rheumatism, he sometimes drank to excess. But, from the proof, he did not drink any on the day he got this drug, unless he did so between the time of getting it and when he was found, a few hours afterwards, in his room under the dominion of the poison. There is no proof at all of his drinking in this interval. At least, the question is, Did he knowingly and purposely take an overdose of the poison to end his life, or did he do so ignorantly and inadvertently, or through a mistake as to the proper quantity constituting a safe dose, intending thereby to ease or relieve his suffering from rheumatism? It is difficult from this proof to settle this point with any certain assurance that the conclusion reached is in accord with the actual truth.

The evidence and the inferences deducible

therefrom present the question in about an even balance. It must be settled, therefore, on the probabilities, viewed and taken in connection with legal presumptions. The law presumes that the deceased did not commit suicide; that is, intentional self-destruction. The evidence of his close friends is that he had never, so far as they had seen, exhibited any suicidal tendency. He was of foreign birth, and about fifty-eight years of age. He was, so far as is disclosed, in no financial trouble. He had no relatives to benefit by dying, and leaving them to get the proceeds of the policy and his other effects. He had not been disappointed in love, or in any scheme of business or money making. While suffering at times with rheumatism, and, in consequence, drinking to excess on some occasions when thus suffering, he does not appear to have considered his life a failure. In view of these facts, taken in connection with the legal presumption stated, we deem it proper to find as a fact that he did not designedly take an overdose of the drug for the purpose of ending his life. Under the evidence, and the fair inferences therefrom, the question of whether he purposely took an overdose of the drug, or innocently, ignorantly, or accidentally did so, is about evenly balanced. In this state of the case, the presumption of the law turns the scale in favor of the liability of the company under its policy. There is no error in the decree of the chancellor, and it will be affirmed, with costs. The other Judges concur.

Mr. A. F. Whitman, for appellant:

If the conditions in the policy were simply against suicide in its technical sense, the company would not be liable, for the evidence shows that insured had formed a determination to take his own life while exercising his reasoning faculties, and was not driven to it by any insane impulse which he could not resist.

Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. ed. 236; *Phadenhauer v. Germania L. Ins. Co.* 7 Heisk. 507, 19 Am. Rep. 623.

A sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts.

Greenl. Ev. § 18; Jones, Ev. § 23.

A person is presumed to be sane. Though the insured may be shown to have committed suicide, insanity will not be presumed.

Weed v. Mutual Ben. L. Ins. Co. 70 N. Y. 561.

There is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity.

Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. ed. 236.

Where insanity is alleged to prevent a policy from being avoided by self-destruction, it devolves on the plaintiff to prove such insanity.

Ibid.

If Ernest Krallop took the morphine for the purpose of killing himself, no matter what the condition of his mind was, the company is not liable.

Bigelow v. Berkshire L. Ins. Co. 93 U. S. 51 L. R. A.

284, 23 L. ed. 918; *Searth v. Security Mut. Life Soc.* 75 Iowa, 346, 39 N. W. 658; *Street-er v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 31 N. W. 779.

Messrs. J. B. Brown and George W. Hight for appellee.

The above decision was affirmed orally by the supreme court on January 31, 1900.

Frank O. CROY, Appt.,
v.

W. W. EPPERSON.

(104 Tenn. 525.)

One who takes orders in his own name, from house to house, for articles manufactured in another state, and who in his own name sends a single order to the manufacturer, without stating the names of his customers, and, on receiving the package containing the articles, delivers therefrom the separate articles to his customers, is not engaged in interstate commerce so as to be exempt from a tax on the privilege of selling articles of that kind within the county.

(May 5, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Obion County in favor of defendant in an action to recover property which had been seized by defendant under a warrant for the collection of a license tax. *Affirmed.*

The facts are stated in the opinion.

Mr. J. M. Ownby for appellant.

Messrs. H. C. Stanfield and C. N. Lannom, for appellee:

When goods are sent from one state to another for or in consequence of a sale they become part of its general property, and amenable to its general laws; provided that no discrimination is made against them as goods from another state, and that they are not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The plaintiff, Croy, was exercising the privilege of a peddler, and as such was taxable under the revenue laws of Tennessee.

Caldwell, J., delivered the opinion of the court:

This is an action of replevin brought by Frank O. Croy against W. W. Epperson, a constable of Obion county, to recover the possession of certain floor-sweeping broom.

NOTE.—For business of agent of nonresident as interstate commerce, see *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97, and note on peddlers and drummers as related to interstate commerce; also *Gunn v. Waite Sewing Mach. Co.* (Ark.) 18 L. R. A. 206; *State v. Phipps* (Kan.) 18 L. R. A. 657; *State v. Gorham* (N. C.) 23 L. R. A. 810; *Milan Mill. & Mfg. Co. v. Gorton* (Tenn.) 26 L. R. A. 135; *State v. Scott* (Tenn.) 36 L. R. A. 461; *Macnaughtan Co. v. McGirt* (Mont.) 38 L. R. A. 307; *Smith v. Jackson* (Tenn.) 47 L. R. A. 416; and *Adkins v. Richmond* (Va.) 47 L. R. A. 583.

brushes, which the latter had seized as the property of the former under a distress warrant issued for the collection of a tax for the privilege of selling articles of that kind in that county. The circuit judge tried the case without a jury, and rendered judgment in favor of the defendant, and from that judgment the plaintiff prosecutes an appeal in error.

The plaintiff rests his claim to relief upon the contention that he was engaged exclusively in interstate commerce, and consequently that he was protected by the commerce clause of the Federal Constitution from state taxation upon his business. Only one witness was examined on the trial, and that was the plaintiff, who testified in his own behalf. He admitted that he had sold numerous articles, like those involved in this case, to different citizens of Obion county, Tennessee, and that he had paid no tax for the privilege of so doing. He said that he made the sales by sample, and as agent of a firm that manufactured the brushes, at Sedalia, Missouri, that he went from house to house and took "orders," which "were just memoranda of names and addresses of parties who agreed to buy the brushes;" that, at his convenience, he, in his own name, and without giving the name of any customer, sent an order for "forty-six brushes and handles" to one of his principal's distributing agents, at Paducah, Kentucky; that his order was there filled, and all of the articles shipped to him in his own name, as an individual, at Union City, in a single box; that he opened the box, took out the brushes, and delivered them, one by one, indiscriminately, at the houses of those who had agreed to buy,—all the brushes being alike, and no one of them having been ordered or shipped for any particular purchaser. The testimony thus delivered fails to disclose transactions in interstate commerce, in the legal sense. The statement that the plaintiff was acting as the agent of a nonresident principal, as in *Hurford's Case*, 91 Tenn. 669, 20 S. W. 201, and in *Scott's Case*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1, is discredited, and the plaintiff shown to have been engaged in intrastate commerce in his own behalf, as in *Kimmell's Case*, 104 Tenn. 184, 56 S. W. 854, by his narration of the manner in which he ordered, received, sold, and delivered the brushes. He did not communicate the names of his customers to his alleged principal, nor take any order from them to that principal, but only took memoranda of their addresses for his own use. He ordered nothing in the name of any customer, but everything in his own individual name, and in that name alone the shipment was made. He ordered no particular article for any particular customer, but all of them, as a whole, for himself, and with a view to an indiscriminate delivery to his customers, one by one, as he might go to their houses. All these are characteristics of a business done for one's self, rather than of a business conducted by an agent for a principal. Furthermore, if the plaintiff had in fact and in good faith made all of these

transactions and done all of these things as agent of a nonresident principal, he would nevertheless have been without the protection of the commerce clause of the Federal Constitution, and subject to taxation by the state, because the sales were not of original packages, but of distinct parts of an original package after it had been broken, and they by force of law had become parts of the general property within the state. *Kimmell v. State*, 104 Tenn. 184, 56 S. W. 854; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 48 S. W. 305.

For the two reasons stated, the judgment of the Circuit Court is affirmed. No opinion is expressed as to the right of the plaintiff to test his liability for this tax by an action of replevin.

J. M. JAMES COMPANY

v.

CONTINENTAL NATIONAL BANK.

(.....Tenn.....)

1. An action against a bank for wrongfully refusing payment of a check is not an action for slander within the meaning of Shannon's Code, § 4468, limiting the time for bringing "actions for slanderous words spoken."
2. Failure to allege special damages is not fatal to a complaint for wrongful refusal to honor a check, where it is averred that plaintiff is a trader.
3. Failure to aver that a bank did not have a lien on a deposit which it refused to apply in payment of a check is not fatal to a declaration against it for such refusal, since the lien, if any existed, was a matter of defense to be brought forward by plea.
4. Evidence that particular persons have ceased to deal with a trader is not admissible without an averment of special damage therefrom, in an action for injury to his credit by wrongful refusal of a bank to pay a check.
5. Evidence of the general impairment of credit resulting from the dishonor of checks is admissible in an action therefor, without any averment of special damage.
6. The law conclusively presumes that a trader is damaged by the wrongful refusal of a bank to pay his checks.

(June 6, 1900.)

A PPEAL by plaintiff and writ of error by defendant to review a judgment of the Circuit Court for Shelby County in an action to recover damages for refusal to honor certain checks drawn by plaintiff on defendant; the plaintiff complaining of the limitation of his recovery to nominal damages, and defendant complaining of the refusal to dismiss the case entirely. *Reversed on plaintiff's appeal.*

NOTE.—As to liability of bank for refusal to pay check when having funds therefor, see also *Schaffner v. Ehrman* (Ill.) 15 L. R. A. 184, and *note*; *Svendsen v. State Bank* (Minn.) 31 L. R. A. 552; *Mt. Sterling Nat. Bank v. Greene* (Ky.) 32 L. R. A. 568.

The facts are stated in the opinion.

Messrs. Jackson & Jackson and Warriner & Warriner, for plaintiff:

The dishonor of the checks and the business in which plaintiff was engaged being shown, the law conclusively presumed that plaintiff had suffered substantial damages.

Schaffner v. Ehrman, 139 Ill. 109, 15 L. R. A. 135, 28 N. E. 917; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 192, 58 N. W. 84; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632; *Svendsen v. State Bank*, 64 Minn. 40, 31 L. R. A. 552, 65 N. W. 1086; *Rolin v. Steward*, 14 C. B. 595; *Continental Nat. Bank v. Bowdre*, 92 Tenn. 723, 23 S. W. 131.

There is no suggestion even, of any false statement written or spoken by defendant, or either of them. Without this, of course, no action for libel or slander can be maintained; for no amount of malice will compensate for the absence of falsehood in the legal requirement of this kind of action.

Payne v. Western & A. R. Co. 13 Lea, 513, 49 Am. Rep. 666; *Harrison v. Burem*, Thomp. Cas. 152.

So, then, the legal question presented is, whether the wrongful and malicious dishonor of the checks of a corporation engaged in trade by its banker, is not "an injury to the person."

Calloway v. Laydon, 47 Iowa, 458, 29 Am. Rep. 489; *Smith v. Sherman*, 4 Cush. 408; *Trafford v. Adams Exp. Co.* 8 Lea, 112.

In an action for breach of the implied contract to honor the checks, recovery is not limited to nominal damages unless special damages are proved.

1 Sutherland, Damages, p. 129; *Hadley v. Bazendale*, 9 Exch. 353; 5 Am. & Eng. Enc. Law, 2d ed. p. 1060.

Slander is "defamatory words falsely spoken of a party, which prejudice such party in his or her profession or trade."

Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; *Cooley*, Torts, pp. 229, 235; *Ireland v. McGarvish*, 1 Sandf. 155; *Onslow v. Horne*, 3 Wills. 186; *Starkie*, Slander & Libel, 180.

There must be false, defamatory words spoken, in order to constitute a slander.

13 Am. & Eng. Enc. Law, p. 297; *Payne v. Western & A. R. Co.* 13 Lea, 513, 49 Am. Rep. 666; *Harrison v. Burem*, Thomp. Cas. 152.

There must be an averment of a false statement written or spoken, or no action for slander or libel can be maintained.

Payne v. Western & A. R. Co. 13 Lea, 513, 49 Am. Rep. 666; *Harrison v. Burem*, Thomp. Cas. 152.

Messrs. Metcalf & Metcalf and W. A. Percy, for defendant:

Action for slanderous words spoken shall be commenced within six months after the words are spoken.

Shannon's Code 4468 (Mill. & V. Stat. 3468).

The word "spoken" does not literally mean vocal utterance. To utter is to assert and declare directly or indirectly by words or actions.

51 L. R. A.

28 Am. & Eng. Enc. Law, p. 1; *Odgers*, Libel & Slander, 7; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Townshend*, Slander & Libel, 58, and note; *Cooley*, Torts, 203; 1 *Jaggard*, Torts, 6.

If the cause of action as stated in the declaration or complaint arises from a breach of promise, the action is *ex contractu*; if from a breach of duty growing out of the contract, it is *ex delicto* and case.

Junker v. Fobes, 45 Fed. Rep. 840.

The plaintiff has chosen to adopt this latter remedy.

Campbell v. Reeves, 3 Head, 226.

Whether the action be *ex delicto* or *ex contractu* is to be determined from the facts and the nature of the relief demanded, and if the facts stated indicate that the plaintiff is proceeding for a measure of recovery adapted only to one form of action, it must be concluded that the pleading belongs to that form, whether *ex contractu* or *ex delicto*.

4 Eng. Pl. & Pr. 2d ed. 916.

The American cases with two exceptions have been laid in tort.

Patterson v. Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632; *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 28 N. E. 917; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190; *Svendsen v. State Bank*, 64 Minn. 40, 31 L. R. A. 552, 65 N. W. 1086; *First Nat. Bank v. Shoemaker*, 117 Pa. 101, 11 Atl. 304; *First Nat. Bank v. Kansas Grain Co.* 60 Kan. 30, 55 Pac. 278.

Treating the first count of the declaration as an action *ex contractu*, no error was committed by the court below against the plaintiff, either in its ruling on testimony or in the charge given or instructions refused.

Every breach of contract gives the injured party a right of action, and the right to a verdict in his favor, but, if no actual loss at all accrues from the breach, he is only entitled to nominal damages, that is, a sum of money that may be spoken of, but that has no existence in point of quantity.

Clark, Contr. 696.

Damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract—such as might have been in their contemplation when the contract was made.

Hadley v. Bazendale, 9 Exch. 341; *Petree v. Tennessee Mfg. Co.* 1 Sneed, 381; *McWhirter v. Douglas*, 1 Coldw. 593.

The measure of damages for the unauthorized refusal of the bank to pay the note of a depositor who has funds on deposit sufficient for the purpose is the amount of the actual loss sustained by the depositor naturally resulting from the breach of contract arising from the relation of debtor and creditor existing between a bank and its depositor, according to the usual course of things, namely, the amount of the debt with interest and cost.

Brooke v. Tradesmen's Nat. Bank, 69 Hun, 202, 23 N. Y. Supp. 802; *Burroughs v.*

Tradesmen's Nat. Bank, 87 Hun, 6, 33 N. Y. Supp. 864.

Beard, J., delivered the opinion of the court:

The J. M. James Company, a mercantile firm in Memphis, was on the 19th day of March, 1897, a customer and depositor with the defendant bank. On that day it drew several checks in favor of different payees on this bank, which were presented the following day for payment. When so presented, payment was refused, and their respective holders were notified of the fact. Subsequently this action of the bank was reconsidered, and the checks were recalled and paid. On the 12th of April, 1898, the present suit was instituted. The declaration of the plaintiff contained five counts, substantially as follows: "(1) That the plaintiff was and had been engaged as a trader, in the mercantile and commission business, in Memphis, for several years prior to March 19, 1897, and a customer of and depositor with the defendant bank, and that on that day, and for several days prior and subsequent thereto, it had on deposit with the defendant \$3,212.46, subject to plaintiff's checks; that on said day it drew several checks on defendant bank, as follows: One in favor of W. W. James for \$500, one in favor of W. H. Cousins for \$54.51, one in favor of W. H. Cousins for \$2,251.76, and one in favor of the Memphis National Bank for \$250; that said checks were presented on the following day, March 20, 1897, to the defendant bank for payment, whereupon defendant refused to pay said checks, and they were thereby dishonored, and that such refusal was wrongful on defendant's part, and a breach of its contract with plaintiff, and plaintiff has suffered great injury therefrom. Wherefore, plaintiff has been damaged in the sum of \$75,000, and sues." (2) After repeating in the language of the first count, the second count alleged: "The refusal and failure of defendant to pay said checks, when it had on deposit more than a sufficiency of money to pay them, deposited with it by plaintiff, was wrongful, wilful, and malicious, and plaintiff has suffered great injury therefrom. Wherefore the plaintiff has been damaged in the sum of \$75,000, and sues." (3) After repeating as in the last count, the third count alleged: "The refusal and failure to pay said checks, when it had on deposit more than a sufficiency of money to pay them, deposited by plaintiff with defendant, as aforesaid, was wrongful, wilful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation; and plaintiff avers that it has been injured in its credit, business, and reputation by the damage thereof, and has suffered to the extent of \$75,000. Wherefore plaintiff sues." (4) After averring as in the former counts, the fourth count alleged: "This failure and refusal on the part of defendant to pay said checks was wrongful, and a breach of its

51 L. R. A.

contract with plaintiff; and plaintiff avers that it has been injured greatly thereby, its credit has been injured, its reputation hurt, and plaintiff has in consequence of defendant's said breach of contract lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has suffered damages to the extent of \$75,000, for which it sues defendant." (5) After averring as in the former counts, and that plaintiff was doing business in the state of Arkansas, Mississippi, and Tennessee, and that it possessed the confidence of the business public in its integrity and fair dealing, said fifth count alleged: "This failure and refusal on the part of the defendant to pay said checks was wrongful, wilful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation. The plaintiff further avers that it has been greatly injured and wronged in its credit, business, and reputation; that, by said wrong inflicted on it by defendant, plaintiff's credit has been impaired, its business reputation hurt, and as a consequence thereof it has lost many of its customers, and has been unable to obtain credit necessary to conduct its business successfully. Hence plaintiff avers that it has been damaged to the extent of \$75,000, for which it brings this suit." The defendant demurred to all five of the counts. The court below sustained the demurrer to the last four of the counts, and overruled it as to the first, upon which, and a plea to it, the case was tried, resulting in a verdict of one dollar for the plaintiff. A new trial having been refused, an appeal in the nature of a writ of error has been prosecuted to this court by the plaintiff below. Many errors are assigned for reversal of the cause.

The record is also before us upon a writ of error sued out by the defendant bank, which assigns error to the action of the trial judge in overruling its demurrer to the first count. One of the contentions, presented by the demurrer was that all the counts of plaintiff's declaration were laid in tort, to recover damages for slander to the reputation and credit of the plaintiff, and that the suit was barred by the statute of limitations of six months. This somewhat novel view was adopted by the trial judge, as to the last four counts, and as to them this ground of demurrer was sustained, but overruled as to the first; the court holding, as we assume, that this count was one *ex contractu*. It is with great earnestness argued by the defendant bank that, as to these four counts, this is a sound view, and that the judgment of the lower court in this regard should be maintained. The statute of limitation relied on by the demurrant, and applied by the trial court to the counts in question, is in these words: "Actions for slanderous words spoken shall be commenced within six months after the words spoken." Shannon's Code, § 4468. It would seem as if it would have been difficult for the legislature to choose words which would more

clearly exclude such an action as the present one from the operation of this section, or more apt to embrace alone an action for slander, as this offense is defined by the text-books, the reported cases, and by standard lexicographers, both law and literary. All these substantially agree in defining slander as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another. Cooley, Torts, pp. 229, 235; Newell, Defamation, 40; Townshend, Slander & Libel, § 3; Rapalje & L. Law Dict. 1198; 3 Bl. Com. 183; Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; Harrison v. Burem, Thomp. Cas. 152; Webster Dict. But it is urged that slander may be perpetrated by an act or deed, and that when a banker wrongfully rejects his depositor's checks, as is charged in these counts, he slanders his business reputation and credit,—as much so as if he had defamed him in uttered words; that in such case it is the "act speaking," thus bringing the case within the terms of the statute. It is true, we often say that actions speak, as in the homely adage, "Actions speak louder than words;" but this is a mere figure of speech, and by it is meant that the acts or deeds of one convey to others more distinct impressions than mere words, and frequently contradict the latter. But the legislature was not, in passing this statute, refining upon the term "slander." An act may, in the sense indicated, speak, but it has no articulate voice; and it is the slander so uttered (that is, by spoken words) which is in the spirit and letter of this section. We have examined the authorities relied on by demurrant to sustain the trial judge in the conclusion reached by him that these were counts in slander, within the terms of this section, and by it barred, because the suit was brought more than six months after the utterance of the slander and we can discover in them no support for the contention of demurrant. Before referring to them it is well to say that in none of the works on Libel and Slander, accessible to us, have their authors included what is called by the counsel for demurrant "slander by deed or act." Slander by spoken words is uniformly the subject of their text. In fact, Mr. Odgers, in the introduction to his work on Libel and Slander (p. 8), says: "A man's reputation may also be injured by the deed or action of another, without his using any words, and for such an injury he has an action on the case, but such cases are not within the scope of the present treatise." Among the illustrations of such an actionable injury, but yet outside the limits of a work on slander, the author gives that of a banker having in his hands sufficient funds belonging to his customer, and dishonoring his check. Cited to this text are the cases of *Marzetti v. Williams*, 1 Barn. & Ad. 415, and *Rolin v. Steward*, 14 C. R. 595; and, while they support it, they give no color to the present insistence that this act of the banker is slander, either in its technical or common acceptation. On the

contrary, Williams, J., in the last-mentioned case, says that such an action is like an action of slander brought by a trader, as such, for an imputation of insolvency, so far as the right to recover in damages is concerned; thus, by implication, negating the idea that it was an action of slander. Upon the basis of the analogy thus suggested between the two actions, as to the right and measure of recovery of damages, rests whatever there may be misleading in the later authorities. Mr. Cooley, in his work on Torts, in note to the text on page 203, says, "It is a species of slander of credit for a bank to refuse to honor the check of his customer who has money on deposit subject to call," citing to his note these two English cases. This is also true as to a footnote found on page 58, Townshend, Slander & Libel. The only case, which the industry of counsel for the demurrant has been able to bring to our attention, which gives any support to his contention, is that of *Svensden v. State Bank*, 64 Minn. 40, 31 L. R. A. 552, 65 N. W. 1086. This, like the two cases already referred to, was an action by a trader against a bank to recover damages for dishonoring his check when it had ample funds of the depositor to meet it. In dealing with the question of the right to substantial damages, the court said: "The case of *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, seems to place the right to recover more than nominal damages in such a case on the ground of public policy; but the other cases place it, rather, on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. . . . To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such a slander." It is apparent, however, that the court was not treating the case in hand as an action for slander, but was dealing with the act of the bank, that was just as effectual in imputing dishonesty or insolvency to its customer as if either had been charged against him by word of mouth, and in the analogy between the cases found a ground common to both for substantial damages. This same analogy is pointed out in *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 28 N. E. 917; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; and *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190. These cases, like the others, are dealing with the question of damages properly recoverable upon the mere averment of the plaintiff, without more, that the plaintiff was a trader; and all agree that in such a case he should be awarded temperate but substantial damages, for in such a case "it is as in cases of libel and slander, which description of suit it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world." *Atlanta Nat. Bank v.*

Davis, 96 Ga. 334, 23 S. E. 190. We think there can be no doubt that the trial judge fell into serious error in treating these counts as counts in slander, and holding them barred by the statute of limitation of six months. He was equally guilty of error in sustaining the defendant's first ground of demurrer to the second count of the declaration. This count has already been set out. It is in tort. It was a count for a breach of duty growing out of the implied contract of the bank to honor plaintiff's checks as long as he had money to his credit. It was a count *ex delicto*. *Junker v. Fobes*, 45 Fed. Rep. 840. It alleged that plaintiff was a trader, and as such engaged "in the mercantile or commission business in the city of Memphis," but, as may be seen, averred no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal. The authorities are uniform that the averment that plaintiff is a trader is sufficient, and he is entitled in such a case to recover substantial damages, though special damage is not alleged. *Rolin v. Steward*, 14 C. B. 595; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190. And in *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 28 N. E. 917, it is held that the averment that plaintiff is a trader supplies the lack of allegations that he suffered special damage, or that the defendant acted out of malice in dishonoring his check. The assignments of error taken by plaintiff below to the action of the court in the two particulars just mentioned are therefore well taken.

Again, the trial judge was in error in sustaining the following ground of demurrer, to wit: "The defendant demurs for this: The plaintiff fails to aver that the bank did not have a lien on said moneys which were on deposit as alleged, for an indebtedness due by plaintiff to defendant." It is clear that, if such lien existed, it was a matter of defense, to be brought forward by plea. There is no rule of correct pleading which required the plaintiff to negative it in its declaration.

Error is assigned upon the action of the trial court in rejecting the testimony of one John C—— that prior to the dishonor of the checks in question he frequently induced his patrons to send their cotton to the house of plaintiff in error, but that after this time he ceased to do so, and also that, having lost confidence in plaintiff in error by reason of this dishonor, he did not send his own cotton. This testimony was properly rejected. In an action of slander by a trader for defamatory words spoken of him in the way of his trade, no averment of special damage is necessary, because the words are actionable *per se*. *Continental Nat. Bank v. Bowdre*, 92 Tenn. 724, 23 S. W. 131. And, in the absence of such averment, evidence of general loss of business is always admissible, for this is not special damage. But the plaintiff cannot show that particular persons have ceased to deal with him, unless the loss of their

custom is set out in the pleadings as special damage; for it is right that the defendant should be furnished with their names before trial. *Odgers, Libel & Slander*, p. 318; *Townshend, Slander & Libel*, § 345. There is such analogy between the present action and one for slander of a trader, it is evident the same rule is applicable. On the other hand, the testimony of Stratton, the secretary of the plaintiff company, showing the general impairment of the credit by the dishonor of these checks, was within the rule of competency, and was improperly excluded from the jury.

In his summary of the material points which the plaintiff must establish in order to recover, the court said to the jury: "It [the company] must satisfy you that it was damaged by the refusal of the bank to pay its checks, and how it was damaged, and the amount of the same, where it was subject to definite proof." This was error. Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury, under proper instructions, to fix. *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 28 N. E. 917; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; *Rolin v. Steward*, 14 C. B. 595; *Continental Nat. Bank v. Bowdre*, 92 Tenn. 724, 23 S. W. 131.

The trial judge was also in error in the following instruction: "Under the law of this case, the only damage that can be considered by the jury is the damage to the credit of the J. M. James Company with the persons or corporations to whom they gave the checks, as established by the evidence." It is evident that this narrow limitation upon the right of recovery by the plaintiff was in the face of the authorities already referred to. The rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact. And, if this customer is a merchant or trader, its natural effect is an injury to his business standing, as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages, measured by all the facts in the case.

The court below was further in error in the following instruction: "If the evidence establishes the fact that there was no absolute refusal to pay said checks, but only a request for delay, to look into the condition of the J. M. James Company's account, you will determine from the evidence whether the request was reasonable or was unreasonable, under the facts and circumstances proved. If the request was reasonable, then you will determine whether the delay was reasonable or unreasonable. If you find it to be reasonable, then there can be no recovery in this case. If the request was unreasonable, or the delay was unreasonable, in making an investigation of the account of

the J. M. James Company, then there can be recovery in this case." Upon this record, it was the duty of the bank to honor these checks on presentation. No excuse was offered in the court below for a failure to do so. No request for an opportunity to examine the account of this company is shown. There is no pretense that time was needed for examination of the account. In truth, the record discloses that, when presented to the bank's teller, he was at once informed that the company had to its credit funds to make them good. In view of these facts, and the additional fact that they were paid after several hours' delay, this instruction could not have been otherwise than misleading to the jury and prejudicial to the plaintiff.

The judgment of the Circuit Court is reversed, and the cause is remanded.

Matthew W. TRAVERS *et al.*, *Appts.*,
v.

John W. ABBEY *et al.*

(104 Tenn. 665.)

1. The removal by church officials, under authority of the church discipline, of a pastor who has no contract right to salary, and the appointment of his successor, will not be reviewed by the civil courts.
2. The objection that a court has no jurisdiction to review the acts of church authorities in a matter purely disciplinary is not waived by an answer, since the court has no jurisdiction of the subject-matter, and an objection raised at any time is fatal.
3. A pastor has no property right in his salary as against his church, when he depends entirely upon the duty of the church to support him by voluntary contributions, and has no contract for salary.

(May 30, 1900.)

A PPEAL by complainants from a decree of the Chancery Court for Shelby County in favor of defendants in a suit to enjoin interference with the transaction by complainants of their ecclesiastical duties as pastor and officials of a certain church. *Affirmed.*

The facts are stated in the opinion.

Mr. C. W. Heliskell for appellants.

Mr. B. W. Hirsch for appellees.

Wilkes, J., delivered the opinion of the court:

Prior to the institution of this suit, Matthew W. Travers had been appointed by the bishop and conference of the African Methodist Episcopal Church pastor of the Desoto street church of that denomination, known as "Avery Chapel," in the city of Memphis. John W. Abbey was the presiding elder of the district in which Avery Chapel is located. He removed Rev. Travers from the pas-

torate of Avery Chapel, and transferred him to another church in the same district, and placed Rev. Beckham in his place and stead, in charge of Avery Chapel. It is alleged, also, that the presiding elder ignored the regularly appointed stewards, against the consent of the congregation, and to the scandal of religion. The bill is filed by the deposed pastor and the old board of stewards against the newly-installed pastor and board, and charges that the latter will "on the morrow" (presumably the Sabbath) take charge of the church and conduct its services, and exclude complainants from the discharge of their official functions. The prayer of the bill is that defendants be enjoined from interfering with complainants in the discharge of their ecclesiastical duties as pastor and stewards, or closing the church upon them, or interfering with them in the discharge of their duties or with their services, and for general relief. There was an answer by the defendants, in which they admit the original appointment of Travers as pastor, but insist that he has been removed by proper disciplinary proceedings. They neither admit nor deny that the complainants named as stewards are such, but disclaim any intention to interfere with their official functions. They deny that the presiding elder removed the pastor without authority, but insist that he was regularly removed, in the mode pointed out by the discipline of the church, by the consent and advice of the bishop. They admit that Rev. Beckham has been appointed pastor, instead of Rev. Travers, and that he will proceed to exercise the duties and functions of pastor, and they insist that this is in strict accord with the discipline of the church. They disclaim any purpose of excluding the defendant stewards from the church, or their functions as officers, so long as they are authorized by the law of the church to act as such. The answer then proceeds to state the manner in which Rev. Travers was deposed from the pastorate, and alleges that it was in strict conformity to the discipline of the church, which is made part of the answer; and likewise as to supplying his place by Rev. Beckham after consultation with and approval by the bishop, in letters and telegrams, which are set out. The answer then says that the controversy is purely an ecclesiastical one, and not involving any legal or property rights, and it is asked that the bill be dismissed and the suit discontinued. Proof was taken, and on final hearing the court dismissed the bill, and complainants appealed.

We have examined the matters of controversy in the case, and they are such as are purely disciplinary, and relate to the ecclesiastical constitution and government of the church, and the exercise of its internal affairs, and the administration of discipline, and do not, in our opinion, involve any questions of property or personal rights. The civil courts will not review the decisions or proceedings of ecclesiastical judicatures in matters properly within their province under

NOTE.—As to conclusiveness of decisions of ecclesiastical tribunals, see also note to *Ryan v. Cudahy* (Ill.) 49 L. R. A. 353, on page 384. 51 L. R. A.

the constitution, laws, or regulations of the church. *Nance v. Busby*, 91 Tenn. 330, 15 L. R. A. 801, 18 S. W. 874.

There was no waiver of jurisdiction in this case by answering, and setting up defense in the answer, as the want of jurisdiction was of the subject-matter of litigation, and not of the persons of the defendants; and the objection could be raised at any time, and is fatal whenever presented. 12 Enc. Pl. & Pr. 186; *Galyon v. Gilmore*, 93 Tenn. 677, 28 S. W. 301; *Agee v. Dement*, 1 Humph. 332; *Dixon v. Caruthers*, 9 Yerg. 30; *Dean v. Snelling*, 2 Heisk. 484.

It may be that the disciplinary proceeding in this case is an arbitrary one. Of that the members of the church must judge, and the courts cannot. It may be that the proceedings were irregularly conducted, measured by the disciplinary standard. That is a question for the ecclesiastical or church revising authority, and not for the courts.

The pastor has no property right in his salary, as against the church. That is a

matter of voluntary contribution by the membership, except so far as individuals may bind themselves therefor. The pastor is not an employee of the church. Pecuniary considerations are not controlling in such relations. The pastor is actuated by a higher motive than the salary he receives. He may secure this as a matter of contract with members of his congregation or others, and when such contract exists it may be enforced in the courts; but, when the pastor relies simply on the duty of his church to support him, if he seeks redress he must find it at the hands of the church. *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 675, 49 N. E. 867; *Tuigg v. Sheehan*, 101 Pa. 363, 47 Am. Rep. 727.

The removal of Travers having been made under authority of the church discipline, the courts will not inquire into its regularity or validity.

There is no error in the action of the court below, and the decree of that court is affirmed, with costs.

SOUTH CAROLINA SUPREME COURT.

L. C. ELMORE, Appt.,
v.

J. T. ELMORE, Exr., etc., of George Elmore,
Deceased, Resp't.

(.....S. C.....)

An action of claim and delivery cannot be maintained against an executor of an estate in his representative capacity, to recover possession of personal property wrongfully withheld by him. [By divided court.]

(July 26, 1900.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Laurens County in favor of defendant in an action of claim and delivery brought to recover for the alleged wrongful withholding of a mule alleged to be the property of plaintiff. *Affirmed.*

NOTE.—In what capacity may an executor or administrator be sued for his personal tort?

The general rule is well established that an executor or administrator is liable in his individual, and not in his representative, capacity for his own torts, even when committed in the management of the estate; thus:

A party injured by the torts of an administrator has no claim on the assets of the estate. *Moulson's Estate*, 1 Brewst. (Pa.) 296. In this case a judgment recovered against the administrator personally in an action of trespass was sought to be interposed as a claim against the assets of the estate, but was rejected.

Executors, whether acting professedly in their representative capacity or not, who wrongfully prevent one who purchased from the decedent timber lying on land, part of the timber having been actually removed and no act remaining to be done by the decedent to complete the delivery of the residue, from entering upon the land and removing the residue, are guilty 51 L. R. A.

The facts are stated in the opinion.

Mr. W. R. Richey, for appellant:

The circuit judge erred in holding that no action of claim and delivery can be sustained against a party, as executor, for an unlawful possession.

The action of claim and delivery under our Code is the same as the old form of action called replevin.

If the goods, etc., taken away continue still *in specie*, in the hands of the executor or administrator of the wrongdoer, replevin or detinue will lie against such executor or administrator to recover them back; or trover, laying the conversion to have been by the executor.

3 Wms. Exrs. p. 1730; 7 Am. & Eng. Enc. Law, p. 332.

Any person who is tortiously or wrongfully in the possession of property may be proceeded against in replevin for the same

of a mere personal tort for which they are liable personally, but not in their representative capacity. *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 218. The court in this case held that if the testator had not completed the delivery at the time of his death, and the executors had failed or refused to do so when requested, an action could have been maintained against them in their representative capacity for breach of contract.

An administrator is not liable in his representative capacity for undertaking to sell patented articles in violation of the plaintiff's patent right. *Thompson v. Canterbury*, 2 McCrary, 332, 12 Fed. Rep. 485.

An estate is not liable for tortious acts of the executor committed in the administration of the estate, when no pecuniary advantage results to the estate by reason of them. *Carr v. Tate*, 107 Ga. 237, 38 S. E. 47.

The implication of the foregoing case, that the estate will be liable if pecuniary advantage results from the tort, does not seem to have the

by any person entitled to the immediate possession.

20 Am. & Eng. Enc. Law, p. 1058; *Ross v. Cash*, 58 Ind. 278; *Middleton v. Robinson*, 1 Bay, 58, 1 Am. Dec. 596; *Chaplin v. Barrett*, 12 Rich. L. 284, 75 Am. Dec. 731; *Huff v. Watkins*, 20 S. C. 477.

Mr. J. L. M. Irby, for respondent:

An action in claim and delivery is a remedy for the wrongful or unlawful taking and detention, or detention alone, of personalty, the same being delivered to the claimant upon security given, either to make out the injustice of the detention, or to return the property.

20 Am. & Eng. Enc. Law, p. 1041; Code, § 71.

This action, being for a wrongful or unlawful withholding, has been considered in the nature of an action *ex delicto*.

18 Enc. Pl. & Pr. 498, and cases cited in

support of any cases in which the action is *ex delicto* in form. But see *Simpson v. Snyder*, 54 Iowa, 557, 8 N. W. 730, *infra*, with respect to actions not *ex delicto*, but which arise out of torts.

Fraud or misrepresentation in sale of property of estate.

The rule that an executor or administrator is not liable in his representative capacity has been applied to actions based on his fraud or misrepresentations concerning property of the estate sold by him, by *West v. Wright*, 98 Ind. 335; *Huffman v. Hendry*, 9 Ind. App. 324, 38 N. E. 727; *Brown v. Evans*, 15 Kan. 91; *Frits v. McGill*, 31 Minn. 536, 18 N. W. 753; *Richardson v. Palmer*, 24 Mo. App. 480; *Guarantee Sav. Loan & Invest. Co. v. Moore*, 35 App. Div. 421, 54 N. Y. Supp. 787.

The objection to holding him liable in his representative capacity is well expressed in *Richardson v. Palmer*, 24 Mo. App. 480, *supra*, where the court, after alluding to the fact that counsel for plaintiff seemed to recognize the doctrine that an action would not lie against an administrator in his representative capacity for a breach of warranty, said that it would be a legal solecism to say that the administrator could not bind the estate by a formal express guaranty with reference to the property, and yet that the estate is liable for a false utterance to the same purport.

So, also, it has been held upon the same ground that a purchaser of property at an administrator's sale cannot, in an action by the administrator as such upon the purchase-money note, avail himself of such fraud or misrepresentation by way of recoupment or counterclaim. *Dunlap v. Robinson*, 12 Ohio St. 530; *Westfall v. Dungan*, 14 Ohio St. 276.

And it was said, *obiter*, in *George v. Bean*, 80 Miss. 151, that where an administrator practices fraud, whereby a purchaser of property of the estate is deceived with reference to its condition, the latter ought to be driven to his action directly against the administrator, so that innocent parties who are interested in a speedy settlement of the estate will not be delayed by the fraudulent conduct of the administrator.

But the Alabama supreme court, in *Rice v. Richardson*, 3 Ala. 428, held that the maker of a note given for the purchase price of a slave at a sale made by an administrator can set up as a defense a fraud by the administrator, in an action on the note by a succeeding administrator, who sues as administrator *de bonis non*.

51 L. R. A.

note 4; *McCaslan v. Nance*, 46 S. C. 568, 24 S. E. 812.

In the case of torts, where the action must be in form *ex delicto* for the recovery of damages, and the plea is "Not guilty," the rule at common law was that *actio personalis moritur cum persona*.

1 Chitty, Pl. 68; *Huff v. Watkins*, 20 S. C. 477; *Chaplin v. Barrett*, 12 Rich. L. 284, 75 Am. Dec. 731.

If an executor, as such, takes possession of property to which the estate has no right, the authorities generally hold that he is liable personally, and not in his representative capacity.

2 Am. & Eng. Enc. Law, p. 943, and case cited in note 1.

Gary, A., J., delivered the following opinion:

The record contains the following state-

This is upon the ground that fraud avoids all contracts, whether made by the person interested therein or by an agent.

The same rule was applied in *Atwood v. Wright*, 29 Ala. 346, to an action brought by the administrator who made the sale.

Fraud practised by an executor in the sale of his testator's effects is a good defense to an action on a note given for the purchase price. *Williamson v. Walker*, 24 Ga. 257, 71 Am. Dec. 119. In this case the trial court ordered a new trial because the jury made a deduction on account of the fraud; and that ruling was reversed by the supreme court.

An administrator cannot create a charge upon the estate he represents by his illegal or fraudulent acts, but the purchaser of property may, in an action on the note given for the purchase money, avail himself of the fraud as a defense, praying for a rescission of the contract. *Crayton v. Munger*, 9 Tex. 286.

Where a purchaser of property at an administrator's sale in an action on the purchase-money note interposes an answer averring fraud on the part of the administrator in misrepresenting the property if the averments of the answer are true, he is entitled, if not to a rescission of the contract by reason of his not having asked a rescission with appropriate averments, at least to an abatement of the price contracted to be paid for the property in so far as its value was diminished by reason of vices and unsoundness concealed by false and fraudulent representations of the plaintiff. *Able v. Chandler*, 12 Tex. 88, 62 Am. Dec. 518.

In *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176, however, the court held that a recovery in such an action could not be reduced by proving fraud. This case does not deny that a defense might be based on such a fraud if there were an offer to rescind the purchase and restore the property.

Some of these apparently conflicting decisions on the point as to the right of the purchaser to avail himself of the fraud as a defense to an action by the executor or administrator as such for the purchase price may be reconciled by observing the distinction between disaffirming the transaction because of the fraud, and affirming it and then relying on the fraud to reduce the recovery. This distinction will reconcile *Dunlap v. Robinson*, 12 Ohio St. 530; *Westfall v. Dungan*, 14 Ohio St. 276, and *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176, where the defendants sought to avail themselves of the fraud by way of recoupment or counterclaim, with *Rice v. Richardson*, 3 Ala. 428; *Atwood v. Wright*,

ment of facts: "On the 21st day of November, 1898, appellant, L. C. Elmore, named above, commenced this action in magistrate J. M. Hudgens' court, in Laurens county, against J. T. Elmore, as executor of the last will and testament of George Elmore, deceased, the defendant (respondent) above named, to recover possession of a mule, alleged to be of value of \$75. On the trial of the case, Magistrate Hudgens dismissed plaintiff's complaint upon the grounds that the action was prematurely brought, and that the plaintiff had not given any undertaking. The plaintiff appealed to the circuit court of common pleas for Laurens county, alleging error on the part of the magistrate. The appeal was heard at February, 1899, term of court, by Judge George W. Gage, who reversed the judgment of the magistrate, and remanded the case to the court of J. M. Hudgens, magistrate, or his

successor in office, for trial. There was no appeal from Judge Gage's order. On the 8th day of July, 1899, the case was tried before J. W. Peterson, magistrate, who had succeeded J. M. Hudgens as magistrate, at Laurens, South Carolina. Before the plaintiff closed the testimony, and before he concluded the examination of his first witness, Magistrate Peterson granted a nonsuit. The plaintiff again appealed to the circuit court of common pleas for Laurens county, upon various grounds. The second appeal was heard at October, 1899, term of court by Judge R. C. Watts, who did not consider plaintiff's grounds of appeal, but dismissed plaintiff's appeal and confirmed the judgment of the magistrate on the ground that no action of claim and delivery of personal property could be sustained against a party, as executor, for an unlawful possession.

29 Ala. 346, and Crayton v. Munger, 9 Tex. 286, where the defendants relied upon the fraud as avoiding the contract.

Williamson v. Walker, 24 Ga. 257, 71 Am. Dec. 119, and Able v. Chandler, 12 Tex. 88, 62 Am. Dec. 518, however, cannot be reconciled by this distinction with the cases first mentioned. Able v. Chandler, 12 Tex. 88, 62 Am. Dec. 518, seems to be in conflict with both an earlier and a later case decided by the same court.

Torts in care or management of property of estate.

The rule also applies to actions based on negligence in the care or management of the property of the estate, whether such negligence is a nonfeasance or a misfeasance; thus:

An action cannot be maintained against executors and trustees in their representative capacity for damages caused by the fall of a building owned by them as executors and trustees, and which had been leased by them; but the action must be brought against them as individuals. Boston Beef Packing Co. v. Stevens, 20 Blatchf. 448, 12 Fed. Rep. 279. The court in this case says: "An action cannot be maintained against an executor or trustee in his representative character, for a wrongful act which was not, and could not be, committed by him in his official capacity, but which, because it was a wrongful act, was in excess of his authority."

The California supreme court in Eustace v. Jahne, 88 Cal. 3, held that, assuming that it was the duty of defendant as administrator to repair a defect in the street in front of property belonging to his testator, and of which as administrator he was in possession by his tenants, he would not be liable in his representative capacity for a personal injury caused by the defective condition, though he might be liable in his personal capacity.

An action will lie against executors in their individual capacity for personal injuries resulting from the defective condition of property of which they are in possession and control as executors. Donohue v. Kendall, 18 Jones & S. 386, Affirmed in 98 N. Y. 635. The implication is that the action would not lie against the executors as such.

An executor may be answerable personally for personal injuries resulting from the negligence of a driver employed in conducting the business of the testator, but is not liable in his representative capacity, notwithstanding that he is conducting the business pursuant to the directions. 51 L. R. A.

of the will. McCue v. Finck, 20 Misc. 506, 48 N. Y. Supp. 242. The court says that an executor may, by his act or neglect, create in favor of another an obligation against himself; but he cannot as a rule create a liability against the estate he represents. He is not an agent, for death terminates agency.

Executors are liable personally, but not in their representative capacity, for an injury resulting from their negligence in permitting a cellar-hole in a hotel devised to them as executors to manage, to be and continue ineffectively covered. Veivin v. French, 84 Va. 81, 8 S. E. 891. The declaration in this case described the defendants as executors, but the court held that was merely *descriptio personae*, and could be stricken out as surplusage, permitting the action to proceed against them as executors. The court also held that the defendants' failure to keep the premises in a safe condition was a breach of their duties as executors, and not as trustees.

Ferrier v. Trépannier, 24 Can. S. C. 86, held that an action would not lie against executors as such for an injury to plaintiff from the want of repair of a building which had been specifically bequeathed to certain persons for whom they were to act as trustees. This decision seems to be on the ground that the defendants were answerable in their capacity as trustees. The court also held that they were answerable in their personal capacity upon the ground that their personal fault and negligence were the immediate cause of the accident, and that they could not use their fiduciary quality as a shield, and claim immunity because they were in possession in the name of others.

Mason v. Rhineland, 8 Ben. 163, Fed. Cas. No. 9,251, held that an executor was liable for damages occasioned to a boat by the faulty construction of a bulkhead in front of property belonging to the estate. The action seems to have been against the executor as such; but no question as to the capacity in which he should have been sued seems to have been raised.

If an executor commits a trespass it is his individual and personal act, not his representative act as the executor of his testator. Plimpton v. Richards, 59 Me. 115.

Actions arising from conversion.

Conversion by an administrator of property not belonging to the estate is his personal tort, and he alone and personally is responsible therefor. A claim against an administrator in his representative capacity, based on such a

The plaintiff appeals to this court, alleging error on the part of Judge Watts."

The practical question raised by the exceptions is whether there was error in the ruling of the circuit judge that "no action of claim and delivery of personal property could be sustained against a party, as executor, for an unlawful possession." There can be no question as to the manner in which the defendant came into possession of the property, for in his answer he alleges, as a fact which the plaintiff does not deny, that he came into possession of the mule as the executor of the will of George Elmore, deceased. In 7 Am. & Eng. Enc. Law, 1st ed. p. 332, the doctrine is thus laid down: "At common law no action founded upon a tort committed by the deceased, for which damages only could be recovered in satisfaction, such as trespass, trover, false imprisonment,

assault and battery, slander, deceit, . . . and the like, where the declaration imputed a tort to person or property, and the plea must be, 'Not guilty,'—lay against his executor or administrator. But if by reason of the tort the estate has derived pecuniary advantage, the representative could be compelled to account to the injured party, in another form of action, for the benefit so obtained. Thus, if goods wrongfully taken away by the deceased remain *in specie* in the hands of the executor or administrator, the rightful owner might maintain replevin or detinue against such executor or administrator to recover them back; or trover, laying the conversion to have been by the representative; or, if sold, an action for money had and received to recover their value." In 3 Wms. Exrs. 1730, it is said: "In some, however, of the cases above mentioned,

conversion, presents a solecism. *Dally v. Dally*, 66 Ala. 266. In this case the property alleged to have been converted seems to have been in possession of the decedent, who was the plaintiff's husband, but, apparently, his possession was not wrongful.

The court, in *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695 (an action against an administrator with the will annexed), said that the plaintiff seemed purposely to have left it doubtful whether he was suing for a conversion or for damages for a breach of a contract entered into by an executrix (the predecessor of the administrator) in the administration of the estate, but said that in neither case could the estate be held liable.

Plaintiff cannot declare in one count on a conversion by the testator, and in another on a conversion by the executors, because the judgment on one count would be *de bonis testatoris*, and on the other *de bonis propriis*. *Terhune v. Bray*, 16 N. J. L. 54.

So, also, it has been held that, even where the action is not in form *ex delicto*, but is based upon an executor's or administrator's tort, it must be prosecuted against the latter in his individual, and not in his representative, capacity; thus:

When property or money which does not belong to the estate of a decedent comes into the possession of the administrator the latter cannot by charging himself as such administrator with the property or money, make it a part of the assets of his decedent's estate; nor can he by so doing render the estate of his decedent or himself as administrator liable for such property or money to the lawful owner thereof. *Rodman v. Rodman*, 54 Ind. 444. This action arose out of the administrators taking possession, as part of the assets, of growing rent corn, which they were not required to take or account for. The court said that in taking possession of the corn the administrators were not acting in their fiduciary or representative character, although they seemed to think they were; and that whatever money they received from the sale of the corn was received by them, not as a part of the assets of the estate, but for the use of the persons to whom it might lawfully belong.

And *Halley v. Wheeler*, 49 N. C. (4 Jones L.) 159, holds that where an executor takes possession of property not belonging to the estate the owner may waive the tort and maintain an action for money had and received; but in such action the declaration is in debt and detinet upon a promise by the defendant personally.

Simpson v. Snyder, 54 Iowa, 557, 6 N. W. 51 L. R. A.

730, however, holds that where the tort is waived, and it appears that the property converted has been sold, and that the estate has received the benefit of the proceeds thereof, an action will lie against the administrator as such to recover the value of the property, and that in support of such action it will be presumed that the administrator sold the property for its value. The court conceded that if the action were *ex delicto* it would not lie against the administrator in his representative capacity.

It is said, *obiter*, in *Crawford v. Nassoy*, 67 N. Y. Supp. 108, that an action for conversion will lie against an administrator individually, or in his official capacity, if he converts property which is absolutely exempted to the widow to his own use and sells the same.

In the following cases the actions do not seem to have been *ex delicto* in form, nor does it appear that the acts of the executors or administrators out of which they arose were torts; but the principle on which they are decided would seem to apply, *a fortiori*, to actions *ex delicto*:

An executor or administrator cannot be charged as such for money had and received to the use of plaintiff. *Farmers' Bank v. Cullen*, 4 Harr. (Del.) 289.

Executors are liable, if at all, personally, and not in their representative capacity, for wrongfully taking possession, as a part of the estate, of the proceeds of a policy on the deceased's life, which is payable to his widow and children. *Heydenfeldt v. Jacobs*, 107 Cal. 373, 40 Pac. 492. The action was brought against the executors personally, evidently upon the theory that they were trustees for the beneficiaries of the money collected.

An executor is not subject in his representative character to an action by a purchaser of property of the estate to recover a deposit made with the executor on account of the purchase, where the sale was void because it was a private, and not a public, sale as directed by the order of the court. *Schlicker v. Hemenway*, 110 Cal. 579, 42 Pac. 1063. In this case the court said: "If he [the executor] had taken the money to make good a bid which he had a right to receive, it might have been contended with some plausibility that he received it in his representative capacity. But, inasmuch as he had no right to demand or to receive the money, because the sale in that mode was void, I think the estate is not liable unless it be further shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit. . . . I do not concede that, even had the executor received the money in his

a remedy may be had against the executor or administrator in another form. Thus, although at the common law an action of trover upon a conversion of the testator dies with him, yet if the goods, etc., taken away continue still *in specie* in the hands of the executor or administrator of the wrongdoer, replevin or detinue will lie against such executor or administrator to recover them back; or trover, laying the conversion to have been by the executor; or, in case they are sold, an action for money had and received, to recover their value." The following cases throw light upon this question: *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929; *Huff v. Watkins*, 20 S. C. 477; *Chaplin v. Barrett*, 12 Rich. L. 284, 75 Am. Dec. 731; *Ford v. Caldwell*, 3 Hill, L. 248; *Midleton v. Robinson*, 1 Bay, 58, 1 Am. Dec. 596. If the testator had sold the mule,

the plaintiff could have sued the executor for the value thereof, and we see no reason why he should not be allowed to recover the specific property, if he can show that it belongs to him.

Since there is no question that the mule came into the possession of the defendant as executor of the testator's will, I think the judgment of this court should be that the judgment of the circuit court be reversed, and the case remanded for a new trial; but, as two members of this court are of the contrary opinion, *the judgment of the Circuit Court must stand affirmed.*

Pope, J., concurring:

I am conscious that an example is to be set, but I am ready to assist in setting such example. I cannot conceive that a man who takes my mule, and then dies, having named

official character, the estate would be liable for it; but, waiving that question, I think it evident that here the estate cannot be held."

An administrator is personally liable to the heirs for rents and profits which belong to them, but which he took as belonging to the estate, even if it is shown that he has used such rents in the payment of the debts of his decedent's estate. *Trimble v. Pollock*, 77 Ind. 576. The court says he can only receive such rents under the law, either as the agent of, or in trust for, the heirs at law; and in any event he is bound to account to such heirs therefor, and cannot bind the estate.

An action will lie against an administratrix personally for money received by her to the plaintiff's use where the plaintiff transferred to her acceptances of a third person with directions to apply the proceeds, or so much thereof as might be necessary to discharge his indebtedness to the deceased, and the administratrix recovered judgment on the acceptances, and out of the proceeds of the execution applied to the estate of the deceased a sum larger than was actually due from the debtor. *Cronan v. Cotting*, 99 Mass. 334. The court said that the fact that the administratrix described herself as such in the suit upon the securities did not affect the relation of the parties; that she could only bind herself in the transaction, and had no power to bind the estate she represented; and that the balance of the money collected after paying the debt due from the plaintiff was not assets of the estate in her hands; and that she was not liable for such balance in her representative capacity.

An administrator of the beneficiary in a deed of trust, who receives from the trustee the proceeds of a sale of property which was not covered by the deed of trust, is answerable in his individual capacity as a constructive trustee, but he is not liable in his representative capacity. *Smith v. Jeffreys* (Miss.) 16 So. 377.

In the next two cases it will be observed that the doctrine is stated with a qualification.

An action for money had and received will not lie against an administrator as such merely because he has received rent to which the estate was not entitled, in the absence of evidence to show that the estate was in any way credited with it. The mere receipt of the money by the administrator is not a receiving of it by the estate, nor is the estate responsible for it, but the administrator is responsible personally for his own act which does not concern the estate and from which the estate receives no benefit. *Fritz v. McGill*, 31 Minn. 530, 18 N. W. 753.

An administrator has no authority to receive 51 L. R. A.

anything other than the money of the estate of his intestate. If he receives more he is responsible as an individual, but not in his representative capacity, unless it be also shown that the money has been actually appropriated to the use of the estate. *Clayton v. Boyce*, 62 Miss. 390.

In *Conger v. Atwood*, 28 Ohio St. 184, 22 Am. Rep. 362, it was held that where an administrator collects rents to which the widow is entitled, and appropriates them to the payment of debts due from the intestate, she has her election to hold him in his personal or representative capacity.

Where a decedent in his lifetime deposits money to the credit of himself as trustee for another, and the bank after his death pays the money to his executor, who accounts for it in his settlement, the beneficiary is entitled to recover the fund on presenting a claim therefor on distribution in the orphans' court. *Gaffney's Estate*, 146 Pa. 49, 23 Atl. 163.

In the following cases the courts merely hold that the executor or administrator is liable in his personal capacity for a conversion without passing on the question whether the plaintiff might elect to sue him in his representative capacity. *Underhill v. Morgan*, 33 Conn. 105; *Walter v. Miller*, 1 Harr. (Del.) 7; *Yeldell v. Shinholster*, 15 Ga. 189; *Kidwell v. Kidwell*, 84 Ind. 224; *Jackson v. Bryan*, 3 J. J. Marsh. 308, 20 Am. Dec. 142; *Goulding v. Horbury*, 85 Me. 227, 27 Atl. 127; *Rough v. Womer*, 76 Mich. 375, 43 N. W. 573; *Newsom v. Newsom*, 1 Leigh, 86, 19 Am. Dec. 739.

And the same is true of the three cases next cited, which were not *ex delicto*.

An administrator who, after notice that a note of which he took possession as a part of the estate belongs to a third person, collects it, is personally liable for the proceeds. *Thompson v. White*, 45 Me. 445.

An administrator is personally liable where he obtained money which had been delivered to his intestate by the plaintiff, and deposited by him in trust for her. *Farrelly v. Ladd*, 10 Allen, 127.

An administrator who receives from a creditor of the estate a greater sum than is due, and applies the entire sum as assets of the estate, is personally responsible for the excess above what was actually due the estate. *Davis v. Krum*, 12 Mo. App. 288. The court expressly refrains from passing upon the question whether the plaintiff might have maintained a bill in equity to recover the excess from the estate in the event of the insolvency of the administrator.

In *Prescott v. Ward*, 10 Allen, 208, the court.

an executor, which executor takes possession of my mule as assets of his testator's estate, to be by him administered, and upon my demand for my mule declines to surrender the mule to me, and, when I sue him to recover my mule in a magistrate's court, his reply is, "You cannot sue in claim and delivery," will be protected by law. If the executor surrenders the mule on my demand, without suit, will not he have to account for such surrender to the legatees of his testator? If the executor refuses to surrender, must I stand by and take no steps to recover my mule? If the executor had been the original tortfeasor, I admit he could plead that his taking of the mule was his personal act, and in no manner connected with his testator's estate. But the testator took my mule, and died with said mule in his possession (which last, we have heard it said, was nine points

out of a possible ten in the law). His executor succeeds to the testator's possession, in his representative character. When I demand my mule, and I am refused possession of him by such executor on the ground that the mule belonged to the estate of his testator, of course I must sue him as executor. I concur in the opinion of Justice Gary and the judgment of reversal.

McIver, Ch. J., delivered the following opinion:

Being unable to concur in the conclusion reached by Mr. Justice Gary in the opinion which he has prepared in this case, I propose to state the grounds of my dissent. The appeal turns upon the single question whether the circuit judge erred in holding that an action of claim and delivery of personal property brought against the defend-

held that an action would lie against an administrator in his representative capacity in an action upon a note given by the deceased, notwithstanding that the note was in the hands of the deceased for safe keeping at the time of his death, and went into the hands of the defendant in his capacity as administrator. It was urged that the only remedy was by conversion against the administrator in his individual capacity, but the court held that while the administrator would doubtless be individually liable for such conversion, yet the plaintiff might elect to bring an action on the note against the estate.

Malicious prosecution; abuse of process.

Executors must be sued in their individual capacity for maliciously suing out a writ in their name as executors, and the action will not lie against them as executors. *Wengert v. Beashore*, 1 Penr. & W. 232.

A succession should not be condemned in damages for an abuse by the administrator of the process of injunction. *Lamorere v. Cox*, 32 La. Ann. 246.

An administrator is not liable as for an abuse of legal process in issuing an execution upon a judgment in favor of decedent which had been paid to the latter in his lifetime, in the absence of evidence that he acted maliciously or without probable cause. *Mell v. Barner*, 135 Pa. 151, 19 Atl. 940. The action was against the administrator personally, no question as to the capacity in which he should have been sued is discussed, and the case was cited on its merits.

Louque v. Saloy, 45 La. Ann. 1386, 14 So. 255, held that an action for malicious prosecution would not lie against a succession on account of an action brought by the administrator, but the decision here seems to be on the merits, and not upon the idea that the action should have been brought against the administrator personally.

Replevin, detinue, etc.

When the possession of the property for the recovery of which replevin, detinue, or a like remedy is sought originates with the executor or administrator, the doctrine previously stated applies, and the action must be against the executor or administrator in his individual, and not in his representative, capacity.

Replevin will lie against an administrator in his individual capacity to recover the possession of a note of which he took possession as a part of the estate. *Rose v. Cash*, 58 Ind. 278. In this case the court said: "Replevin is an action of tort. An administrator cannot com-

mit a tort as an administrator; if he commits a tort he commits it as an individual, and is liable as an individual."

Davis v. Schmidt (Ind. App.) 81 N. E. 840, is to the same effect.

In *Herd v. Herd*, 71 Iowa, 497, 82 N. W. 469, the court held that an administrator who takes property of the estate of the widow of the intestate as belonging to the estate is liable in his individual capacity to an action for the recovery of the property, and that he has no right to insist that he shall be substituted in his capacity as administrator.

No claim against an estate can be based on the taking by the executor of a ring belonging to the claimant by gift from the testator in his lifetime. When the executor took the ring under such circumstances he did so as an individual, and as such could be made responsible in a proper proceeding for the consequences of his act. *Van Slooten v. Dodge*, 145 N. Y. 327, 39 N. E. 950, Reversing 76 Hun, 55, 27 N. Y. Supp. 666.

De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457, holding that whatever property or money is lawfully recovered or received by the executor or administrator after the death of his testator or intestate in virtue of his representative character, he holds as assets of the estate, and is liable therefor in such representative capacity to the party who has a good title thereto, and that the owner of the property or money may elect whether he will sue the administrator in his representative or individual capacity, is distinguished in the foregoing case upon the ground that in that case the liability of the administrator as such existed because of a transaction to which deceased had been a party, and because his estate had become chargeable with a liability which he was under, or would have been under, had he lived.

De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457, was an action for money had and received by the administrator pursuant to an arrangement made between the plaintiff and the intestate, and was not based on a tort.

But there is an apparent exception to the rule as applied to replevin or detinue when the possession of the goods, or at least when the possession and detention, originate with the testator or intestate, and the possession of the executor or administrator is merely a continuation of that possession. In that event the rule seems to be that the owner may elect to proceed against the executor or administrator individually or in his representative capacity.

The Virginia court of appeals in *Allen v. Harlan*, 6 Leigh, 42, 29 Am. Dec. 206, held that det-

ant as executor of the will of the testator, George Elmore, under the allegations that he, as such executor, is in the unlawful possession of such property, cannot be maintained, but that such action should have been brought against the defendant individually, and not as executor. This is an important question, far-reaching in its results, and, it is claimed, has never heretofore been distinctly decided in this state. It is not a mere question of pleading or of the proper parties to an action, but its decision vitally affects the interests of those who may be interested in the estates of decedents; for if this case is allowed to proceed in its present form, and the plaintiff shall succeed in establishing his right to the possession of the mule sued for, or damages in lieu thereof, then it is clear that a liability will be fastened upon the estate of the testator, not

by reason of any act of his own (for it is distinctly declared that "no wrong is imputed to defendant's testator"), but solely because of a tort committed by the defendant, who has been appointed executor of the testator's will. So that it seems to me that the practical inquiry is whether one who has been intrusted by a decedent with the execution of his will can by any act or omission of his own fasten a legal liability upon the estate of his testator, in the absence of any provision in the will investing him with authority so to do; and it is not pretended that there is any such provision in the will in the case.

The doctrine is well settled that neither an executor, in the absence of authority in the will so to do, nor an administrator, can, by contract, either express or implied, impose any new debt upon the estate of the

estate would lie against an executor as such for goods that were in the possession of the testator where they have come to the executor's possession.

The doctrine was reaffirmed by the same court in *Catlett v. Russell*, 6 Leigh, 844, after a reconsideration of the question. Each of the judges wrote an opinion embodying an elaborate discussion of the question, and a review of the authorities. They all agreed in approving the doctrine laid down in the preceding case. In both these cases the action had been commenced in the testator's lifetime, and the real question was whether the action could be revived against the executor under a statute which provided in effect that actions pending at the time of the decedent's death, which would have been originally maintainable against the executor or administrator, should not abate. In both cases it was held, notwithstanding the doctrine so declared, that the action could not be revived because it did not appear that the property had come into the executor's possession.

Detinue will lie against an executor or administrator as such for property detained by the intestate in his life and by the defendant as administrator since his death. *Mansell v. Israel*, 3 Bibb, 510. The court said: "That detinue will in some cases lie against an executor or administrator, there seems no room to doubt upon principle. As where goods are bailed to the testator or intestate upon a contract to redeliver them, or where he sells and agrees to deliver specific goods at a future day, and the goods come to the hands of the executor or administrator. In such a case the right on the one side and the obligation on the other, are founded upon contract, and the action is said to arise *ex contractu*, and will therefore properly lie against the executor or administrator upon whom the testator or intestate's obligations arising from contracts respecting the personalty devolved by operation of law. Where there is no obligation arising from contract to deliver the goods, there may be more room to doubt the propriety of the action; but even in such a case, where the goods are detained by the defendant as executor or administrator, there seems to be no substantial reason why he should not be sued in the character in which he detains them." The court then pointed out that it was only by suing him in his representative character that damages for the detention by the testator or intestate could be recovered, and considered that fact a strong argument in favor of the propriety of the action.

Denny v. Booker, 2 Bibb, 427, held that detinue would lie against an administratrix in her

individual capacity for detaining a slave belonging to the plaintiff that was in the possession of the intestate at the time of his death, and came into her possession as part of the estate. The court intimated that the action would not lie against the administratrix as such, but this intimation is overborne by the preceding case.

It is now well settled that if goods came to the possession of a testator or intestate by bailment or taking, and continue still *in specie* in the hands of his executors or administrators, replevin or detinue will lie against them in their fiduciary capacity to recover back the specific goods. *Gentry v. McKeehen*, 5 Dana, 34.

Detinue will lie against an executor as such for a chattel which was in possession of the testator and after his death came to the hands of the executor, who detains it as such. *Brewer v. Strong*, 10 Ala. 861, 44 Am. Dec. 514.

Detinue will lie against an executor in his representative capacity for detaining a slave which had been converted by his testatrix, and came to him as a part of the estate. *Lawson v. Lay*, 24 Ala. 184.

But a judgment cannot be rendered against an administrator as such in detinue where the suit has been revived against him, unless the property sued for was in the possession of the intestate, and came to him as assets of the estate. *Easley v. Boyd*, 12 Ala. 684.

It is well settled, both on principle and authority of the adjudged cases, that where property has passed from the possession of the deceased to the possession of his legal representative the person claiming a better right to such property may maintain an action to recover the property and damages for the detention against the legal representatives, either in his individual or representative capacity. *Clapp v. Walters*, 2 Tex. 130.

Chief Justice Henderson in *Mobley v. Runnells*, 14 N. C. (3 Dev. L.) 303, limited the doctrine to cases where the possession of the executor or administrator is but in affirmance and continuance of the claim set up by the intestate, and denied its application to the case at bar, because it appeared that the intestate claimed only a life estate in the property.

And, so, it was held in *Royall v. Epps*, 2 Munf. 479, that where an executor holds slaves in which his testator or intestate had only an estate for life he may be charged in detinue personally, but not in his representative capacity.

Some of the decisions on this point leave it doubtful whether the rule applies to a case like the principal case, where, though the possession was in the testator or intestate at the

testator or intestate, as the case may be. *McBeth v. Smith*, 2 Treadway Const. 676 (reported, also, in 3 Brev. 511); *Nehbe v. Price*, 2 Nott & M'C. 328, where Mr. Justice Hugger, in delivering the opinion of the court, said that the point had been repeatedly decided; *O'Neill v. Abney*, 2 Bail. L. 317; *Wilson v. Huggins*, 11 Rich. L. 410; *Cook v. Cook*, 24 S. C. 204. This rule is also recognized in the court of equity, as may be seen by reference to the case of *Boggs v. Reid*, which, though an equity case, is reported in the appendix to 3 Rich. L. at page 450. So, also, it seems to be the well-settled rule elsewhere; for it is said in 11 Am. & Eng. Enc. Law, 2d ed. at page 932 of that very valuable work: "The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration, moving between the promisee and the executor or administrator as promisor, is his personal contract, and does not, in the absence of authority given by statute or by the will of the decedent, bind the estate, though the consideration moving from the promisee is such that the executor or administrator could properly have paid from the assets, and been allowed for on the settlement of his accounts. So inflexible is the rule denying to personal representatives the power to bind by any original contract the estates committed to their charge, that its application is not affected by the fact that the contract was made or the debt in-

curred for the benefit of the estate,"—citing quite an array of authorities. I may add, however, that notwithstanding this well-settled rule a court of equity, in a proper case, where an executor has paid an obligation contracted by him for the benefit of the estate, will allow him credit for the amount so paid, although no action could be maintained against him as executor to enforce the payment of such obligation, though this is scarcely pertinent to the present inquiry.

Now, if an executor or administrator has no power to fasten upon the estate which he represents any liability by contract, either express or implied, even though such contract may be entered into for the benefit of the estate, how much stronger is the reason for holding that an executor has no power to fix upon the estate placed in his charge any liability for any tort that he may commit, and hence that no action based upon a tort committed by him can be maintained against him as executor, for that would be imposing upon the estate a liability for his own wrongful act. This view is supported by authority. See 11 Am. & Eng. Enc. Law, 2d ed. at page 942, where it is said. "Executors and administrators can create no liability against the estates represented by them by any tortious or wrongful act. Their torts are their individual acts, for which the only remedy of the person injured is against them individually, and the rule is the same whether the injury results from-

time of his death, no fault is imputed to him, but the tort originated in the refusal of the executor to yield possession to the true owner.

In *Allen v. Harlan*, 6 Leigh, 42, 29 Am. Dec. 205, and *Catlett v. Russell*, 6 Leigh, 344, *supra*, the wrongful detention must have originated with the deceased, since the action was pending at the time of his death; and in the latter case *Tucker, P.*, in announcing the doctrine, said: "The true owner may, at his election, sue the executor as such in detinue declaring upon the possession and detention of the testator, and on the executor's continued possession and detention since his death." (Italics ours.)

And *Ruffin, J.*, in *Mobley v. Runnella*, 14 N. C. (3 Dev. L.) 303, *supra*, while not denying that detinue would lie against executors as such, held that it must be on the testator's detention, saying: "For a matter arising wholly in the executor's time no action against him as executor will lie. The contract or wrong is altogether the executor's own."

In *Lawson v. Lay*, 24 Ala. 184, *supra*, it will be observed that the doctrine was applied to a case where the conversion was by the testatrix, but the doctrine is not there expressly limited to such a case, and in *Strong v. Brewer*, 17 Ala. 706, the court said that when the case was before it at a previous term it was decided that the action of detinue could be maintained against the executors in their representative capacity, although the cause of action did not accrue until after the death of the testator, upon the proof that he was in possession of the property before his death, and that it came to their possession as executors.

In *Clapp v. Walters*, 2 Tex. 130, *supra*, it does not appear whether the deceased's possession was wrongful or not, but there is nothing in the opinion intimating that the doctrine is limited to cases where deceased's possession was wrongful.

51 L. R. A.

In *Mobley v. Runnella*, 14 N. C. (3 Dev. L.) 303, *supra*, Chief Justice Henderson said that he would consider the declaration as having two counts, one for the detention by the intestate, and one for the detention by the defendants themselves as executors; and, after holding that the evidence did not support the first count, because it appeared that the intestate held the property with the owner's consent, disposed of the second count on the ground already stated. This opinion seems to imply that the fact that the intestate's possession was not wrongful would not have defeated the count against the administrators in their representative capacity if their possession could otherwise have been regarded as continuous with that of the intestate.

If the view expressed by *Ruffin, J.*, that the action must be based on testator's detention, is accepted, the doctrine of these cases is not an exception to the general rule that an action will not lie against an executor or administrator in his representative capacity for his own tort, but results from the principles governing the survival of causes of action. It is difficult, however, to understand how replevin or detinue, the gist of which is not the original conversion but the detention, can rest solely upon the detention by the testator or intestate. It would seem that in any case, whether the unlawful detention originated with the deceased or with his representative, the action must rest on the latter's detention at the time the action is commenced, and, therefore, it seems difficult to base a distinction on the idea that if the wrongful detention originated with deceased the action rests on his tort, and its maintenance does not infringe the general rule, while if the unlawful detention originated with the representative, the maintenance of the action against him in his representative capacity would necessarily infringe that rule.

G. H. P.

intentional wrong or negligence." On the next page of the same volume, under subdivision 17, treating of the liability of an executor or administrator for taking property of third persons, I find the following language: "If an executor or administrator, as such, receives money or takes possession of property to which the estate has no right, he is liable to an action by the real owner for its recovery. The authorities are uniform in holding this, and they generally hold that he incurs personal liability; but there is some diversity as to whether his liability is only personal, or whether he also becomes liable in his representative capacity. The English courts, adhering to the principle that an executor or administrator has no power to create any new liability on the estate, hold that he becomes liable in his individual capacity alone, though the money or property is applied to the purposes of the estate; and some of the decisions in the United States are to the same effect,"—citing cases from the states of Alabama, Arkansas, Iowa, Massachusetts, Mississippi, New Jersey, Pennsylvania, and Virginia. The writer of the article in the Encyclopædia then proceeds to say: "But other authorities have adopted a more equitable rule, and hold that, if an executor or administrator has applied to the use of the estate money or proceeds of property belonging to third persons, he is liable in his representative capacity, and that the person injured may elect whether he will hold the executor or administrator liable personally or in his representative capacity." The cases of *Ford v. Caldwell*, 3 Hill L. 248, and *Huff v. Watkins*, 20 S. C. 477, seem to indicate that the courts of this state are disposed to hold what the writer in the Encyclopædia calls the "more equitable doctrine,"—that, where the estate of a decedent has received benefit from the use of money or property not rightfully belonging to it, an action *ex contractu*, but not an action *ex delicto*, may be maintained against the executor or administrator, as the case may be, in his representative capacity, for the recovery of the amount to which the estate has thus been benefited. This, it seems to me, is the true and logical doctrine, but that in no case can an action *ex delicto* be maintained against executor or administrator in his representative character. If the tort upon which such an action is founded was committed by the decedent, then it dies with him. *Chaplin v. Barrett*, 12 Rich. L. 284, 75 Am. Dec. 731; *Huff v. Watkins*, 20 S. C. 477. But, if the tort was committed by the executor or administrator, then the action can only be brought against him in his individual, and not in his representative, capacity; for, as is said in the foregoing quotation from the Encyclopædia, "their torts are their individual acts, for which the only remedy of the person injured is against them individually." In this connection it may be noted that the case of *Ross v. Cash*, 58 Ind. 278, relied upon by the appellant, is one of the many cases from Indiana cited to sustain the doctrine laid down in the 51 L. R. A.

Encyclopædia, cited above, from which I infer that the action in that case was brought against the defendant in his individual, and not in his representative, capacity, and that what the court really held was that he would be liable, "whether he claim as owner, agent, administrator, trustee, custodian, or in any other capacity," if he tortiously withheld the possession of the property sued for from the real owner. But as I have not, at present, access to that case, this is a mere inference from the fact that I find it cited in the Encyclopædia to sustain a doctrine contrary to that for which it is cited in the argument of the counsel for appellant. The case of *Middleton v. Robinson*, 1 Bay, 58, 1 Am. Dec. 596, likewise cited by appellant's counsel, has no application to this case. That was a special action on the case, brought by the executors, for the value of certain cattle taken from the plantation of testator in his lifetime. There was also a count in the declaration for money had and received. The court sustained the action upon two grounds: First, because, by the terms of the statute of 4 Edw. III., chap. 7, executors were expressly allowed to sue for trespass in taking away the property of a testator in his lifetime; second, because the tort might be waived, and the action proceed in assumpsit, under the count for money had and received. But it will be observed that the statute of 4 Edw., now incorporated in Rev. Stat. 1893, as § 2319, only gives the right to executors to sue trespassers, but does not give any right to third persons to sue executors for trespasses or other torts, and we know of no statute which confers any such right. As to the second ground, it only proceeds upon the well-settled doctrine that there are cases in which the tort may be waived, and the action proceed, upon proper allegations, as an action *ex contractu*, as was properly allowed in that case, under the count in the declaration for money had and received, which rests upon an implied assumpsit. But in the case now under consideration the action is not brought by an executor against an alleged trespasser upon the property of his testator (which is the only case provided for by the statute of Edward), but the action is brought against an executor for an alleged tort committed by him, and there is no pretense that the tort has been waived. It is plain, therefore, that the case cited by appellant has no application to the present case. It seems to me that it would not only be anomalous, but illogical, to hold that while an administrator or executor cannot be sued in his representative capacity on a contract made by him, and not by his intestate or testator, as the case may be, whereby a new debt or liability may be fastened upon the estate which he represents, yet he may be sued in his representative capacity for a tort committed by him, with which his testator or intestate had nothing whatever to do and is in no way responsible for, and thus a new liability may be fixed upon the estate which he represents. Such a doctrine would not only be anomalous and

illogical, but would tend to prejudice, perhaps to destroy, the interests of those beneficially interested—oftentimes minors—in the estates of decedents.

In the present case no wrong whatever is imputed to defendant's testator, and, on the contrary, appellant, in his argument, distinctly repudiates any intention to make such an imputation. The action is based upon a tort committed by the defendant since the death of his testator, in wrongfully withholding the possession of the chattel, sued for from the alleged rightful owner; and for that he can only be held liable in his individual, and not his representative, capacity. It is not difficult to conceive of a case in which no wrong could be imputed to the testator in taking and retaining the possession of the chattel in dispute, and yet the person who may unlawfully withhold the possession of such chattel from the rightful owner would be guilty of a wrong in so doing. For example, if the testator was entitled to a life interest in the chattel, with remainder over to the plaintiff, there could be no possible wrong on the part of the testator in taking and retaining the possession of such chattel during his lifetime. But if after his death any person, be he executor or administrator or a third person, should unlawfully withhold the possession of the chattel from the person entitled in remainder, then the wrong done is

that of such person, for which he would be liable in his individual, and not in his representative, capacity. If it should be said that it would be a hard case upon the executor if he should be held individually responsible in a case like the one supposed, the answer is obvious. The court of equity would, in a proper case, and upon a proper showing that the executor had acted in good faith, allow him credit for whatever he had been required to pay in an honest effort to protect the interests of the estate committed to his charge. It is everyday practice to allow an executor, upon his accounting, credits for amounts paid out by him for counsel fees and other proper expenses incurred by him in the management of the estate, upon contracts for which he is responsible in his individual, and not in his representative, capacity, whenever the court is satisfied that such obligations have been incurred in good faith for the benefit of the estate. I think, therefore, that there was no error upon the part of the circuit court in holding that this action could not be maintained against the defendant in his representative capacity, but that the action should have been brought against the defendant individually. This view being conclusive of the case, there was no error in holding that it was not necessary to pass upon appellant's exceptions.

TEXAS COURT OF CRIMINAL APPEALS.

Ex parte A. A. KENNEDY.

(.....Tex.....)

The work of a barber is not a work of necessity, within the meaning of an exception to Penal Code, art. 196, forbidding Sunday labor, in the absence of any peculiar reason showing that under the circumstances of a particular case the work was necessary.

(June 20, 1900.)

APPPLICATION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for violation of the statute against Sunday labor. *Denied*.

The facts are stated in the opinion.

Mr. Marsene Johnson, for petitioner:

By the word "necessity" we are not to understand a physical and absolute necessity but a moral fitness or propriety of the work and labor done under the circumstances of any particular case may be deemed "necessity" within the statute.

Hennersdorf v. State, 25 Tex. App. 597, 8 S. W. 926.

The necessity may grow out of, or indeed

NOTE.—As to works of necessity or charity in general, see *note* to *Quarles v. State* (Ark.) 14 L. R. A. 192.
61 L. R. A.

be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act.

Com. v. Waldman, 140 Pa. 97, 11 L. R. A. 563, 21 Atl. 248.

Mr. Newton J. Skinner also for petitioner.

Messrs. J. S. Wheless and Robert A. John for the State.

Henderson, J., delivered the opinion of the court:

This is a proceeding by original application for writ of habeas corpus, and brings in review the validity of article 196, Penal Code, it being claimed that it does not apply to barbers, as their business is a work of necessity. The statement of facts, which is agreed to, shows that relator, A. A. Kennedy, was the proprietor of a barber shop in the city of Galveston; that on Sunday, April 8, 1900, he had his barber shop open for business; that he shaved Louis Ricci, William Presler, and others; that he charged them the usual price of 15 cents for shaving them. There are no other facts stated tending to show that any of said customers were laboring under any peculiar conditions suggesting a necessity for them to be shaved, other than as stated; that is, we understand the bald question is here presented whether or not a barber, in the ordinary pursuit of his voca-

tion, is in the discharge of a work of necessity. Sunday laws are almost universally held to be constitutional, as being within the police power of the state. In the language of Mr. Justice Field in *Soon Hing v. Crowley*, 113 U. S. 710, 28 L. ed. 1147, 5 Sup. Ct. Rep. 734: "Sunday laws are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the state." As to what is a work of necessity, 24 Am. & Eng. Enc. Law, p. 541, gives the following definition: "A work of necessity is not meant a physical and absolute necessity, but any labor, business, or work which is morally fit and proper to be done on that day, . . . under the circumstances of the particular case." And again: "The necessity must be a real, and not a fancied, one; there must not be merely an honest belief on the part of the defendant that the necessity exists, but the actual existence of the necessity must be shown. Nor does the exception embrace work which is merely convenient, but not necessary." And this definition seems to be adopted as applicable to our Sunday law in *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926. And see, also, *Nelson v. State*, 25 Tex. App. 599, 8 S. W. 927. Applicant contends that there is a necessity for a man to be barbered on Sunday, and that this performance renders it necessary for someone to do the barbering for him; and he refers us to *Com. v. Waldman*, 140 Pa. 97, 11 L. R. A. 563, 21 Atl. 248, and other authorities, to support his contention. In the Pennsylvania case, supra, there are some expressions of the judge (not necessary to the decision, however) which may bear this construction. We may concede that there may be isolated cases which should suggest a necessity for a tonsorial artist, and the statutes of some of the states make an exception in favor of shaving a corpse. But we do not understand that to be the case here presented; the insistence being that a barber can ply his vocation on Sunday for the benefit of all customers; that it is necessary for their convenience; and that it is a work of necessity, so far as he is concerned. We might concede it would be a matter of convenience to many of his customers, but it would by no means follow that it would be a work of necessity as to the barber. We believe that our statutes, in authorizing a work of necessity on Sunday, meant something more than mere convenience. It apprehended that there must be some peculiar exigency which would authorize Sunday labor. It might be more convenient to a number of citizens to buy their groceries or dry goods on Sunday, but this would not render it necessary for

them to do so, when there are six days in the week in which they could provide these wants. It might be more convenient to the farmer in harvesting season to utilize all seven days of the week, but this would not make it necessary. Still there might be some occasions when the merchant would be authorized to sell some article of merchandise on account of necessity; and there might be an exigency for the farmer to harvest his grain on Sunday. And so it is with the trade of the barber. There are six full days in which the citizen can apply to the barber to have his hair cut or shampooed, or his beard shaved; but this would not imply that there might not be an exigency in which the barber might use his tonsorial art for the benefit of someone who required his labor as a necessity. But unless there should occur some peculiar reason showing that under the circumstances in the particular case the attendance of a barber was a work of necessity, he would not be relieved from the operation of the statute. This is what we understand the court to have decided in *Nelson's Case*, 25 Tex. App. 599, 8 S. W. 927. In that case it was held that a blacksmith was authorized to shoe a horse on Sunday, in order to facilitate the carrying of the United States mail. But this could not be considered an authority to authorize a blacksmith to keep his shop open every Sunday, and during the entire day, in order to ply his vocation as a blacksmith. In *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, though the exact question here discussed was not before the court, the question of necessity was explored and discussed, and a number of authorities are cited in accordance with the views herein expressed. And it has been held in a number of cases that the work of a barber is not one of necessity, so as to exonerate him from the operation of Sunday laws. We quote from 24 Am. & Eng. Enc. Law, p. 544, as follows: "The business of a barber in shaving his customers is a matter of convenience, and not a work of necessity or charity, and therefore it does not come within the exception." (See authorities cited in note.) We accordingly hold that the ordinary vocation of a barber is not a work of necessity, and that such occupation comes within the statute, as provided in article 196, Penal Code, prohibiting all persons from laboring on Sunday. While, in our advancing civilization, barber shops are required as necessary to the general public, yet this necessity can be responded to without infringing on the Christian Sabbath. As a general rule the barber labors more hours in the day than those following other vocations; their business generally being conducted into the night. Especially is this true of Saturday nights. We think it is a most reasonable police regulation, and one which should meet with the approval of their craft, to rest from their labors one day in seven. To hold otherwise would be to declare and single out the occupation of a barber as a work of necessity, and the result would be to open all the barber shops on this day. Our statute has not excepted bar-

bers, and we do not feel authorized to ingraft this exception on the Sunday law.

Relator is accordingly remanded to the custody of the officer; and it is further ordered and adjudged that he pay all costs incurred in this court.

George JOHNSON *et al.*, Appts.,

v.

STATE of Texas.

(.....Tex.....)

1. A provision that a judgment shall not be reversed for error in the charge of the court, unless such error is excepted to by bill or on motion for new trial, in Code Crim. Proc. § 723, is not unconstitutional, since it affects no vested right, but regulates the remedy merely.
2. An alleged error in the charge of the court cannot be reviewed on appeal, where appellant failed to complain of the charge by bill of exceptions or on motion for a new trial, as required by Code Crim. Proc. § 723.

(Davidson, P. J., *dissents.*)

(June 6, 1900.)

APPPEAL by defendants from a judgment of the District Court for Wilbarger County convicting them of burglary. *Affirmed.*

The facts are stated in the opinion.

Messrs. Weeks & Fleeger for appellants.

Mr. Robert A. John for the State.

Brooks, J., delivered the opinion of the court:

Appellants were convicted of burglary, and their punishment assessed at confinement in the penitentiary for a term of two years.

We find no bill of exceptions nor statement of facts in the record. Appellants urge error in this court for the first time as to the charge of the court. If article 723, Code Crim. Proc., is constitutional, then, however erroneous the charge of the court may be, appellants having reserved no exception in the court below, either by bill or motion for new trial, they are without remedy at law. We think said article is constitutional, and unless appellants complain of the charge below, and reserved that complaint in a bill of exception or in motion for new trial, then such error cannot be reviewed in this court, however erroneous or fundamental it may be. We think a bare inspection of this article, coupled with the eight preceding articles, clearly manifests this to be the legis-

lative intent. Article 723 reads as follows: "Whenever it appears by the record in any criminal action, upon appeal of defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, which error shall be excepted to at the time of the trial or on motion for new trial." It has never been successfully controverted, and never really seriously denied, until of late, that the legislature of the state has not ample and complete authority to pass any law regulating the means, manner, and mode of assertion of any of appellant's rights in the court; and so long as this means, manner, and mode be adequate for the assertion of either statutory or constitutional rights, just so long are the statutes and remedies provided by law constitutional. Article 715 provides: "The judge shall give to the jury a written charge, in which he shall distinctly set forth the law applicable to the case, but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony whether asked or not." Article 716 provides that the judge shall not discuss the facts; article 717 provides that either party may ask written instructions; article 718, that the charge shall be certified by the judge. Article 719 provides that, in criminal actions for misdemeanor, the court is not required to charge the jury except at the request of counsel on either side, but, when so requested, shall give or refuse such charges, with or without modification, as are asked in writing. Article 720 provides: "No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties." Article 721 provides: "When charges are asked, the judge shall read to the jury only such as he gives." Article 722 provides: "The jury may take with them, in their retirement, the charges given by the court, after the same have been filed, but they shall not be permitted to take with them any charge or portion of a charge that has been asked of the court and which the court has refused to give." Then follows the above quoted article 723. Now, then, in order to construe these articles, they must be considered together. If the judge fails to read to the jury his charge, as provided in article 721, or should give the jury a verbal charge, as provided in article 720, or should disregard any of the eight preceding articles, then, before the same could be availed of in this court as cause for reversal, it must be excepted to by appellant at the time of the trial by bill, or in motion for new trial; otherwise, it is considered as waived, and we are not authorized to consider it. If appellant excepts to the ruling of the court by bill or in motion for new trial, then he has a perfect, complete, and adequate remedy provided by statute for the assertion of his rights. If he fails to do so, then he is cut off, and has no remedy at law or right to a reversal of the case in this court, by sheer force of

NOTE.—On the question of the constitutional right to appeal, see *St. Louis, I. M. & S. R. Co. v. Worthen* (Ark.) 7 L. R. A. 374; *Sullivan v. Haug* (Mich.) 10 L. R. A. 263; *Klein v. Valerius* (Wis.) 22 L. R. A. 609; *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 38; *Taggart v. Claypole* (Ind.) 32 L. R. A. 586; and *McClain v. Williams* (S. D.) 43 L. R. A. 287. 51 L. R. A.

the fact that any of the eight preceding articles have been disregarded. To hold otherwise would be to say that the legislature could not provide a reasonable, rational, and adequate remedy for the assertion of rights guaranteed under the Constitution of this state.

The object of article 723, and the legislative intent in passing the same, was to give the trial court an opportunity to rectify and correct errors and rulings in the trial of the cases before them. Hence it is provided that appellant should assert, either in bill of exceptions or motion for new trial, the alleged errors in the trial court, in order that said court may have an opportunity of granting a new trial and correcting such errors. If appellant can come to this court, and complain for the first time of the action of the trial court, without bill of exceptions or motion for new trial, why not permit appellant to disregard the actions and rulings of the trial court, as far as urging them for new trial, and insist for the first time in this court upon their consideration? How it can be seriously insisted that the requirements of said article are not reasonable has never been made to appear in brief or argument in any case filed before us.

The 25th legislature prescribed a new form of recognizance for appeal to this court in misdemeanor cases, and this form provides that the fine and costs assessed against appellant in the lower court must be stated. We have repeatedly held that this is a prerequisite to an appeal to this court. Numerous cases under this statute have been dismissed by us where parties have been deprived of legal, and perhaps constitutional, rights by sheer force of the fact that they have not complied with the strict letter of the law regulating recognizances. It has never been contended that this statute is unconstitutional, yet one can readily imagine cases where several constitutional rights might be denied appellant, and, simply by reason of the fact that his recognizance is not in proper form, his case is dismissed, and his constitutional rights thereby denied him. This is nothing but a remedy,—a reasonable, rational, and adequate legislative requirement for an appeal to this court. If the party follows that remedy, his case is properly docketed and considered; but, if he does not, his appeal is dismissed because of his failure to comply with the adequate remedy provided by the legislature for the assertion of his rights. The same might be said of statement of facts; for unless they are filed within term time, or within ten days after the adjournment of the court under a ten-day order, they will not be considered; or if they are filed in term time, and not properly certified by the trial court, they will not be considered. Whenever a statement of facts is stricken out for any or either of these reasons, it frequently deprives a party of a constitutional or legal right at least. But it has never been gainsaid, nor is the statute claimed to be unconstitutional. Suppose a court in the trial of a murder case admits evidence going to show

defendant has committed arson, robbery, burglary, and theft on divers and sundry occasions, but there is no bill of exceptions reserved to this action of the trial court; this cannot be considered by us, but we have uniformly held that defendant must reserve his bill of exceptions. This is a statutory requirement,—a remedy under which appellant can assert his legal rights. If he does not follow the remedy, he loses his rights; the remedy being adequate and reasonable. The same might be said of the homestead law. A party is sued for his homestead, but makes no answer to the citation. Judgment would be rendered by default. Yet this is a constitutional right, guaranteed by express stipulation, that no one's homestead shall be taken under execution or any character of judgment, except for the purchase money and taxes. Yet if one has a judgment against A., and levies on his homestead, buys it in at execution sale, brings trespass to try title, and the homestead plea is not properly filed, the owner is deprived of his home. This is a remedy, but it is manifestly an adequate remedy, and if he does not see fit to assert his rights in the courts at the proper time, and in the proper way and manner, he loses his rights; and he cannot be heard to complain in courts of last resort that his constitutional rights have been taken away from him, when he utters not a word in the lower court to assert those rights. We might continue indefinitely to cite instances where the legislature in its discretion has provided, under the Constitution, divers and sundry other manners and means for the assertion of legal and constitutional rights, and where the courts of last resort have upheld the constitutionality of such remedies; but this is unnecessary.

Prior to the adoption of article 723, the old article read as follows: "Whenever it appears, by the record in any criminal action upon appeal of defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall be reversed, provided the error is excepted to at the time of the trial." The old article was properly held by this court as being mandatory upon us, and as requiring of us a reversal of the case, whether or not a violation of the eight preceding articles, or any one of them, was calculated to injure his rights; that we had no discretion in the matter; and, in deference to the decision asserting this proposition, the legislature amended said article, and passed the amendment above indicated. This article has been passed upon by this court in several instances, and its validity thoroughly maintained. *Darter v. State*, 39 Tex. Crim. Rep. 45, 44 S. W. 850; *Pena v. State*, 38 Tex. Crim. Rep. 333, 42 S. W. 991; *Garza v. State*, 38 Tex. Crim. Rep. 317, 42 S. W. 563. In the latter case, Judge Davidson, delivering the opinion of the court, uses this language: "Under this latter act [referring to article 723] this court is prohibited from reversing judgments on errors in connection with the charge, unless

they are material, and excepted to at the time of the trial or on motion for new trial." In *English v. State* (Tex. Crim. App.) 45 S. W. 713, Judge Hurt, delivering the opinion of the court, said: "Under the recent act of the legislature, in order to require a reversal for errors in the charge of the court, bills of exception must be reserved, or it must be excepted on motion for a new trial. This was not done. . . . As presented by the record, this judgment must be affirmed; and it is so ordered." A careful perusal of the last-mentioned case indicates that this article would apply even if the charge had been oral, the case being a felony. See also *Bailey v. State* (Tex. Crim. App.) 45 S. W. 708; *Ford v. Same* (Tex. Crim. App.) 51 S. W. 935.

If we revert to the common-law authorities on this subject, the foregoing position is amply sustained. Endlich, *Interpretation of Statutes*, p. 387, uses this language: "No person has a vested right in any course of procedure, [nor in the power of delaying justice or deriving benefit from technical and formal matters of pleading.] He has only the right of prosecution or defense in a manner prescribed, for the time being, by or for the court in which he sues, and, if statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. It takes away no vested right; for the defaulter can have no vested right in a state of the law which left the injured party without or with only a defective remedy. If the time for pleading were shortened, or new powers of amending were given, it would not be open to the parties to gainsay such a change; the only right thus interfered with being that of delaying or defeating justice, a right little worthy of respect. . . . In this country the general rule seems to be in accordance with the English, that statutes pertaining to the remedy, i. e., such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced, and neither directly nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage." In *Black, Constr. & Interpretation of Laws*, p. 265, we find the following: "No person has a vested right in any form of procedure. He has only the right of prosecution or defense in the manner prescribed for the time being, and, if this mode of procedure is altered by statute, he has no other right than to proceed according to the altered mode. Indeed, we rule seems to be that statutes pertaining to the remedy or course and form of procedure, but which do not destroy all remedy for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage. Statutes which relate to the mode of procedure, and affect only the remedy, and do not impair the obligations of contracts or vested rights, are valid. . . . It is competent for the legislature at any time to change the remedy

51 L. R. A.

or mode of procedure for enforcing or protecting rights, provided such enactments do not impair the obligations of contracts or disturb vested rights, and such remedial statutes take up proceedings in pending causes where they find them." Again, in *Potter, Durr, Stat.*, this language is used: "But it is well-established law that the individual citizen, with all his rights to protection, has no vested right in what is known in the law as remedies, nor in any particular existing remedy. He has no such vested interest in the existing laws of the state as precludes their amendment or repeal by the legislature, nor is there any implied obligation on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. . . . If the remedy does not impair the right of property itself, if it still leaves the party a substantial remedy according to the course of justice as the right existed at the time of the passage of the statute, it does not impair the obligation of the contract, nor will it be held to do so merely because the new remedy is less efficient, less speedy, or less convenient than the old one." Page 471. In *Cooley, Const. Lim.* p. 326, we find the following: "But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispute with any of those substantial protections with which the existing law surrounds the person accused of crime."

So, none of the rights guaranteed under the eight preceding articles to article 723 are taken away from appellant, provided he reserve a bill of exceptions, or insist upon such rights in his motion for new trial. Clearly, this is giving him an adequate remedy for the assertion of such rights.

But can it be seriously contended that appellant has a vested right in any of said eight articles? Certainly not. The legislature could abrogate every one of them at the next session without violating the letter or spirit of the Constitution, thereby relegating the courts back to the common law for mode and manner of trial. Then, if so, why should appellant now insist that said articles give him a vested right in the same? Said eight articles have no more constitutional sanctity than article 723, and, in considering and passing upon the same, they must be construed in conjunction with said article 723; and, when so construed, there is but one conclusion to be drawn, and that is that the violation of any of said eight

articles will not be reviewed unless the same were calculated to injure the rights of defendant, and which error must be excepted to at the time of the trial or on motion for new trial.

In the time allotted for the investigation of this case we have been unable to review all the authorities, but we note that the supreme court of Missouri in *State v. Reed*, 89 Mo. 171, 1 S. W. 225, upholds the validity of a similar statute to the one we are now considering. There we find this language: "Now, in the application of the general rules before stated, and with these statutes in full force, it has been ruled that instructions are not before this court for consideration where the motion for new trial is not incorporated in full in the bill of exceptions, though the instructions are contained therein. *State v. Dunn*, 73 Mo. 586; *State v. McCray*, 74 Mo. 303. So it was said in *State v. Preston*, 77 Mo. 294: 'It is also insisted that the court erred in giving instructions. This objection cannot be considered by us, for the reason that it is not alleged in the motion for new trial that the court misdirected the jury.' The same ruling was made in *State v. Emory*, 79 Mo. 461; and in the case of *State v. Bayne*, 88 Mo. 604, it was held two instructions asked by the defendant and refused would not be considered, because exceptions were not taken at the time to the ruling of the court. It must follow that the instructions given in this case cannot be reviewed." Without commenting in detail upon other authorities and statutes, we cite the following which are very similar to the article under consideration and decisions thereunder: Mo. Rev. Stat. 1889, § 4297; Wis. Rev. Stat. 1899, § 4720; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122; *State v. Davidson*, 73 Mo. 428; *Williams v. State*, 61 Wis. 290, 21 N. W. 50; *Flower v. Nichols Bros.* 55 Neb. 314, 75 N. W. 864.

It follows, therefore, that, appellant by neither bill of exceptions nor motion for new trial having complained of the court's charge, we cannot review any supposed error in the charge, however erroneous it may be; that article 723, Code Cr. Proc., gives appellant a perfect, complete, and adequate remedy for the assertion of his rights; and if, through ignorance, neglect, or any other cause, he fails to avail himself of this remedy, we cannot review the matter, and appellant is without remedy. We might discuss this matter further, but we do not deem it necessary.

No reversible error appearing in the record, the judgment is in all things affirmed.

Davidson, P. J., dissenting:

I dissent from the opinion of the majority, and believe the judgment should be reversed, though the charge was not excepted to in the court below in any manner, and the error was presented for the first time on appeal. The charge given is on the weight of the evidence, and such as has frequently been condemned by this court, and reversals

awarded on account of the error. Penal Code, art. 715; *Wheeler v. State*, 34 Tex. Crim. Rep. 350, 30 S. W. 913; *Pollard v. State*, 33 Tex. Crim. Rep. 197, 202, 26 S. W. 70; *Hayes v. State*, 36 Tex. Crim. Rep. 140, 35 S. W. 983; *McCarty v. State*, 36 Tex. Crim. Rep. 135, 35 S. W. 994; *Franks v. State*, 36 Tex. Crim. Rep. 149, 35 S. W. 977; *Berry v. State*, 37 Tex. Crim. Rep. 44, 38 S. W. 812; *Grande v. State*, 37 Tex. Crim. Rep. 51, 38 S. W. 613; *Wheeler v. State*, 38 Tex. Crim. Rep. 71, 41 S. W. 615; *Millsaps v. State*, 38 Tex. Crim. Rep. 570, 43 S. W. 1015. In *Millsaps v. State*, 38 Tex. Crim. Rep. 570, 43 S. W. 1015, this charge was given: "And in this connection you are also charged that when an instrument is shown to be a forgery under the rules of law as herein stated, and shown to be in possession of someone (other than the person whose act it purports to be), such possession, standing alone, is sufficient to warrant a conviction for the execution of the same." There was no statement of facts in that case. Judge Henderson, speaking for the court, uses this language: "This would be, in effect, telling the jury that if the evidence shows that the instrument was not the authorized act of the Waco Hardware Company, and it was found that the instrument purported to be the act of the Waco Hardware Company by its officers, and was not authorized by it, but if it was found in the possession of appellant, this circumstance alone would authorize the jury to convict defendant. This charge is unquestionably on the weight of the testimony, and no statement of facts would authorize the court to give such a charge." The case cited is in harmony with the decisions of this state, which require a reversal even when the evidence is not before us where the charge is on the weight of the evidence. It is also in harmony with another line of decisions, to the effect that, even in the absence of the testimony, judgments will be reversed when the charge is not applicable to any state of facts, and is injurious. Prior to the amendment of article 723 by the act of 1897, charges of this character were held to be reversible error, whether excepted to or not, when assigned as error only in this court. These cases are so numerous that it is unnecessary to cite them. It is the principle of our Code, gathered from every provision relating to that subject, to prohibit a judge from expressing an opinion as to the weight of testimony or the credibility of witnesses. This underlies our entire criminal jurisprudence, constitutional and statutory, and relegates all controverted issues of fact to a decision by a jury. He is as strictly prohibited from doing this in the charge as from expressing an opinion in the admission and rejection of the testimony. *Kirk v. State*, 35 Tex. Crim. Rep. 224, 32 S. W. 1045; *Leverett v. State*, 3 Tex. App. 217. The trial court cannot even advise the jury as to the process of reasoning upon facts. For authorities, see White's Anno. Code Crim. Proc. § 809. Judge Brooks, for the majority, says: "We think said article is

constitutional, and unless appellants complain of the charge below, and reserve that complaint in a bill of exception or in motion for new trial, then such error cannot be reviewed in this court, however erroneous or fundamental it may be." From this no character of error committed by the court with reference to articles 715 to 722, inclusive, can be error, unless excepted to in one of the modes provided in said article. I cannot agree to such a proposition. If this is law, the trial court can charge the jury to disregard every word of exculpatory evidence introduced by the accused, and convict on the state's testimony, and the accused would be helpless unless exceptions were reserved in one of the modes specified. The court could refuse to give the required charge in writing, and it would not be error. In a sharply-contested case, where the state's evidence disclosed murder, and that for defendant a clear case of self-defense, under this ruling the court could with impunity charge the jury to disregard the evidence of appellant, and give absolute verity to that of the state,—in so many words direct a conviction,—and unless an exception be reserved it could not be assigned as error on appeal. To sustain this, Endlich, Interpretation of Statutes; Black, Constr. & Interpretation of Laws; Cooley, Const. Lim.; Potter's Dwarrr. Stat.—are cited. These citations are treating the question of remedies under, as well as the effect of, retrospective laws, and only that character of legislation, when not violative of the fundamental law of the land. These citations have no bearing on this question, and it is unnecessary to discuss them. Some Missouri decisions are cited, as well as those of other states; also Mo. Rev. Stat. 1889, § 4297, and Wis. Rev. Stat. 1889, § 4720, as similar to article 723.

To show the inapplicability and dissimilarity of the Missouri statute, I quote it, as follows: Sec. 4297. No assignment of error or joinder in error shall be necessary upon any appeal or writ of error in a criminal case issued or taken pursuant to the foregoing provisions of this article; but the court shall proceed upon the return thereof, without delay, and render judgment upon the record before them." Construing this statute, the supreme court of Missouri in *State v. Davidson*, 73 Mo. 428, says: "In civil causes, for failure to assign errors, the appeal may be dismissed or the judgment affirmed. 2 Wagner, Stat. p. 1066, § 22. In civil causes, also, the statute is express that each party shall 'furnish the court with a clear and concise statement of the case and the points intended to be insisted on in argument.' Id. p. 1067, § 31. In civil causes, also, the judgment will be affirmed if appellant fails to prosecute his appeal by filing in this court a perfect transcript, and such transcript be produced here by the opposite party. Id. p. 1069, § 49. There are no such provisions in criminal causes, and the practice therein, if we are to follow the statute, is totally dissimilar from that in civil causes. In the former class of causes

no assignment of error or joinder in error is necessary, nor statement of the case or points intended to be insisted on, but on the return of the appeal it becomes the duty of this court to 'render judgment on the record' before us. Id. p. 1115, § 20; *State v. Barnett*, 63 Mo. 300. The case of *State v. Armstrong*, 46 Mo. 588, where the judgment was affirmed because the defendant failed to prosecute his appeal by presenting a brief of the facts and points on which he relied, was not well considered, and is not law." *State v. Reed*, 89 Mo. 171, 1 S. W. 225, is to the same effect. It says: "In criminal cases in this court no assignment of errors or joinder in error is required, and it is made the duty of this court to proceed and render judgment upon the record." So, it will be seen that article 4297, above cited, has nothing to do with the question. In *State v. Hopper*, 71 Mo. 425, 431, construing a statute of that state, which provided that under an indictment for murder in the first degree the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether defendant was guilty of murder in the first or second degree, the supreme court said: "It has always been held to be the duty of the court in trials for murder, if the evidence would warrant it, to instruct the jury as to murder in the second degree, and if the above section was meant to require such an instruction to be given, without regard to the evidence, we do not hesitate to say that it is such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the Constitution. The legislature can pass any constitutional law it may deem proper, and the courts are bound to observe it, but it cannot prescribe for them what instructions they shall give in a cause, unless they have previously embodied into a legislative enactment, as the law of the land, the substance of such instructions. We hold, therefore, that, in any view to be taken of § 1234 [Rev. Stat. 1879], the trial courts cannot in a trial for murder give an instruction in regard to murder in the second degree, unless there is evidence which would warrant the jury in finding the accused guilty of murder in that degree." So it would seem the supreme court of that state has put its seal of condemnation in emphatic terms upon legislative interference with the independency of the judiciary. The Missouri statute cited by Judge Brooks simply provides for a disposition of the appeal on the record, without error joined or assigned, and thus differentiates it from civil causes. The law has never been otherwise in this state. With us the criminal appeal is tried on the record without joinder of errors.

The Wisconsin statute (Rev. Stat. 1889, § 4720) reads as follows: "Any person who shall be convicted of an offense before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode and presented to the court

at any time before the end of the term, and if found conformable to the truth of the case, shall be allowed and signed by the judge, and thereupon all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge that such exceptions are frivolous, immaterial, or intended only for delay, and in that case judgment may be entered and sentence awarded in such manner as the judge may deem reasonable, notwithstanding the allowance of such exceptions." This provides, and was only intended to provide, an appeal, under circumstances therein stated, after conviction, and before entry of judgment, and, in order to stay such judgments pending appeal under such state of case, the exceptions were required. There seem to be three modes of appealing in Wisconsin,—two after conviction and before judgment; the third, after judgment. Where the party desires to stay the judgment pending appeal, he could do so; otherwise, he brought his appeal on writ of error. This was not an infringement, and could not be construed into an infringement, of the right of appeal. There is a remarkable difference between amplifying rights, extending rights, enlarging rights, and curtailing rights or abolishing rights. The Wisconsin statute belongs to the first class, and gave the convicted person three modes of taking his appeal, and, if he failed in the first two, he could then carry his case up on writ of error. *State v. Compton*, 84 Wis. 355, 54 N. W. 578, construes said article 4720. Article 723, Code Crim. Proc., is exactly opposite to the Wisconsin statute in its tendency and effect, and belongs to the curtailing class. It is a disabling statute. Under the construction placed upon it by the majority, defendant's constitutional right of a fair trial by a jury on the merits of his case and the evidence may be cut off suddenly and without remedy, and this by a construction in direct contravention of the evident legislative intent, plainly expressed.

In *Brown v. Buck*, 75 Mich. 274, 283, 42 N. W. 827, 830, 5 L. R. A. 226, 230, it was said: "It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights." This is the correct rule. It is too well known to require discussion that in amending article 723 the legislature was seeking to avoid the effect of the old article in regard to reversals. Under the former statute, the appellate court was called upon to reverse judgments in criminal causes whether there was injury or not, provided the charges were excepted to on the trial. The present statute requires affirmance "unless the error was calculated to injure the rights of defendant." It has no reference to the settled law in this state, wherein judgments were reversed when the error was of a fundamental nature, or which impinged upon those rights guaranteed the accused, of a fair "trial by an impartial jury," due process of law, etc. Nor was it intended to take from the jury the right to decide controverted issues of fact, nor was it passed for

that purpose, nor does it attempt to do so. It expressly recognizes the validity of the eight preceding articles, refers to and emphasizes their binding force, and thereby expressly requires the court to give a written charge in all felony cases, whether asked or not, distinctly setting forth the law applicable to the case. 11 Am. & Eng. Enc. Law, 1st ed. p. 26, and notes. Article 716 places it beyond the province of the judge in criminal cases to discuss the facts or use any argument in his charge calculated to arouse the sympathy or excite the passions of the jury. "It is his duty to state plainly the law of the case." Article 714 (not included within the eight, and therefore not affected by it) provides especially that the jury are the exclusive judges of the facts in every criminal case, but not of the law in any case. They are bound to receive the law from the court, and be governed thereby. Article 766 (not referred to in article 723) provides: "The jury in all cases are the exclusive judges of the facts proved, and of the weight to be given the testimony." Article 767 (also outside the provisions of article 723) expressly prohibits the court from discussing or commenting upon the weight of the testimony, or its bearing upon the case, or from making any remark calculated to convey to the jury his opinion of the case; and article 817 requires the court, where he has misdirected the jury as to the law, to grant a new trial. Then it may be deduced from an inspection of article 723 that the legislature never intended, and does not provide, that a case shall not be reversed where there is fundamental or radical error. It only undertakes to limit the action of this court in reversing cases to those where the error is of a nature doubtful in its bearing upon the case; that is, such as may be calculated to injure the rights of the party on trial. To give it any other construction would be violative of the Constitution, as well as the plain provisions of the statute itself. In construing this statute, it must be presumed that the legislature did not intend to exceed its rightful authority (Black, Constr. & Interpretation of Laws, p. 89), and that it, like every other statute, must be construed with reference to the intent, scope, and purpose in enacting it. Id. p. 56. The spirit and reason of the law must be looked to (Id. p. 48), and it must be construed so as to be consistent with other statutes bearing upon the same question, and which have the same general object in view. Id. p. 98. It must be presumed that the legislature never intended to do injustice. If the statute is doubtful, or ambiguous, or fairly open to more than one construction, that construction should be adopted which will avoid injustice as a result. We must also keep in mind another rule of construction; that is, the presumption that the legislature did not intend an absurdity, or that absurd consequences shall follow its enactments. Such a result as will bring confusion, absurdity, or injustice must be avoided, if the terms of the act admit. Endlich, Interpretation of Statutes, §§ 258, 260, lays down the same

rules. On the construction given this statute by the majority, there is not only a want of harmony, but it is so construed as to authorize bringing about great injustice, and is a practical overturning of constitutional guaranties. Again, if the legislature can dictate to this court when it shall or shall not reverse a judgment, the functions of the court have been usurped by that body, and the judges simply are made clerks to record legislative judgments. This would be a direct infraction of the Constitution, debasing to, and destructive of, the independence of the judiciary. It will not be presumed the legislature intended either to violate the Constitution, perpetrate injustice, bring about absurdities, or destroy the independence of the judiciary. If so, it would be the plain duty of this court to hold such action absolutely null and void.

Article 2, § 1, of the Constitution, distributes the powers of government into three co-ordinate branches,—judicial, legislative, and executive,—and expressly provides, further, that “no person or collection of persons being of one of those departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.” The court itself cannot direct a verdict of guilty under the plea of not guilty. 6 Am. & Eng. Enc. Law, p. 93, and notes for authorities. If courts cannot do this, inevitably the legislature cannot, nor can it direct courts to do so. The legislature cannot direct courts how they shall render opinions. By the terms of its creation under the Constitution, this court decides appeals and renders opinions. To this end it was created and organized. But as to how it shall render those opinions the legislature is powerless to direct or command. This has been held with reference to requiring courts to give written opinions. For authorities collated on this subject, see *Id.* p. 1049, and note 12. The strongest opinion upon this subject which has been called to my attention was written by Chief Justice Field, of the supreme court of California, before his elevation to the supreme bench of the United States. *Houston v. Williams*, 13 Cal. 24. 73 Am. Dec. 565. See also *Vaughn v. Harp*, 49 Ark. 160. 4 S. W. 751. It is well settled the legislature cannot place a binding construction on the Constitution. For authorities on this question, see 6 Am. & Eng. Enc. Law, p. 1038, notes 4, 5, and 6; *Powell v. State*, 17 Tex. App. 345, 350. Nor can the legislature authorize the opening of a case for rehearing. 6 Am. & Eng. Enc. Law, p. 1038. It is beyond the power of the legislature to provide conclusive evidence of any fact. *Id.* p. 1050, and notes. The Constitution having pointed out the specific mode or method of trial (i. e., by jury), no other method can obtain. All persons accused of felony must be tried by jury, and every disputed issue of fact must be settled by the jury, and, unless these issues are properly submitted, the jury cannot, of course, properly decide them. *Id.* p. 928. That the legislature cannot direct the courts in the interpretation of statutes in this state

is well settled. *Powell v. State*, 17 Tex. App. 350; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430. Article 723, in assuming to dictate to this court how it shall decide a case, is absolutely null and void. This court will obey the Constitution, and follow legal methods in deciding cases, and in giving reasons for such decision; and this must necessarily be so while the Constitution is the law of the land, and the judiciary remains independent of the legislative department. Again, article 1, § 10, of the Bill of Rights, provides: “In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury.” Section 15 of said article 1 provides: “The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.” Section 19: “No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land.” “Due course of the law of the land” has been so often discussed and decided it would seem a work of supererogation to again enter that field. That the Bill of Rights and the Constitution is a part “of the law of the land” will not be questioned by courts nor legislature with any confidence of success. What is understood by a fair trial or a “trial by an impartial jury” is equally well settled. I will not enter into a discussion of that subject further than to state that any action on the part of the legislature or courts, which undertakes to deprive a party accused of crime of a fair trial, or “an impartial jury,” or a “fair trial by an impartial jury,” would be nugatory. How an impartial jury can be constituted has been the subject of much legislation and varied discussion by courts, but whenever that impartial jury has been impeached there is no question of its absolute right to pass upon, untrammelled by dictation from courts or legislature, every disputed issue of fact arising on the trial, guided alone by the court as to the law applicable to those issues, and any attempt on the part of the court to dictate to the jury how they shall decide such disputed question, under a plea of not guilty, would be subversive of every rule of constitutional law, every question of right, and every principle applicable to jury trials, and subversive of our criminal jurisprudence. To authorize a trial court to inform a jury that any issue is adverse to the accused, when that issue is disputed, would be an infraction of the inviolability of jury trials, and violative of that portion of the Bill of Rights which guarantees the accused a trial under “due process of the law of the land.” If article 723, *supra*, undertakes to limit this court in its authority to honestly, correctly, justly, or legally decide cases, it is unconstitutional and therefore void; or if it undertakes to dictate when the court shall reverse or affirm cases, it is equally unconstitutional; or, if it undertakes to inhibit the court from deciding an appeal according to constitu-

tional requirements, it would be a plain infraction of those sections of the Constitution pointed out. Article 723 is therefore unconstitutional in that it impairs the right of trial by jury, because it transfers, or seeks to transfer, to the court the right to dictate to the jury how they shall decide the case. It is unconstitutional because it requires an affirmation, however erroneous the charge may be. It takes away the right of trial by jury, and transfers it to the court, to be avoided only by exception; thus making the constitutionality of the law dependent upon an exception reserved. The constitutionality of a law does not depend upon a bill of exceptions reserved to some act of the court.

Again, it is unconstitutional because it sets aside trial by jury. Does it invade the province of the jury? Let us see. If the trial judge can, without an exception reserved, charge the jury to disregard the facts and convict the accused, why can he not with equal legal propriety discharge the impaneled jury, and himself render a judgment of conviction? What is the difference, legally speaking. It is, in effect, inevitably the same thing. In either event, the jury trial is set at naught. One is as hurtful as the other. One is as unjust as the other, and attended with as injurious consequences, and as much out of harmony with the fundamental principles of our jurisprudence. They both invade and set at naught the jury trial. Inviolability of jury trials is the express command of the written law, constitutional and statutory. A jury trial cannot be waived. Code Crim. Proc. art. 22. This cannot be accomplished any more by charging the jury to convict than by refusing a jury in the first instance. A jury cannot be waived directly; therefore the waiver cannot be forced upon the accused by devious and indirect methods. The jury trial should remain inviolate as prescribed by our written law and jurisprudence, and it should be the duty of all courts to see that it does so remain. By way of illustration, suppose the court should instruct the jury to disregard the right of self-defense; would not this be directly violative of the right of trial by jury? Most clearly. Self-defense has always been, among English-speaking people, not only a right, but an "inalienable right, of every human being." "Self-defense, therefore," says Blackstone, "as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." 3 Bl. Com. 4. "It may be rightfully exercised by every human being whether beneath a despot's rule or on freedom's soil, whether he exists in a heathen land, or breathes beneath a Christian sun. But still it is a law of necessity, and while in its just and proper exercise it places the subject of it above and beyond the influence of the civil or municipal law, renders him irresponsible for his acts done by its permission, and not amenable to the civil authority." Thus wrote Judge [Wheeler] one of the greatest judges who has graced the supreme court of this state, in *Lander v. Sl L. R. A.*

State, 12 Tex. 476. And so that great commentator of English law, Sir Wm. Blackstone. It was so in the beginning, and should so remain to the end, of our jurisprudence and civilization, despite devious and sinister attacks from whatever source. It was so recognized as the law of this state in *McOundless v. State* (decided by this court on the last day of the month just passed) 57 S. W. 672, wherein Judge Henderson, speaking for the court, said: "It [self-defense] is the natural and inalienable right of every human being, and is to be held sacred and inviolable by any law of human or civil institution." If self-defense is "an inalienable, inviolable right," or "is to be held sacred and inviolable by any law of human or civil institution," how can it be made alienable and violable for want of a bill of exceptions? If it can be, it is not inalienable or inviolable." Self-defense is "sacred and inviolable by any law of human or civil institution," and is a question of fact to be determined by the jury. It cannot be taken away so as to deprive the accused of it by the court's charge. If this be true of self-defense, why not of a jury trial?

But it is said that this is procedure. In a certain sense, this is correct. So are the provisions of the Constitution with reference to "jury trials" procedure. "Due process of law" is procedure. I believe the assertion is a safe one that no court would hold the finding and return of an indictment by a grand jury to be other than procedure. The organization and Constitution of the grand jury—every act it performs—is procedure; the impanelment of the trial jury is procedure; the obtaining of witnesses for or against the accused is procedure; every step in the prosecution is procedure; and if the legislature has the right, under their power to provide reasonable rules of procedure, to nullify or restrict the trial by an impartial jury, destroy the judiciary, or overturn due process of law, then that body may, at its will, set aside every provision of the Constitution where the rules of procedure enter, or can be deducible, by simply passing statutes and calling them "procedure." It is thoroughly settled by a long unbroken line of decisions that the legislature cannot destroy the indictment required by the Constitution by providing allegations which do not charge the offense. *Hewitt v. State*, 25 Tex. 725, to the present time. See *Huntman v. State*, 12 Tex. App. 619, for discussion of this question.

Bills of exception have been and are required with reference to admission and rejection of testimony; rules have been provided by the legislature with regard to making, certifying, and sending up statements of fact on appeal; and decisions sustaining these are relied on as authority on the question at issue. There is no analogy. When a question of fact arises, a bill of exceptions, or some certain rule of procedure, is required. Why? Because such matters must be verified in some manner, so that the truth thereof may be judicially known by the appellate court, and it is necessary that some

definite rule be prescribed by which such matters can be settled certainly for the information and action of the appellate court. This must be done by an impartial arbiter, —the trial judge. Where the Constitution is silent, or relegates it to the legislative discretion, that body can provide reasonable rules. But not so in opposition to the Constitution. But these rules of legislative procedure do not apply with the same force to charges, because they are written, and speak for themselves, under the verity of the trial judge. The bill of exceptions and motion for new trial cannot add verity to charges written and given by the judge, nor in any manner affect them. They remain as written, and speak for themselves.

Now, with reference to the statements of fact, and extension of ten days beyond adjournment of the court at which the case is tried in which to file same. This is singled out. The Constitution fixes the terms of court; that is, it requires at least two terms of the district court each year in each county, and laws have been held null which might operate, if upheld, to limit this number to less than the necessary two terms. It is a rule of almost universal application that all orders, decrees, and actions of the trial court with reference to matters transpiring during the term shall be closed or entered during its legal term, and orders, judgments, and decrees, except in special cases, occurring subsequent to the adjournment of the term, are treated as nullities. So, in the absence of the helping statute authorizing it

within ten days after such adjournment, a statement of facts would necessarily have to be filed during the terms, in order to be considered on appeal. I do not purpose entering the field of constitutional argument in defense of such act of the legislature. It does not restrict any reserved right. It enlarges procedure in his behalf, and redounds to the benefit of the accused. It extends the time to his benefit, so he may secure a statement of facts, to the end that the issues of his case may be passed upon by the appellate court. This does not infringe, but enlarges, his right. So recognizances add another mode of appealing, and are not therefore restrictive, but enlarging and beneficial, to the accused. I wish to state here that the legislative body cannot infringe, impair, or restrict constitutional guaranties, but may enlarge in aid of them. To the end there might be no cavil about this matter, § 29, art. 1, Const., was ordained as follows: "To guard against transgressions of the high powers herein delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void." So, the people, not only in ordaining the Constitution expressly reserved the rights set forth in the first 28 sections of article 1 from the powers of government, but emphasized them by adding § 29.

Rehearing denied June 17, 1900.

UTAH SUPREME COURT.

WILLOW CREEK IRRIGATION COMPANY *et al.*, Appts.,

v.

Sarah C. MICHAELSEN, Resp't.

(21 Utah, 248.)

- *1. Utah Comp. Laws 1888, § 2780, must be construed to refer to a "natural stream, or other natural source of supply," flowing or situated upon lands over which the sovereignty has dominion, or which forms a part of the public domain, and not to streams or springs or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto has passed into private ownership.
2. Water intermingling with the ground, or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, has no characteristic of ownership distinct from the land itself, and the rules of law applying to the appropriation of surface waters do not apply thereto.

(March 30, 1900.)

*Headnotes by BARTCH, Ch. J.

NOTE.—Upon the question of the appropriation of percolating waters, see *note* to *Sullivan v. Northern Spy Min. Co.* (Utah) 30 L. R. A. 186, and the subsequent cases of *Bruening v. Dorr* (Colo.) 35 L. R. A. 640; and *Vineland Irrig. Dist. v. Azusa Irrig. Co.* (Cal.) 46 L. R. A. 820.

51 L. R. A.

A PPEAL by plaintiff from a judgment of the District Court for Sanpete County in favor of defendant in an action brought to restrain defendant from diverting water from a marsh which was alleged to be the source of a supply which had been appropriated by plaintiffs. *Affirmed.*

The facts are stated in the opinion.

Messrs. William K. Reid and James W. Cherry, for appellants:

The ownership of the water and use and appropriation of the waters of the running streams for irrigation and domestic use are proper subjects of legislation.

Stowell v. Johnson, 7 Utah, 227, 26 Pac. 290; *Yunker v. Nichols*, 1 Colo. 551.

The source of the waters involved in this case is the same as that of all other water-courses in this state. All are supplied by waters issuing from the land of various owners. If one owner can obstruct the waters arising upon his land as against a prior appropriator of the same, all such landowners can do so as well, and whole streams can be dried up, notwithstanding the prior appropriation thereof.

Stowell v. Johnson, 7 Utah, 227, 26 Pac. 290; *Drake v. Earhart*, 2 Idaho, 716, 23 Pac. 541; *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313; *Malad Valley Irrig. Co. v. Campbell*, 2 Idaho, 378, 18 Pac. 52; *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442.

The owner of land on which a spring is located has no right to appropriate the waters thereof for irrigation, as against a prior appropriator of water from a stream into which the water of the spring passes by percolation or seepage.

Bruening v. Dorr, 23 Colo. 195, 35 L. R. A. 640, 47 Pac. 290.

The doctrine of prior appropriation extends to all running streams, whether running through either public or private lands.

Coffin v. Left Hand Ditch Co. 6 Colo. 443; *Thomas v. Guiraud*, 6 Colo. 530; *Hammond v. Rose*, 11 Colo. 524, 19 Pac. 466; *Olough v. Wing* (Ariz.) 17 Pac. 453; *Moyer v. Preston*, 6 Wyo. 308, 44 Pac. 845.

Even a riparian owner of lands on both sides of a natural stream cannot obstruct the stream to the exclusion of a lower proprietor, or divert the stream from its natural course; and this, even if the stream arises on the lands of the upper proprietor.

Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911; *Hinkle v. Avery*, 88 Iowa, 47, 55 N. W. 77.

Messrs. William D. Livingston and A. H. Christenson, for respondent:

The statute when it refers to "any natural stream, watercourse, lake, or spring, or other natural source of supply," should be construed as meaning "natural stream, watercourse, etc.," over which the government, Federal and state, has control.

It refers to water which is part of the public domain, or ownership of which has been reserved from grants of public land, and not to waters arising in the lands of a private owner after he has acquired such ownership, or to such water so long as it remains upon his claim.

Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 54 Pac. 247; *Black's Pomeroy, Water Rights*, §§ 30, 44, and cases cited.

The United States in parting with its domain always gives the title absolute, extending skyward indefinitely and to the center of the earth, subject only to such restrictions and reservations as minerals, waters, watercourses, channels, etc., as provided by local laws, and customs of the several states duly approved by Congress, and by such other legislation as Congress deems expedient.

Black's Pomeroy, Water Rights, § 32; *Lindley, Mines*, §§ 80, 208, 779.

Bartch, Ch. J., delivered the opinion of the court:

This action was brought to restrain the defendant from interfering with the water of a certain spring, and to quiet title to the use of the water in the plaintiffs. It appears from the findings of fact, which are not disputed, that the plaintiff company is a corporation duly organized and existing under the laws of Utah, and its business is to control and distribute to its stockholders, for the purposes of irrigation, the water of Willow creek and its tributaries, in the county of Sanpete, state of Utah: The 51 L. R. A.

stockholders are owners of land which is being irrigated from that stream, and the plaintiffs are the owners by appropriation of all the waters flowing therein. In the year 1891 the United States government conveyed by patent to the defendant a certain tract of land, and thereafter water appeared on the land from natural causes, and formed a bog or marsh. The water stood still in a natural depression covering about three fourths of an acre of land, and increased in volume, until 1895, when it flowed in a stream, through a natural depression, into Willow creek, and thereafter continued to flow from the bog or marsh into that creek, and the plaintiffs used it with the other water of the stream. In October, 1898, and January, 1899, the defendant, by means of a dam, diverted the water flowing from the bog or marsh, and thereby prevented its flowing into Willow creek, and its use by the plaintiffs. The defendant thus diverted the water, claiming ownership thereof and right to its use upon her land. At the trial the court rendered judgment in favor of the defendant.

The decisive question to be determined upon this appeal is whether the defendant, by virtue of her patent to the land on which the bog or marsh was formed, is the owner of the water in dispute. The appellants contend that notwithstanding the fact that, at the time the government conveyed the land to the respondent, there was no bog or marsh thereon, nor any water issuing or flowing therefrom, the stream, which afterwards began to flow, and thenceforward continued to flow therefrom, was a natural stream, and subject to appropriation, under § 2780, Utah Comp. Laws 1888, and that they had a right to, and did, appropriate the water thereof. The respondent insists that since, at the time the title to the land vested in her, the water in question had not come to the surface and its existence was unknown, the right to such water passed to her with the title to the land, as a part of the purchase, and was not included within the terms of the statute, and not subject to appropriation. In the section of the statute referred to, it is provided: "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of any reasonable necessity, for such use thereof, under any of the following circumstances: (1) Whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, watercourse, lake, or spring, or other natural source of supply." Undoubtedly, under this provision, any person or persons may divert and use the unappropriated water of any "natural stream, watercourse, lake, or spring, or other natural source of supply," for any of the purposes mentioned in the statute, but it is evident that the enactment, although

comprehensive terms are employed therein in reference to the appropriation and use of water for the purposes of irrigation, must be construed to mean a "natural stream, or other natural source of supply," flowing or situated upon lands over which the sovereignty has dominion, or which forms a part of the public domain, and not to streams or springs or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto passed into private ownership. The statute, therefore, cannot be so interpreted as to include a stream flowing from a bog or marsh like the one in the case at bar, which did not make its appearance upon the surface until after the land had been purchased from the government by a private individual.

When the United States issued its patent to the respondent, neither the bog nor marsh, nor the water in question, was visible upon the land conveyed. Nor was there any known and defined subterranean stream thereon. At that time the water, if it existed at all, was percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses, or banks. Water so percolating and flowing forms a part of the realty, and belongs to the owner of the soil. A conveyance or grant by the United States of any part of the public domain to a person, natural or artificial, carries with it the right of filtrating or percolating water, and to streams flowing through the soil beneath the surface, but in undefined and unknown channels, just the same as it carries with it the right to rocks and minerals in the ground which have not been reserved in the instrument of conveyance or by statute. Water, intermingling with the ground or flowing through it by filtration or percolation or by chemical attraction, is but a component part of the earth, and has no characteristic of ownership distinct from the land itself. In the eye of the law, water so commingled and flowing, or motionless, underneath the surface, is not the subject of ownership apart and distinct from the soil. If, however, subsurface streams of water flow in clearly-defined channels, it is otherwise, for then the rules of law applicable to surface streams and waters apply. In *Gould, Waters*, § 280, the author says: "Water percolating through the ground beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, belongs to the realty in which it is found. The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor, or consequentially injure his clearly-defined rights, is applicable to the interruption of subsurface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress. The landowner may therefore make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so 51 L. R. A.

doing he interrupts the underground sources of a spring or well on his neighbor's land." So, in *Kinney, Irrigation*, § 49, it is said: "Percolating waters are those which pass through the ground beneath the surface without definite channels, although the same rules of law govern those which have definite channels, but the course of which is unknown and unascertainable. Where there is nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil. Percolating waters, and those whose sources are unknown, belong to the realty in which they are found." In *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433, Mr. Justice Finch, delivering the opinion of the court, said: "Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to watercourses and their diversion apply. *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 553; *Rauston v. Taylor*, 33 Eng. L. & Eq. 435; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Goodale v. Tuttle*, 29 N. Y. 466; *Ellis v. Dunoon*, 21 Barb. 234; *Barkley v. Wilcox*, 86 N. Y. 147, 40 Am. Rep. 519. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few exceptions are admitted to exist, and others may occur; but, outside of these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of watercourses, and they may be intercepted or diverted by the owner of the land for any purpose of his own." In *Metzger v. Nelson*, 8 S. D. 87, 65 N. W. 911, it was said: "As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control." So, in *Frazier v. Brown*, 12 Ohio St. 294, it was observed: "The law cannot properly limit the ordinarily absolute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon, or rights in, a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject-matter of his complaint." And in *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 444, 54 Pac. 244, this court said: "The waters issuing from the artificial tunnel into the lake are found to be underground percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks, and course. Under such a state of facts, the law seems to be well settled that water percolating through the soil is

not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks." *Kinney, Irrigation*, § 48; *Washb. Easem.* p. 605, par. 2; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Acson v. Blundell*, 12 Mees. & W. 324; *Taylor v. Welch*, 6 Or. 199; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783; *Ocean Grove Camp Meeting Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447, 3 Atl. 168; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Williams v. Ladew*, 161 Pa. 283, 29 Atl. 54; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49; *Delhi v. Youmans*, 50 Barb. 316.

It appearing, in the case at bar, that at the time of the conveyance of the land by

the government the water in question was not visible thereon, nor its existence known, and there being nothing to show that it flowed thereon at any previous time, or that there was at the time of the purchase any well-defined and known subterranean stream there, the presumption is that the water was percolating through the earth, and that the stream in question is the result of filtration or percolation; and, the water having commenced to flow after the patent was issued, it belongs, under the authorities, as we have seen, to the respondent or owner of the land as a part thereof. The water was therefore not subject to appropriation under any statute or rule of law, and by its use the appellant acquired no title to it. Hence the respondent had the lawful right to divert and use the water in such manner as she chose, and may continue to do so. The court committed no error in deciding this case in her favor.

The judgment is affirmed with costs.

McCarty, District Judge, concurs. **Baskin**, J., concurs in result.

VIRGINIA SUPREME COURT OF APPEALS.

Charles S. TABB *et al.*, Appts.,
v.

COMMONWEALTH of Virginia *et al.*

(.....Va.....)

1. Tax assessments on land made pending a life estate are not a lien on the fee where the statute requires the assessment to be against the life tenant as such, and authorizes a sale of his chattels as well as of his estate in the property to pay the tax, and then expressly provides that it shall not be so construed as to affect the title of a tenant in reversion or remainder to real estate sold for default of the life tenant.
2. The lien of a city for its taxes on land in possession of a life tenant is not extended to the fee by a charter provision that if land is sold to the city for taxes, and not redeemed, the city or its assigns shall acquire an absolute title to the same in fee, where the other charter provisions and the ordinances follow in all material respects the general tax laws of the state which give a lien only on the life estate, and under the

NOTE.—That taxes accruing during a life estate are liens on that estate alone, and not on the fee in the property, where the laws require them to be assessed in the name of the owner, and make his personality liable to their payment, see also *Ferguson v. Quinn* (Tenn.) 33 L. R. A. 688, and note thereto on the effect on estates in reversion or remainder of a tax sale during the existence of a life estate.

As to effect of tax sale on land held by life tenant, see *Estabrook v. Royon* (Ohio) 32 L. R. A. 805, and note, in which effect of purchase by the life tenant is also considered.

As to duty of life tenant to pay taxes, see note to *Defrees v. Lake* (Mich.) 32 L. R. A. 744.

51 L. R. A.

charter the lien extends only to the life estate in case the property is struck off to a private bidder, while no opportunity for redemption is given to a reversioner or remainderman.

(*Cardwell, J., dissents.*)

(January 25, 1900.)

A PPEAL by petitioner from a decree of the Circuit Court for Henrico County allowing the lien of interveners for past-due taxes in a suit for the partition of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Thomas N. Carter and Christian & Christian, for appellants:

The remaindermen and present owners of the land are not liable for taxes accrued during the life of P. M. Tabb and wife, and neither the state, city, nor county has a lien for taxes on said land.

The life tenant must pay taxes accruing during his tenancy.

Whyte v. Nashville, 2 Swan, 365; *Spangler v. York County*, 13 Pa. 322; *Cooley, Taxn.* 2d ed. 399; *Garland v. Garland*, 73 Me. 97; *Estabrook v. Royon*, 52 Ohio St. 318, 32 L. R. A. 805, and note, 39 N. E. 808.

Taxes accruing during a life estate are liens on that estate alone, and not on the fee simple in the property, where the laws require them to be assessed in the name of the owner, and make him personally liable to their payment.

Ferguson v. Quinn, 97 Tenn. 46, 33 L. R. A. 688, 36 S. W. 576; *Blackwell, Tax Titles*, 4th ed. 630, *549.

This must be so, as otherwise the remain-

derman, whose name does not appear in the assessment list, nor in any other of the proceedings, would be deprived of his property without due process of law.

Blackwell, Tax Titles, 4th ed. 630; Minor, Tax Titles, 46, 48, 158; *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Staats v. Board*, 10 Gratt. 400; *Matney v. Ratliff*, 96 Va. 231, 31 S. E. 512.

Laws regulating the assessment and collection of taxes are to be strictly construed, as they, to a certain extent, deprive the owner of his property without rendering him proper compensation therefor.

Richmond v. Daniel, 14 Gratt. 385; *Montgomery County Supers. v. Tallant*, 96 Va. 723, 32 S. E. 479; *Boon v. Simmons*, 88 Va. 264, 13 S. E. 439; *Combined Saw & Planer Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976.

Mr. A. J. Montague, Attorney General, for appellees:

When delinquent land is sold, and in default of a purchaser the same is bid in by the commonwealth, then the latter stands as the owner of this property by operation of law.

Com. v. Ashlin, 95 Va. 145, 28 S. E. 177.

It is true that the person owning the land may pay the taxes, and a levy upon his personality may be made for such tax, yet by virtue of the statute the lien attaches to the land instantly and permanently.

Simmons v. Lyle, 32 Gratt. 758; *Com. v. Ashlin*, 95 Va. 149, 28 S. E. 177; *Verdery v. Dotterer*, 69 Ga. 198.

Mr. Henry R. Pollard, for appellee city of Richmond:

The statute (§ 636) has no application to taxes levied under the charter of the city of Richmond.

The fact that the city is given ample powers show that the law-making power did not intend for it to be affected by the general laws on this subject.

Endlich, Interpretation of Statutes, §§ 227, 228.

There is no limitation on the time within which the city of Richmond may enforce the lien which it has under its charter for taxes assessed by the city on real estate therein.

Powell v. Richmond, 94 Va. 79, 26 S. E. 389.

Both under the general statutes and under the charter of the city the estate of a remainderman is liable for taxes assessed against the property while held by the life tenant.

All property interests should be taxed, and the taxation should be uniform and ad valorem.

The law is complied with when the assessment or listing is made in the name of the life tenant.

2 Chitty's Bl. p. 120.

His estate is a freehold estate, and he stands for, or represents, the whole estate, whether it be for life, for a term, or in fee.

The policy of the tax laws is undoubtedly to create liens *in rem* in favor of the taxing power.

25 Am. & Eng. Enc. Law, p. 268; *Osterberg v. Union Trust Co.* 93 U. S. 428, 23 L. 51 L. R. A.

ed. 965; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Com. v. Ashlin*, 95 Va. 145, 28 S. E. 177.

A listing to the life tenant is all that is sufficient to give a lien upon the whole estate, both for life and in remainder.

Cooley, Taxn. 399; *Pike v. Wassell*, 94 U. S. 711, 24 L. ed. 307; *Varney v. Stevens*, 22 Me. 334; *Stetson v. Day*, 51 Me. 434; *Cairns v. Chabert*, 3 Edw. Ch. 312; *McMillan v. Robbins*, 5 Ohio, 28; *Phelan v. Boylan*, 25 Wis. 679.

One in possession or having the ownership of real estate must pay the taxes assessed on the value of such land, no matter whether his ownership be that of fee or of a mere life estate.

Defreese v. Lake, 109 Mich. 415, 32 L. R. A. 744, 87 N. W. 506; *Arnold v. Smith*, 3 Bush, 163; *Dubois v. Campau*, 24 Mich. 360; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524.

The special provisions of the charter override the provisions of the section of the Code.

Norfolk v. Norfolk Landmark Pub. Co. 95 Va. 564, 28 S. E. 959; *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44.

When the statute for the collection of a tax provides a mode for confirming and contesting an assessment, the assessment cannot be said to deprive the owner of his property without due process of law.

Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

On petition for rehearing.

The legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of the tax.

Cooley, Taxn. 445; *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813; *Osterberg v. Union Trust Co.* 93 U. S. 428, 23 L. ed. 965; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711.

Without statutory prohibition, the whole estate, life and remainder, passes by a sale for delinquent taxes.

Watkins v. Green, 101 Mich. 493, 60 N. W. 44.

If the law be as determined by the court, that the whole value of the estate—that is, the whole fee-simple interest—must be ascertained, and the tax assessed on the whole value, and the life tenant alone made liable for its payment, then the law is a clear violation of the constitutional requirement that taxation, whether imposed by the state, county, or corporate bodies, shall be equal and uniform.

It is self-evident that the life estate is of less value than the fee-simple estate. If the tax is solely the tax of the life tenant, then he has been taxed upon property not his.

The duty of the life tenant to pay the taxes is a common-law duty, recognized as such for ages.

See *Clark v. Middlesworth*, 82 Ind. 240, Quoting *Wade v. Malloy*, 16 Hun, 226.

Taking the rents and profits, the law imposed the duty of paying taxes.

No injustice can be done the remainderman by the life tenant failing to pay the taxes, because courts of equity are always open to compel the payment of taxes by the life tenant, and, on his failure, a receiver may be appointed to take charge of the property and rent it, the courts holding that the failure to pay taxes, in effect, constitutes waste on the part of the life tenant.

Pike v. Wassell, 94 U. S. 711, 24 L. ed. 307; *Varney v. Stevens*, 22 Me. 334; *Stetson v. Day*, 51 Me. 434; *Cairns v. Chobert*, 3 Edw. Ch. 312; *McMillan v. Robbins*, 5 Ohio, 28; *Phelan v. Boylan*, 25 Wis. 679.

This honorable court's construction is at variance with the uniform construction placed upon the same provisions of the statute, both by the executive officers of the state and by the inferior courts, through a long series of years.

Courts, in construing or interpreting statutes, give much weight to the interpretation put upon them since their enactment by those whose duty it has been to construe, execute, and apply them.

23 Am. & Eng. Enc. Law, pp. 239, 240, 342; *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648.

The section of the charter declaring what title the city shall take when it becomes a purchaser is so clear that "he that runs may read."

If the language of a statute is clear it is not allowable to attempt interpretation, and there is no room for construction.

23 Am. & Eng. Enc. Law, pp. 298, 299; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830.

Mr. C. R. Sands also for appellees.

Riely, J., delivered the opinion of the court:

The question for decision in this case is whether taxes and levies assessed on land are a lien on the fee, or only on the estate in the land of the person against whom or in whose name they are assessed; or, to be more specific, are taxes and levies which accrued during the estate of a tenant for life a lien on the estate of the remainderman and enforceable against it? It is not a question of the power of the legislature to make taxes and levies a lien on the fee or entire interest in the land, but whether it has done so.

For the proper determination of the question, it is necessary to consider, not merely the particular statutes giving the lien, but to pass in review certain other statutes *in pari materia* enacted for the assessment of the value of real estate for the purposes of taxation, and the assessment of taxes and levies thereon, and the provisions made for the collection of the taxes and levies and the enforcement of the lien thereof, which bear materially upon the matter in controversy and serve to elucidate the inquiry. It is only in this way that we may correctly as-

certain the intent of the legislature and the extent of the lien that is given upon the land.

Assessors are appointed every five years to ascertain the value of all real estate for the purposes of taxation. They are required to ascertain and assess the cash value of each tract and lot of land; and, upon the basis of such assessment, it is prescribed that the annual tax upon land shall be extended. And it is provided that there shall be a lien on all real estate for the taxes and levies assessed thereon. Code 1887, §§ 437, 441, 447, 456, and 636.

If these were the only statutes affecting the question for decision it might be very plausibly contended that the lien was in every case upon the fee or whole interest in the land, and never upon any less estate. But when we turn to the statutes prescribing how taxes and levies on real estate shall be assessed, and how they shall be collected and the lien thereof enforced by a sale of the land if they are not paid, such contention cannot be maintained.

By §§ 465 and 466 of the Code, each commissioner of the revenue, in making up his land-book and entering and extending the tax and levy imposed upon real estate is required to enter each tract and lot of land separately, and to set forth in separate columns, among other things, the name of the person who by himself or his tenant has the freehold in possession, his place of residence, and the nature of his estate, whether in fee or for life. Any goods or chattels in the county or corporation belonging to the person assessed with taxes or levies may be distrained therefor; and anyone indebted to or having in his hands estate of the person assessed with taxes or levies may be required to pay the same to the extent of such indebtedness or estate, thus making the taxes and levies a personal liability of him who has the freehold in possession as well as a lien on the land. Code, §§ 622, 624, 627.

When taxes and levies on real estate are not paid, and the treasurer is unable after due diligence to find property within his county or corporation liable to distress for the taxes and levies, he is required to make out and return three lists of uncollected taxes and levies, the second whereof, which is the only one pertinent to the matter under consideration, shall contain the real estate that is delinquent for the nonpayment of the taxes and levies thereon. The form of this list is prescribed, and it is required, as in the land-book, that it specify the land returned delinquent, and give, among other things, the name of the person assessed with the taxes and levies, his residence, and the nature of his estate in the land. Code, §§ 605, 606.

If the taxes, levies, interest, costs, and charges, and a due proportion of the expense incurred, be not paid, the treasurer is required to sell at public auction the real estate mentioned in the aforesaid list, after due publication of the time and place of sale, to satisfy the said charges; and if no person bids the amount thereof, the treasurer shall

purchase the real estate in the name of the auditor of public accounts for the benefit of the state, county, city, or town respectively, unless the same has been previously purchased in the name of the auditor, in which case it shall be sold for such a price as it will bring. Code, §§ 637, 638, 639, 662.

If at said sale any person shall bid for any real estate delinquent for the nonpayment of taxes, and levies the amount chargeable thereon, the same shall be cried out to him; and if it be not redeemed within the time prescribed by the owner, his heirs or assigns, or by someone having the right to charge the same with a debt, the purchaser is entitled to a conveyance of the land.

When the purchaser has obtained a deed therefor, and it has been duly admitted to record in the county or corporation in which the real estate lies, the statute prescribes that "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made, at the commencement of the year for which said taxes or levies were assessed or in any person claiming under such party." Code, §§ 650, 655, 661.

And in § 661 it is expressly provided that nothing in that section "shall be so construed as to affect or divest the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or levies assessed thereon."

When any real estate delinquent for the nonpayment of taxes or levies assessed thereon has been purchased in the name of the auditor of public accounts, and has not been redeemed, provision is made for the sale and conveyance thereof to any person desiring to purchase the same for the amount for which the sale to the commonwealth was made, together with such additional sums as would have accrued from taxes and levies and interest, if such real estate had not been so purchased by the commonwealth, with interest on the amount for which said sale was made at the rate of 6 per cent per annum from the day of sale, and on the additional sums from the 15th day of December in the year in which the same would have accrued. Code, § 666.

The provisions of § 661 are expressly made applicable to deeds made under authority of § 666, from which it follows that there is vested in the grantee only the right or title to the land of the person assessed with the taxes or levies on account whereof the sale was made to the commonwealth; and if the sale was made on account of the default of the tenant for life in paying the taxes or levies accruing during his estate, the title of the tenant in reversion or remainder is in no wise affected or divested.

It thus appears from the foregoing review of the statutes respecting the assessment of taxes and levies on real estate, their collection, and the means provided for the enforcement of the lien therefor created upon the land, that they are required to be assessed

in the name of, and against, the person who by himself or his tenant has the freehold in possession; that upon him, and upon no one else, are they made a personal liability, and that only his goods and chattels and estate can be distrained therefor or otherwise subjected to their payment, and that when the treasurer has been unable to find any property liable to be distrained for, or otherwise subjected to, the payment of the taxes or levies, and the land has been returned delinquent, sold for their nonpayment, and not redeemed, the purchaser, whether at the sale of the land made by the treasurer for the unpaid taxes, levies, and other charges, or from the commonwealth, if she bought it at such sale, acquires, by the deed of conveyance of the land made to him in pursuance of his purchase, no other right or title to the land than the right or title thereto of the person assessed with the taxes or levies on account whereof the sale was made. And as such sale is the method provided by the legislature for the enforcement of the lien created upon the land for the unpaid taxes or levies, and must be presumed to have been intended to be commensurate with the extent of the lien and effectual for its enforcement, there being nothing to indicate a different intent, it is manifest therefrom, when considered in connection with the provisions for the collection of taxes and levies by the treasurer which have been reviewed, that the lien for the taxes and levies is only upon the interest in the land of the person assessed therewith. And so as the remedy for the enforcement of the lien for the taxes and levies asserted in the case at bar only extended to the estate of the tenant for life, the lien therefor was only on the life estate, and to that extent only was it intended to be given by the law-making power.

It is to be further observed that if the commonwealth has become the purchaser of the land at the sale made thereof by the treasurer, and it is thereafter resold to any person under the provisions of § 666, the sale is only authorized to be made, as heretofore shown, for the amount for which the sale to the commonwealth was made, together with such additional sums as would have accrued from taxes and levies and interest, if such real estate had not been so purchased by the commonwealth, with interest on the amount for which said sale was made at the rate of 6 per cent per annum from the day of sale, and on the additional sums from the 15th day of December in the year in which the same would have accrued. Upon such sale the commonwealth would therefore receive all unpaid taxes, levies, and interest, and be reimbursed all expenses incurred in respect thereto. If the sale at which the commonwealth became the purchaser of the land was made on account of the default of the tenant for life in paying taxes or levies accruing during his estate, the purchaser from the commonwealth would in that case acquire only the estate of the tenant for life, which, if the contention so earnestly made in argument were true, that the lien for taxes and levies was upon the fee or entire

interest in the land, would leave the reversion or remainder in the commonwealth under its purchase at the sale by the treasurer, without any provision whatever by the legislature for the revesting of the reversion or the remainder in the reversioner or remainderman, although the commonwealth in the resale of the land under the provisions of § 666 has been fully reimbursed all unpaid taxes, levies, and all other charges and expense. This is conclusive to my mind if aught else were necessary that the lien for taxes and levies is only upon the estate in the land of the person in whose name they are assessed; otherwise the commonwealth would be made a speculator in the lands of its citizens, which, it may be safely affirmed, was never intended by the legislature.

It was argued by the learned counsel for the city of Richmond that even if the lien of the commonwealth be only coextensive with the estate in the land of the person assessed with her taxes, nevertheless the lien of the city for its taxes is in all cases on the fee. He founded this contention on the language of § 83 of the charter of the city, where it is provided that when land is struck off to the city at the sale thereof for its taxes, and is not redeemed by the owner or someone having a right to charge it with a debt, "the said corporation or their assignees shall acquire an absolute title to the same in fee."

In this contention I am unable to concur. I do not think that the language quoted above is to receive the unlimited literal construction contended for.

The charter, § 75, prescribes that "there shall be a lien on real estate for the city taxes as assessed thereon" which is substantially, almost literally, the language in which the lien is given to the commonwealth for taxes. The ordinances of the city, prescribing how its taxes on real estate shall be assessed, follow in all material respects the statutes for the assessment of taxes for the commonwealth. Richmond City Code, Ordinances, chap. 12. By § 4 thereof the commissioner of the revenue is required to enter in the land-book, among other things, as is required by the statutes in assessing taxes for the commonwealth, the name of the owner of each parcel of real estate, his residence, and the nature of his estate, whether in fee or life, and it is against such owner, the tenant for life, or the fee-simple owner, as the case may be, that the taxes are assessed. It is such owner whom the ordinances make personally liable for the taxes, and whose goods and chattels or estate may be distrained therefor or subjected to their payment. City Code, Ordinances, chap. 14. If it were intended that the lien should be on the fee-simple estate, upon the estate of the remainderman, as well as upon the estate of the tenant for life, why was not the goods and chattels and other estate of the remainderman made liable for the payment of the taxes as well as the personal estate of the tenant for life? This by itself renders it reasonably clear that the lien given upon

real estate for taxes assessed thereon was intended to be a lien only on the estate of the person assessed therewith.

But to return to the charter: If the taxes are not paid, or cannot be made out of the estate of the person assessed therewith, provision is made for the sale of the land for the taxes after publication of notice of the time and place of sale, in which notice each parcel of land shall be described, the name of the person given to whom each parcel is assessed, and the amount of the tax. If at such sale no bid shall be made for the land, or such bid shall not be equal to the tax, with interest and charges, the land shall be struck off to the city. Charter, §§ 76, 78.

When any real estate has been so sold and it is not redeemed within the time prescribed by the owner, his heirs or assigns, or by some one having a right to charge such real estate for a debt, it is expressly provided, as in the case of land sold for taxes due to the commonwealth, that, when such real estate has been conveyed and the deed recorded, "such estate shall be vested in the grantee in such deed as was vested in the party assessed with the taxes on account whereof the sale was made." Charter, § 82.

It was conceded by the learned counsel that when any person other than the city became the purchaser of land at the sale for taxes, he acquired only such estate in the land as was vested in the person assessed with the taxes, but he claimed that when the land was struck off to the city, and not redeemed, the city, by reason of the language hereinbefore quoted from § 83, acquired an absolute title to the fee, although the person assessed with the taxes on account whereof the land was sold owned only a life estate in it. There is no sound reason for such distinction. The object of the lien is to secure the payment of the taxes, and the purpose of the sale is to enforce the lien, and thereby realize the amount of taxes, interest, and charges. If this amount is bid by anyone at the sale there is no authority to strike off the land to the city. Considering the object of the lien and the purpose of the sale, it could not have been intended that the city occupy any higher ground than any other purchaser, or acquire any greater estate by reason of her purchase; and yet if the contention made in its behalf be true, in the case of a sale of land for taxes assessed against a tenant for life, the city would acquire the fee, while any other purchaser would get only the life estate. A construction that would result in so great inconsistency, and create such a want of harmony with all other provisions and statutes *in pari materia*, is not to be favorably entertained unless plainly required.

Further: Provision is made for the redemption of the land by the owner, that is, by the person assessed with the taxes (*Dooley v. Christian*, 96 Va. 534, 32 S. E. 54), who in this case was the life tenant, or by anyone having the right to charge the land with a debt; but there is no provision for its redemption by the reversioner or remainderman, when the person assessed with

the taxes on account whereof the land was sold had only a life estate. Charter, § 79. It is conceivable that the legislature could have intended to deprive the reversioner or remainderman of his interest in the land and vest it absolutely in the city under a sale for taxes assessed against the tenant for life, without any opportunity to redeem it, although ample provision was made for the tenant for life, whose default in paying the taxes assessed against him caused the sale, and also for anyone having the right to charge the land with a debt, to redeem it. Injustice so gross could not have been intended. Inconsistency and injustice are not generally to be taken as potential guides in the construction of statutes, but cases do occur when these considerations are entitled to great weight, and this is one of them. Sutherland, Stat. Constr. §§ 246, 322, 324; Endlich, Interpretation of Statutes, § 286.

A provision of a section of a statute ought not to receive a mere literal interpretation, when it would contravene the intention of the legislature apparent from the other sections and provisions thereof, but the words are to be expanded or qualified to effectuate the intention. Sutherland, Stat. Constr. §§ 218, 246, 324; Endlich, Interpretation of Statutes, § 115; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176.

The clause in the charter which was relied upon by the counsel of the city for his con-

tention was only intended, I think, to accentuate what would otherwise have been true,—that the city would take absolutely the right or title of the person assessed with the taxes. If he owned the fee the city takes the fee in absolute estate; if he owned a life estate it takes that absolutely, but no greater interest. But, however this may be, the question presented for decision is not, What estate is acquired by the city, on becoming a purchaser of land sold for the payment of delinquent taxes assessed against a tenant for life? but simply, What is the extent of the lien it has for its taxes in such a case? For taxes which accrued during the estate of the tenant for life and assessed against him, the lien is, I think, only upon the life estate, and does not extend to the reversion or remainder. My conclusion therefore is that the lien for taxes and levies assessed on real estate, whether they are assessed for the commonwealth or counties or for the city of Richmond, is only upon the estate of the person assessed with the taxes and levies.

The decrees appealed from must therefore be reversed, and the cause remanded for further proceedings to be had therein in accordance with the views expressed in this opinion.

Cardwell, J., dissents.

Petition for rehearing overruled.

WASHINGTON SUPREME COURT.

Wisa H. HALL, *Respt.*,
v.

UNION CENTRAL LIFE INSURANCE
COMPANY, *Appt.*

(.....Wash.....)

1. A presumption of the continuance of an agency arises from proof of a prior appointment as agent without anything to show its revocation.
2. An admission by an insurance agent, after the death of a person from whom he had authority to collect premiums, that the premiums were paid during the lifetime of the insured, is competent evidence against the insurance company.
3. A stipulation in a contract between a general insurance agent and a person employed to solicit insurance and collect premiums for the company, that he shall not be the agent of the company, but only of the general agent with whom he makes the contract, is ineffectual to relieve the company from liability for the acts of such agent within the scope of his employment.
4. Delay in bringing action for life

insurance until after the expiration of the year within which the policy requires it to be brought does not defeat the action, when the delay was caused by representations of the general agent of the company that it would be better to delay until the return to the state of an agent to whom the premiums were alleged to have been paid, and that, if it was found that they were so paid, the policy would be paid without suit.

5. A period of about eight months after the expiration of the year within which a policy requires action thereon to be brought cannot be held unreasonable as matter of law, but that question is for the jury, where the insurer had authorized a delay for the return of an agent to whom it was alleged that premiums had been paid.

(December 27, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to power of insurance agent to bind company, see *German Ins. Co. v. Gray* (Kan.) 8 L. R. A. 70, and *note*; *Mathers v. Union Mut. Acc. Asso.* (Wis.) 11 L. R. A. 83; *Hoose v. Prescott Ins. Co.* (Mich.) 11 L. R. A. 340, and *note*; *Ermentrout v. Girard F. & M.* 51 L. R. A.

Ins. Co. (Minn.) 30 L. R. A. 346; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* (Wis.) 37 L. R. A. 131; *McCabe v. Etna Ins. Co.* (N. D.) 47 L. R. A. 641; and *Travelers' Ins. Co. v. Myers* (Ohio) 49 L. R. A. 760.

Messrs. John E. Humphries and Harrison Bostwick, for appellant:

The declarations of the agent who took the application, made two years after the issuing of the policy, are not part of the *res gestæ*, are not contemporaneous with the issuing of the policy, are simply hearsay testimony, and do not prove, or tend to prove, any fact necessary to make out the case.

Chicago, R. I. & T. R. Co. v. Yarbrough (Tex. Civ. App.) 35 S. W. 422.

The admissions of an agent, made after the act which he was authorized to do is completed, are not competent evidence against his principal.

Pacific Mut. L. Ins. Co. v. Walker, 67 Ark. 147, 53 S. W. 675; *Oraven v. Russell*, 118 N. C. 564, 24 S. E. 381; *Smith v. North Carolina R. Co.* 68 N. C. 107; *Branch v. Wilmington & W. R. Co.* 88 N. C. 573; *Southerland v. Wilmington & W. R. Co.* 106 N. C. 100, 11 S. E. 189; *Chesapeake & O. R. Co. v. Reeves*, 11 Ky. L. Rep. 14, 11 S. W. 464; *East Tennessee Teleph. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171; *Dean v. Aetna L. Ins. Co.* 62 N. Y. 642; *Hubbard v. Elmer*, 7 Wend. 446, 22 Am. Dec. 590; *Maason v. Michigan C. R. Co.* 117 Mich. 218, 75 N. W. 459.

The representation, declaration, or admission of an agent does not bind the principal if it is not made at the very time of the contract.

Gilmore v. Mittineague Paper Co. 169 Mass. 471, 48 N. E. 623; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34; *Schoep v. Bankers' Alliance Ins. Co.* 104 Iowa, 354, 73 N. W. 825; *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208; *Lee v. Marion Sav. Bank*, 108 Iowa, 716, 78 N. W. 692; *Marrow v. Goodrich*, 92 Me. 393, 42 Atl. 797; *German F. Ins. Co. v. Schroeder*, 48 Kan. 643, 29 Pac. 1078; *Hartford Life & Annuity Ins. Co. v. Hayden*, 90 Ky. 39, 13 S. W. 585; *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Western U. Tele. Co. v. Waford* (Tex. Civ. App.) 42 S. W. 119; *Herrmann v. Sarles*, 42 App. Div. 268, 58 N. Y. Supp. 1017; *Decker v. Seaton*, 19 Misc. 59, 43 N. Y. Supp. 167; *Estey v. Birnbaum*, 9 S. D. 174, 68 N. W. 290; *Union L. Ins. Co. v. Haman*, 54 Neb. 599, 74 N. W. 1090; *Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50; *Weideman v. Tacoma R. & Motor Co.* 7 Wash. 517, 35 Pac. 414.

There being no conflict in the testimony and with the admissions in the pleadings, it was the duty of the court to render judgment in favor of appellant, as there could be but one verdict under the issues and testimony, there being no testimony that respondent performed the conditions of the contract.

Naill v. Lebold, 5 Kan. App. 880, 49 Pac. 323; *Derby v. Gallup*, 5 Minn. 119, Gil. 85; *Harding v. Jenkins*, 26 Misc. 827, 56 N. Y. Supp. 1086; *Ketchum v. Wilcox*, 5 Kan. App. 881, Appx., 48 Pac. 446; *McCormick v. Holmes*, 41 Kan. 265, 21 Pac. 108; *Stein v. Adams*, 1 Miss. Dec. (No. 16) 135, 23 So. 269; *Bondies v. Ivey*, 15 Tex. Civ. App. 290, 39 S. W. 156; *Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 55 U. S. App. 51 L. R. A.

113, 83 Fed. Rep. 437; *Taylor v. American Freehold Land Mortg. Co.* 106 Ga. 238, 32 S. E. 153; *Shiverick v. R. J. Gunning Co.* 58 Neb. 29, 78 N. W. 460; *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24; *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031.

It was necessary for respondent to prove, before a recovery could be had, that the premiums for June and September had been paid. This the respondent failed to do.

There is no testimony that any authority was ever given to Edward Newbegin to waive any condition of the policy before or after the death of the insured. This being true, he had no right whatever to waive any condition of the policy. The insured and the beneficiary knew the fact that his authority was limited, and had no right to rely upon any statement made by him.

Carlson v. Metropolitan L. Ins. Co. 172 Mass. 142, 51 N. E. 525; *Porter v. United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Metropolitan Acci. Asso. v. Clifton*, 63 Ill. App. 152; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414, 39 N. W. 571; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 285; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 601, 19 Am. Rep. 305; *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Oliver v. Mutual L. Ins. Co.* 97 Va. 134, 33 S. E. 536; *Bernard v. United L. Ins. Asso.* 11 Misc. 441, 32 N. Y. Supp. 223; *Wilkins v. Mutual Reserve Fund Life Asso.* 54 Hun, 294, 7 N. Y. Supp. 589; *Porter v. United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188, 17 N. W. 781.

The evidence of payment of the premium was the premium receipt provided for, and in the absence of the showing that the premium receipt had been lost or destroyed no secondary evidence of payment was proper.

Busby v. North American L. Ins. Co. 40 Md. 572; *Clevenger v. Mutual L. Ins. Co.* 2 Dak. 114, 3 N. W. 313; *Wilkins v. State Ins. Co.* 43 Minn. 177, 45 N. W. 1.

When the facts are admitted what is a reasonable time is a question for the court.

Wiggins v. Burkham, 10 Wall. 129, 19 L. ed. 884; *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 512; *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093.

The appellant would not be bound by any statements made by Edward Newbegin or John Doser to respondent after the death of the insured, unless Doser and Newbegin were authorized to make statements which would be binding upon appellant.

Carlson v. Metropolitan L. Ins. Co. 172 Mass. 142, 51 N. E. 525; *American Bldg. & Loan Asso. v. Farmers' Ins. Co.* 11 Wash. 619, 40 Pac. 125; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77; *Morrill v. New England F. Ins. Co.* 71 Vt. 281, 44 Atl. 358; *Griem v. Fidelity & O. Co.* 99 Wis. 530, 75 N. W. 67; *Lents v. Teutonia F. Ins. Co.* 96

Mich. 445, 55 N. W. 993; *Shackett v. People's Mut. Ben. Soc.* 107 Mich. 65, 64 N. W. 875; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332; *Harrison v. Hartford F. Ins. Co.* 102 Iowa, 112, 47 L. R. A. 709, 71 N. W. 220; *McFarland v. Railway Officials' & Employees' Assn. Asso.* 5 Wyo. 126, 27 L. R. A. 48, 38 Pac. 347; *Wilhelmi v. Des Moines Ins. Co.* 103 Iowa, 532, 72 N. W. 685; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47; *Travelers' Ins. Co. v. California Ins. Co.* 8 L. R. A. 769, and note, 1 N. D. 151, 45 N. W. 703; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332.

Messrs. Martin, Joslin, & Griffin, for respondent:

Any attempt to deceive the patrons of this insurance company, and to avoid its just liabilities, by such a secret understanding between its agents, is so palpably dishonest, unjust, and against public policy that it will not be tolerated by the courts.

Hart v. Niagara F. Ins. Co. 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213; *International Trust Co. v. Norwich Union F. Ins. Soc.* 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. Rep. 81.

The admissions of Mr. Doser refer, not to the making or effect of the contract of insurance, but to certain payments of premiums upon the insurance policy, made by a decedent during his lifetime, and during the time the policy was in force after its issue by appellant. These admissions were made by an agent within the scope of his authority, and were competent evidence to bind the principal.

Wright v. Stewart, 19 Wash. 179, 52 Pac. 1020; *Waldron v. Home Mut. Ins. Co.* 16 Wash. 193, 47 Pac. 425; 2 Wharton, Ev. § 1177; *Schutter v. Adams Exp. Co.* 5 Mo. App. 316; *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563; *Nelson v. First Nat. Bank*, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. Rep. 798; *Webb v. Smith*, 6 Colo. 366; *Preferred Acci. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986; *International Trust Co. v. Norwich Union F. Ins. Soc.* 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. Rep. 81; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197, 55 Pac. 481.

The general agent, Newbegin, referred to Doser, and promised upon Doser's return from Alaska, and his representations that the premiums had been paid, the policy would be paid. This act of the general agent rendered the admissions of Doser, made after his return from Alaska, competent evidence, even though they would otherwise not have been.

1 Am. & Eng. Enc. Law, 2d ed. p. 701.

The one-year period for bringing suit does not begin to run until sixty days after the date of furnishing satisfactory proof of death.

State Ins. Co. v. Meesman, 2 Wash. 465, 27 Pac. 77; *Sample v. London & L. F. Ins. Co.* 46 S. C. 491, 47 L. R. A. 696, 24 S. E. 334; 2 May, Ins. 2d ed. § 479; *Murdock v. Franklin Ins. Co.* 33 W. Va. 407, 7 L. R. A. 51 L. R. A.

572, 10 S. E. 777; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 46 N. W. 857; *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150, 56 N. W. 697; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711; *Hong Sling v. Royal Ins. Co.* 8 Utah, 135, 30 Pac. 307; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, 9 Am. Rep. 506; *Spare v. Home Mut. Ins. Co.* 17 Fed. Rep. 568; *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 688; *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Steel v. Phenix Ins. Co.* 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. Rep. 715; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385.

The condition in an insurance policy limiting the time for bringing suit thereon is waived by the action of the insurance company in making no positive denial of liability until after the time limit had expired, the company having in the meantime led the claimant to believe that the matter was held open for adjustment.

David v. Oakland Home Ins. Co. 11 Wash. 181, 39 Pac. 443; *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L. R. A. 529, 70 N. W. 898; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019.

When the limitation is once waived it is at an end and cannot be insisted upon, and the statute of limitations of the state controls.

Galloway v. Standard F. Ins. Co. 45 W. Va. 237, 31 S. E. 969; *Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240, 38 N. E. 627.

In such cases claimant has at least a reasonable time after final rejection of the claim within which to commence an action on the policy.

David v. Oakland Home Ins. Co. 11 Wash. 181, 39 Pac. 443; *Steel v. Phenix Ins. Co.* 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. Rep. 715.

The conditions of a policy are always construed favorably to the insured and against the company issuing the policy.

Turner v. Fidelity & C. Co. 112 Mich. 425, 38 L. R. A. 529, 70 N. W. 898.

An agent may waive a condition or forfeiture, notwithstanding a clause in the policy "that none of its terms or conditions can be waived except by the president of the company by an instrument in writing."

Holt Mfg. Co. v. Dunnigan (Wash.), 60 Pac. 128; *James v. Mutual Reserve Fund Life Asso.* 148 Mo. 1, 49 S. W. 978; *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 So. 596; *Wagner v. Westchester F. Ins. Co.* 92 Tex. 549, 50 S. W. 569; *John Hancock Mut. L. Ins. Co. v. Schlunk*, 175 Ill. 284, 51 N. E. 795; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Terry v. Provident Fund Soc.* 13 Ind. App. 1, 41 N. E. 18; 2 Joyce, Ins. § 1356; *Mechem, Agency*, § 931, p. 767, note; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, 28 Am. Rep. 535.

Cole v. Union Cent. L. Ins. Co. (Wash.) 47 L. R. A. 201, 60 Pac. 68; 1 May, Ins. p. 240, § 136; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197, 55 Pac. 481; *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. 538.

Forfeitures are not favored in law, and will be avoided upon slight evidence of the insured having been misled by statements or acts of insurer to his prejudice.

Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *Allen v. McFall*, 89 Fed. Rep. 463.

Dunbar, Ch. J., delivered the opinion of the court:

This is an action by the respondent against the appellant on a policy of insurance issued upon the life of her husband, George E. Hall, deceased. On a trial by jury, verdict was rendered in favor of the plaintiff for the amount sued for, and judgment was entered in accordance with the verdict, from which this appeal is taken. There are some twenty-one assignments of error set forth in appellant's brief, the most of which are discussable under the second and third assignments, *viz.*, that the court erred in denying the motion of appellant for nonsuit, and that the court erred in denying the motion of appellant in the challenge to the whole evidence, and in not taking the case from the jury. The substance of these objections might have been raised on error alleged in allowing incompetent testimony. It is contended by the appellant that defendant's challenge to the sufficiency of the testimony ought to have been sustained for the reason that there was no testimony that the deceased had complied with the provisions and conditions of the policy, the only testimony introduced being declarations and admissions of one John Doser, who, it is admitted by the appellant, had formerly been a district agent for the appellant, and who, it is maintained by the respondent, was the agent at the time the declarations were made. Many authorities are cited by the appellant to sustain the proposition that the admissions of a discharged agent are not competent evidence to bind such agent's former principal. Conceding for the purpose of this investigation the correctness of the rule contended for, the cases are not applicable to the facts proved in this case, as determined by the jury. As to the existence of Doser's agency, the plaintiff showed his appointment by the company, and there was no proof that such agency had been revoked. Under the rule that where an agency is shown to exist, it will be presumed to continue until the contrary is proved, it must be concluded that Doser was the agent of the company at the time these alleged admissions were made. His first appointment was made in December, 1896, and was to continue for ten years unless terminated by service of notice upon him by the company. If there is anything in the proof that would indicate that he had been removed, it would be his second appointment in December, 1898, where he is appointed by P. F. Leavy, general agent of the Union Central Life In-

surance Company, and it is not shown that this appointment was revoked prior to the time the alleged declarations were made. We think sufficient evidence went to the jury to sustain the verdict on that ground. In any event the testimony shows that the company held him out as an agent, and it is bound by his acts.

But it is contended by the appellant that these admissions, if made, were not of the *res gestæ*, were not within the scope of the agent's authority, and were mere hearsay; and many cases are cited in support of the contention that the admission of an agent must be made at the time of the contract. We do not think these cases are applicable to the case at bar. Doser's admissions were not with reference to the making or effect of any contract, but with relation to the payment of the premiums during the decedent's lifetime. Under the contract it was his duty to collect and pay to the company these identical premiums. Under such circumstances an admission in relation to such collections would be within the scope of his duties as agent, and the evidence was competent to bind the principal. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

It is true that, under the conditions of the contract between P. F. Leavy, who was the general agent of the company, and Doser, it is provided that, "although the said John Doser shall be styled and addressed as agent for said company, it is yet distinctly understood to be the purport and intent of this agreement that he shall be the agent of said P. F. Leavy alone, and that no liability is hereby created against said company; nor shall said John Doser, party of the second part, create any such liability." It would seem that comment upon such a stipulation in an agreement was unnecessary. It is too late in the history of jurisprudence, if such time ever existed, to allow corporations or individuals to escape their honest liabilities by secret understandings between principals and agents of which the public has, and can have, no knowledge. Under this contract, which provides that Doser shall work for the company although he was to be the agent of Leavy only, he is clothed with authority, not only to solicit and procure persons to insure with said company, but to collect and pay over the premiums to the agent of the company, and the company cannot escape its responsibilities when he does collect them from his patrons and fails to turn them over to the company. *Hall v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213.

Another question involved raises the question of limitation of the commencement of the action. The policy provides that the action shall be commenced within a year from the death of the insured. The death of the insured occurred on October 27, 1897, and the action was not commenced until June 13, 1899, and it is contended by the respondent that the action is barred. But the testimony shows that the respondent was attempting to get her policy paid without the expense of a lawsuit, that she was told by

Mr. Newbegin, who was then the general agent of the company, that the money would be paid if it was found that the payments had been made, and that it was best to wait until Mr. Doser, to whom it was claimed the payments had been made, and to whom the testimony shows the payments were actually made, returned from the Klondike country. On this proposition the evidence is conclusive and undisputed that the respondent was led by these representations on the part of the agent of the company to wait until after the year had expired. It is insisted, however, by the appellant, that, even if that be true, the length of time was unreasonable. But that matter was submitted by the court to the jury, by their verdict they have found that it was not unreasonable, and the court cannot, as a matter of law under all the circumstances of the case, say that it was.

Many objections to the instructions of the court are made, and error is based upon the refusal of the court to grant the instructions asked for; but we think the court gave instructions that were applicable to the

pleadings and circumstances proved upon the trial, that the law was properly given to the jury, and that, without particularly traversing them, the instructions asked by the appellant, and which were mostly based upon the theory of the case which we have been discussing, were properly refused.

It is insisted that the court erred in giving certain oral instructions after the request to have the jury charged by written instructions. In answer to this assignment it is sufficient to say that it does not appear from the record that any oral instructions were given by the court.

There is also an assignment to the effect that the court erred in overruling a demurrer to the respondent's complaint, but from the record we are unable to discover that any demurrer to the complaint was interposed.

There seems to be no meritorious defense to this action, and, no prejudicial error of law having occurred, *the judgment will be affirmed.*

All concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Ida C. FISHER *et al.*, *Appts.*,

v.

Robert CUSHMAN *et al.*

Re Ida C. FISHER *et al.*, *Petitioners.*

(103 Fed. Rep. 860.)

1. The fact that an unauthorized appeal, which must be dismissed, is taken in a bankruptcy case in which a petition is also filed to revise the proceedings of the lower court, will not defeat the right to have the case determined on the petition.
2. A liquor license which is by law transferable to any person who is satisfactory to a board of police commissioners, though it may be destroyed without compensation by subsequent legislation, is "property" within the meaning of the bankrupt act, § 70 (30 Stat. at L. 563, 566), which provides that a bankrupt must transfer "property which, prior to the petition, he could by any means have transferred."
3. Any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf.
4. A court in which a person has been adjudged bankrupt has power to proceed summarily to compel the bankrupt to sign a transfer of property to which the trustee in bankruptcy is entitled.

(June 15, 1900.)

A PPEAL by bankrupts from an order of the District Court of the United States for the District of Massachusetts appropri-

NOTE.—On the question whether a bankrupt's assets include a trademark, see *Sarrasin v. W. B. Irby Cigar & Tobacco Co.* (C. C. App. 5th C.) 46 L. R. A. 541, and *note*.
51 L. R. A.

ating the equity in a liquor license for the benefit of creditors of the bankrupt. *Dismissed.*

PETITION by bankrupts for the revision of an order of the District of Massachusetts appropriating the equity in a liquor license for the benefit of creditors of the bankrupt. *Order affirmed.*

The facts are stated in the opinion.

Before *Colt* and *Putnam*, Circuit Judges, and *Webb*, District Judge.

Messrs. Brandeis, Dunbar, & Nutter and *Edward F. McClennen*, for appellants and petitioners:

The trustee in bankruptcy acquired no rights in the liquor license issued to the bankrupt, as nothing passes to the trustee except the property and powers of the bankrupt, and a liquor license, and the rights incident to it, are neither.

A liquor license is not a power.

The powers which the bankrupt had to dispose of property by will or deed did not pass to the trustee.

Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908; *Brandeis v. Cochrane*, 112 U. S. 344, 28 L. ed. 760, 5 Sup. Ct. Rep. 194.

A power of appointment unexercised was not an asset of the holder of it.

Ex parte Gilchrist, L. R. 17 Q. B. Div. 521.

The intention of Congress in introducing into the present act the additional words as to powers was to cover the question involved in these cases, and the word "powers" is used in its legal sense, as meaning this well-recognized right of distribution of property, more particularly employed in connection with trust estates.

It can hardly be supposed that it was intended to be used in the sense of ability,—

as, the power to earn money, of which, of course, the trustee cannot avail himself.

Mays v. Manufacturers' Nat. Bank, 4 Nat. Bankr. Reg. 446.

A liquor license is not property.

A liquor license is not assignable.

Strahn v. Hamilton, 38 Ind. 57; *Blumenthal's Petition*, 125 Pa. 412, 18 Atl. 395.

It is not a right of which a receiver can avail himself.

Semple v. Flynn (N. J. Eq.) 10 Atl. 177.

It is much less of the nature of property than a franchise to operate a turnpike for the use of the public, which, it has been held, does not pass to the trustee.

People ex rel. Jenkins v. Duncan, 41 Cal. 507.

It partakes much more of the nature of a license to inter in a particular burial ground, incident to the ownership of shares in the corporation owning the ground, which does not pass to the trustee.

Re Ely, 1 N. Y. Legal Obs. 131.

The purpose of the bankruptcy act is to grant a man a discharge, so that he may continue to pursue his business, unfettered by former debts.

New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 23 L. ed. 336.

If the bankrupt is deprived of permission to conduct his business, the result intended is defeated. It differs little from taking from him the right to the use of his name in connection with a particular pursuit. This cannot be done.

Maittingly v. Stone (Ky.) 12 S. W. 467.

Messrs. Carver & Blodgett and Addison C. Burnham, for appellees and respondents:

The district court was not in error in holding on the facts in evidence that there was a right in the trustee in bankruptcy to have the license of the bankrupt applied for the benefit of the bankrupt estate.

The term "property," as used in bankruptcy acts, has not been construed in a narrow or technical sense, or as including only things corporeal and tangible in their nature.

Longman v. Tripp, 2 Bos. & P. N. R. 67; *Barton v. White*, 144 Mass. 281, 59 Am. Rep. 84, 10 N. E. 840; *Re Gallagher*, 16 Blatchf. 410, Fed. Cas. No. 5,192.

An unregistered trademark is "property" (*Hall v. Barrows*, 4 De G. J. & S. 150; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769), and passes to the trustee in bankruptcy (*Warren v. Warren Thread Co.* 134 Mass. 247; *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79; *Walker v. Mottram*, L. R. 19 Ch. Div. 355), except where it is of such a nature that it is incapable of being used by any other than the debtor without deceiving.

Hozje v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713.

An invention is "property" which may be sold and conveyed before it is patented.

Rathbone v. Orr, 5 McLean, 131, Fed. Cas. No. 11,585.

The goodwill of a business is "property."

Washburn v. National Wall Paper Co. 21 51 L. R. A.

C. C. A. 312, 51 U. S. App. 380, 81 Fed. Rep. 17.

"Alabama claims" against the United States government are property which passes to the assignee in insolvency.

Goreley v. Butler, 147 Mass. 8, 16 N. E. 734.

The right to publish a certain newspaper is within the term "goods and chattels," as used in the bankrupt act.

Longman v. Tripp, 2 Bos. & P. N. R. 67.

So, also, a seat in the stock exchange.

Re Ketchum, 1 Fed. Rep. 840; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; *Fish v. Fiske*, 154 Mass. 302, 28 N. E. 278.

Membership in the produce exchange.

Re Warder, 10 Fed. Rep. 275; *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264.

Permit to occupy a stall in a public market for the sale of goods.

Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192.

The liquor license is a right incident to business, as in the case of trademarks.

Warren v. Warren Thread Co. 134 Mass. 247; *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79.

And in stock-exchange cases.

Re Ketchum, 1 Fed. Rep. 840; *Re Warder*, 10 Fed. Rep. 275.

It has a distinct and well-recognized market value, being transferable, with the assent of the police commissioners, by the method of surrender and cancelation and the issuance of a new license.

Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; *Re Warder*, 10 Fed. Rep. 275; *Re Ketchum*, 1 Fed. Rep. 840.

There is nothing anomalous or particularly novel in the idea that a liquor license may be made available and be disposed of for the benefit of the estate of a bankrupt. Such has been the law of England since the time of George IV.

Stat. 9 Geo. IV. chap. 61; *Re Gilmer*, Ir. L. R. 17 Eq. 1; *Rutter v. Daniel*, 30 Week. Rep. 724.

There is nothing personal to the licensee in the nature of the right.

Mueller's Appeal, 190 Pa. 603, 42 Atl. 1021.

There is no such personal element in a license to sell liquor as enters into an unregistered trademark or a goodwill, both of which pass in bankruptcy.

Hall v. Barrows, 4 De G. J. & S. 150; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Warren v. Warren Thread Co.* 134 Mass. 247; *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79.

Designating the right by the term "privilege," or prefixing to that term the word "personal," does not affect the nature of the right, or aid in determining the question whether it should be made available for the benefit of the creditors of the bankrupt.

Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.

The license of a bankrupt should be applied for the benefit of his estate.

Re Fisher, 1 Am. Bankr. Rep. 557, with note, 98 Fed. Rep. 89, 2 N. B. N. Rep. 221; *Re Becker*, 2 N. B. N. Rep. 241, 98 Fed. Rep. 407, 2 N. B. N. Rep. 245.

There is no difficulty in this case by reason of the method of transfer. The phraseology of the new act is very broad in this particular, being "property . . . which the bankrupt could by any means have transferred."

Re Ketchum, 1 Fed. Rep. 840; *Re Warder*, 10 Fed. Rep. 275; *Re Gallagher*, 16 Blatchf. 410, Fed. Cas. No. 5,192; *Ex parte Joynes*, Cooke, Bankr. Laws, 8th ed. p. 316; *Ex parte Butler*, 1 Atk. 210.

The fact that the method is established by usage, and not by express enactment, makes it no less a means by which the property may be transferred, and which the law will recognize.

Re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; *Ex parte Butler*, 1 Atk. 210; *Ex parte Joynes*, Cooke, Bankr. Laws, 8th ed. p. 316; Robson, Bankr. 7th ed. p. 453.

The fact that the transfer must be acceptable to an outside body, which can block a transfer altogether if it so chooses, does not prevent the making of an order which will effect the transfer, provided the transferee is accepted.

Re Ketchum, 1 Fed. Rep. 840; *Re Warder*, 10 Fed. Rep. 275; *Re Gallagher*, 16 Blatchf. 410, Fed. Cas. No. 5,192; *Re Gilmer*, Ir. L. R. 17 Eq. 1; *Ex parte Joynes*, Cooke, Bankr. Laws, 8th ed., p. 316; *Ex parte Butler*, 1 Atk. 210.

Mr. George A. Blaney for respondent Chapin.

Putnam, Circuit Judge, delivered the opinion of the court:

One of these cases is an appeal from the district court for the Massachusetts district, sitting in bankruptcy, and the other is a petition to revise the proceedings of that court. 98 Fed. Rep. 89. Both relate to the same subject-matter. The appeal will not lie because the subject thereof is not within the three specifications of the matters of appeal found in § 25 of the bankrupt act, approved July 1, 1898 (30 Stat. at L. 553, chap. 541). Nevertheless, as was determined by us in *Re Worcester Co.* in our opinion passed down on April 20, 1900, 42 C. C. A. 637, 102 Fed. Rep. 808, the fact that an appeal was taken and a petition also filed does not defeat the right of the party moving this court to have the merits of the controversy adjudicated by us. They do not neutralize each other, and the only result is that the appeal must be dismissed, while the court must proceed to the adjudication of the merits in *Ida C. Fisher et al., Petitioners*, which petition, on the record before us, involves only a "matter of law," as required by § 24b of the bankrupt act.

The controversy in this case is whether, under the circumstances shown in the record, a license issued in accordance with the provisions of the Public Statutes of Massachusetts (chap. 100, § 5), and held by the bank-

rupt at the time the petition in bankruptcy was filed, can be availed of as assets for the benefit of the creditors in bankruptcy. That section is as follows: "In a city which at its annual municipal election, or in a town which at its annual meeting, votes to authorize the granting of licenses for the sale of intoxicating liquors, as hereinafter provided, licenses of the first five classes mentioned in section ten, and in any city or town licenses of the sixth class mentioned in said section, may be granted annually by the mayor and aldermen of cities or the selectmen of towns to persons applying therefor. Every license shall be signed by the mayor or the chairman of the selectmen, and by the clerk of the city or town by which it is issued, and shall be recorded in the office of such clerk, who shall be paid by the licensee one dollar for recording the same. It shall name the person licensed, shall set forth the nature of the license and the building in which the business is to be carried on, and shall continue in force until the first day of the May next ensuing, unless sooner forfeited or rendered void."

Section 1 of the same chapter provides as follows: "No person shall sell, or expose, or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter; but nothing herein contained shall apply to sales made by a person under a provision of law requiring him to sell personal property, or to sales of cider and native wines by the makers thereof, not to be drunk on their premises."

The power of issuing licenses was transferred to the police commissioners by § 1, chap. 83, of the Acts of 1885, as follows: "The police commissioners, instead of the mayor and city clerk of the city of Boston, shall exercise the powers and perform the duties given to and imposed upon said mayor and city clerk by section five of chapter one hundred of the Public Statutes relating to the signing of licenses for the sale of intoxicating liquors; and said licenses, together with all licenses as hotel keepers or common victuallers shall be recorded in the office of the said commissioners instead of the office of said city clerk."

Obviously, the licenses thus authorized appertain to the police regulations of the state; and, except for the facts further appearing in the record, they would be in no manner subject to the control of a Federal court sitting in bankruptcy, nor could they be availed of by such courts as assets.

The petition for the adjudication in bankruptcy of *Ida C. Fisher* was filed on October 19, 1898. The license in controversy issued on May 1, 1898. On its face, it purported to run to *Ida C. Fisher* and *Rollin B. Fisher*, as *Fisher & Co.* The record shows that *Fisher & Co.* was *Ida C. Fisher* solely, and that therefore *Rollin B. Fisher*, who is the husband of *Ida*, had only a nominal interest, and that his name appeared in the license, in accordance with a prevailing custom, to prevent a lapse thereof in the case of the death of *Ida*. For the purpose of consider-

ing the fundamental question in the case, we can assume that it is not complicated by the fact that the name of Rollin B. Fisher appeared in the license, and that Ida was the sole holder of it, both substantially and nominally. The record also shows as follows: "Liquor licenses are issued by the city of Boston to a limited number only, and are much in demand. They are transferable only with the assent of the board of police commissioners, and then only in the following manner: There is a usage and practice by which a license may be surrendered, and a new license issued to another in the place thereof, as follows: The man that desires to go into business files an application describing the locality, and who the persons are that propose to engage in business; and if they are satisfactory, and there is no legal objection to the place where they propose to engage in business, and there will be a vacancy caused in the list of licenses ordinarily granted, the board agrees to one license being surrendered for the purpose of being canceled, and in place of it another is issued to the new firm or persons applying for it. The surrender is ordinarily by a simple form of indorsement addressed to the board of police stating, 'The undersigned hereby surrenders his license for the purpose of having it canceled,' and signed by one or more of the licensees, binding the firm to that agreement."

"There is a recognized value of from \$4,000 to \$5,000 which attaches to a license for the purpose of such transfer, and such sum can be obtained in the liquor trade for the surrender of a license in favor of another, conditional upon the purchaser proving satisfactory to the board of police commissioners as a licensee."

It is also said in the record that evidence was submitted that the police commissioners have refused to consent to the transfer of any license until the one seeking to make the transfer has shown himself to be free of debt; but there is no finding to this effect, and the topic becomes unimportant, because, in fact, the license in controversy, with the consent of the commissioners, was surrendered by Ida C. Fisher and Rollin B. Fisher, by their indorsements thereon, made under the order of the district court, a new license substituted, and a valuable consideration received in connection with the transfer, in accordance with the practice shown by the citation which we have already made.

The trustee in bankruptcy of Ida C. Fisher seasonably claimed that the license should be realized for the benefit of the estate, and petitioned the court for an order on her and Rollin B. Fisher to indorse the license, so that the proceeds thereof might be thus secured. An interlocutory order was entered, pursuant to which the license was indorsed as follows: "This license is hereby surrendered for cancellation. Ida C. Fisher. Rollin B. Fisher." The amount of \$4,250 was realized, which was deposited in the registry of the district court, to await its final determination in reference to the claims
51 L. R. A.

thereto. Subsequently a final decree was entered that the amount so deposited in the court, less an equitable charge thereon of \$1,000, should be paid to the trustee as assets. Ida C. Fisher and Rollin B. Fisher objected throughout to these proceedings, and their petition to revise them was seasonably filed in this court, and was answered by the trustee. An issue was thus duly raised on the matter of law whether or not the license or its proceeds were under the control of the district court for the purpose of the action which it took in reference thereto. The appropriate parts of the record in the district court were sent up on the appeal, and they are made parts of *Ida C. Fisher et al., Petitioners*, by references to them in the petition and answer, though it would have been more prudent to have incorporated them by an express agreement therefor filed in the case.

The only provision of the bankrupt act covering the fundamental question in this case is found in § 70 (30 Stat. at L. 565, 566), wherein it is provided that among other things which shall vest in the trustee of an estate of a bankrupt is "property which prior to the petition he" (that is, the bankrupt) "could by any means have transferred or which might have been levied upon and sold under judicial process against him." No determination by any judicial tribunal of sufficient authority to conclude this court has been brought to our attention or found by us. It is, of course, well settled that governmental pensions and salaries of public officers are not affected by proceedings in bankruptcy; but neither of these can be presumed to represent any capital invested, and public policy forbids their transfer. *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264, and *Sparhawk v. Yerkes*, 142 U. S. 1, 12, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104, which relate to seats in stock exchanges, in no way touch on matters of police regulation. Nevertheless they settle one question in this case, and that is that the fact that transferability depends on the consent of a stranger does not defeat the claim of creditors in bankruptcy to realize what can be obtained on a transfer if made. This, however, is a rule of law well settled and broadly applied.

In *Ex parte Butler*, 1 Atk. 210, the question came before Lord Chancellor Hardwicke whether or not the office of undermarshal of the city of London, which was a salable office, passed into the control of a commission in bankruptcy. It was held that it did, but the terms of the statute under which that case was decided include some expressions which render the decision inapplicable as an authority on the question at bar. Nevertheless the Lord Chancellor made an observation which leads up to a line of reasoning of importance with reference to this proceeding, as follows: "This is a matter of very great consequence; for, when a man is likely to become bankrupt, he may sell all his stock in trade and effects, and invest the produce in one of these salable offices, and in that manner cheat his creditors."

Following out this suggestion of Lord

Chancellor Hardwicke, it cannot be denied that the license in controversy represented pecuniary interests of the bankrupt of substantial value. Not only, as shown by the extracts which we have made from the record, does a recognized value of from \$4,000 to \$5,000 attach to a license of this nature for the purposes of transfer, but in this particular case the license in fact realized \$4,250. Whether Ida C. Fisher, on her acquisition of the first license, of which the one in issue was the successor, paid for the transfer thereof from her assets an amount in excess of the governmental fee, which fee was, in the eyes of the law a substantial sum, although the particular amount is not stated in the record, or whether that excess gradually accrued as an increment of the value of the successive licenses during the several years in which she was carrying on the business of Fisher & Co., the record does not show. Neither is it of consequence that it should, because the question underlying this case cannot be determined with reference to all the special circumstances of a particular license, but it must be disposed of in the light of the fact that every license, however obtained, has a recognized value, as already stated, in excess of the governmental fee, and of the further fact that the amount of that excess may represent actual cash of its holder paid for it on its transfer from some other licensee. Thus, it represents capital. To apply to these conditions the propositions of the petitioners would come to the same result, whether the amount involved was that at issue in this case, or much larger. In either case, if their propositions are sound, the creditors of a bankrupt may be left without the receipt of any percentage of their debts, and the bankrupt may remain in possession of what is practically under his own control, and of a pecuniary value sufficient to characterize him as a person of substance. To put their propositions in another form is to say that, although a bankrupt is otherwise unable to pay his creditors even a small percentage, yet he stands under no legal obligation to realize for their benefit a matter of large pecuniary value, but that, on the other hand, he may apply to his own uses what he can secure therefrom, although it has absorbed a large amount of assets which otherwise would have been within the reach of his creditors. Nothing but a clear purpose on the part of any bankrupt act to accomplish such a result, or an absolute defect in its provisions, would justify sustaining propositions which work such results.

It is impossible to give any categorical definition to the word "property," nor can we attach to it in certain relations the limitations which would be attached to it in others. This will be obvious on examining the article about property in the several editions of Bouvier's Law Dictionary. The same is equally obvious on an examination of the definitions given to the word in the standard dictionaries of the English language. All that can be said positively in reference to it is that, when found in a statute like the 51 L. R. A.

bankrupt act, it is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. In this view, considering that the mere license represents a police regulation, so that, according to the determinations of the supreme court, even though given for a fixed period, it may be revoked without compensation by legislation touching the public interests, because it represents no vested right, it is not possible to regard it as property of itself. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 74, 42 L. ed. 948, 954, 18 Sup. Ct. Rep. 513. On the other hand, under the circumstances shown in the record, it so far represents invested capital that it cannot be disputed that a licensee's administrator, who after his death obtains on its transfer a valuable consideration, is required by law to account in his official capacity for the sum received. Neither can it be denied that the same rule applies to a copartner settling the affairs of a copartnership after the death of one of the copartners, or, in the present case, to Rollin B. Fisher, in case he had survived his wife and no bankruptcy proceedings had interposed. Further, as we have already said, there is not here involved the rule of public policy which applies to governmental pensions and the salaries of public officers; but the case in that respect is more akin to instances where hotels, livery stables, and other establishments subject to police regulation, and requiring licenses from the public authorities, are disposed of, with all the privileges and advantages appertaining thereto. Having in view, therefore, the evident fact which we have already stated,—that nothing but a clear purpose on the part of the statute to accomplish a different result, or an absolute defect in its provisions, would lead to a different conclusion,—we see no difficulty in holding that the pecuniary interest or capital which this license represents, and which may customarily be made available, is property which the bankrupt is bound to assist in realizing for his creditors, so long as he can render practical aid thereto by merely giving his signature, and without that substantial assistance which it is well settled creditors in bankruptcy are not entitled to receive, for accomplishing anything which requires skill or substantial labor on the part of the bankrupt after the petition is filed by him or against him. We therefore agree on this point with the conclusions of the district court.

It may be claimed that the reasoning on which this result is based cannot be carried out to its logical conclusion. We have reference especially to the matter of inventions and literary manuscripts, and contracts which require for their completion the skill of the bankrupt. It is generally said that none of these pass to the creditors. *Wma.*

Bankr. 7th ed. 106; Copinger, Copyright, 3d ed. 176; and Lowell, Bankr. 233. However, these facts make no difficulty with the result which we have reached, because, with reference to inventions and manuscripts, and contracts partly completed which involve the personal skill of the bankrupt, there is no doubt that all such things are property, as all the authorities make clear; and they are capable of being assigned as such, and of devolution by succession. Copinger, Copyrights, 3d ed. 177, and elsewhere. So, also, it is ordinarily said that an action for breach of a contract to marry, or breach of a contract to cure, and other actions of tort which do not concern injuries to property, do not pass to the bankrupt's creditors, and yet all these are property. The most that can be said about these exceptional rights is that they illustrate what we have already pointed out,—that it is impossible to give any categorical definition to the word "property" or to give such specific limitation to it as would always determine its relations to any particular statute. All these things are property, and absolutely at the disposal of the owner of them; and yet they lack one usual element of property, in that they are not within the reach of creditors. But our point is that these exceptional illustrations relate clearly to what is property, and therefore they cannot obstruct us in determining whether or not the matter in controversy is property, within the meaning of the bankrupt act.

The rule with reference to nonpatented inventions has never been laid down, except in the most general terms; and it may well be doubted whether, under peculiar circumstances, a court in bankruptcy might not compel an inventor to do what the district court in this case compelled the owner of this license to do. Assuming, as an extreme case, that an inventor has completed his invention, has put it in practical form, and has depleted his estate in experimenting in the course thereof, and that all that remains for him to do in order to procure his patent is the nominal act of giving his signature to the application therefor, we would have a case somewhat parallel to the case at bar; and we cannot concede that there are any authorities of so precise a character as would prevent a court in bankruptcy from realizing capital thus locked up.

We have proceeded in this matter without any special reference to the language which we have cited from the statute. This, in terms, covers "property which prior to the filing of the petition he" (the bankrupt) "could by any means have transferred or which might have been levied upon and sold under judicial process against him." It seems to us safer to put the case on broad ground, rather than on any peculiar phraseology of the statute, the precise scope of which is not plain. Very likely some of these words were used for the purpose of meeting difficulties arising under previous statutes in bankruptcy, by reason of the fact that sometimes a large amount of property

was held under unrecorded deeds, which had given the debtor a credit to which he was not entitled, and which might have been attached under the local practice in various states, or might have been conveyed by the debtor to an innocent purchaser, but which, however, did not pass to assignees in bankruptcy. Nevertheless the language may well be held to be so broad as to sweep in cases of the precise character of that at bar. However, we pass this by, observing only that the alternative in this quotation shows a statutory declaration of what we have already found to be the fact,—that there may be property which cannot be sold under judicial process, and that there may be property of that character which passes for the benefit of creditors.

In behalf of the trustee in bankruptcy, reference is made to the paragraph of § 70 of the bankrupt act which provides that the trustee shall be vested with certain "powers;" and it is claimed that this applies at bar, because the bankrupt had the power to realize from the license. However, we prefer not to attempt to rest the case on this expression, because we doubt whether so popular a signification can be given to the word, and whether, on a careful examination of the English statutes from which this was drawn, and of the decisions of the English courts in regard thereto, we might not be required to determine that it is to be construed technically, as known to the common law.

Questions as to the jurisdiction of the district court with reference to this license have been raised, in view of the fact that it issued to Rollin B. Fisher as well as to his wife; and a question is also made with regard to the intervention of one Chapin, who claimed an equitable interest in the fund derived from its transfer, and paid into the registry of that court. We do not understand that the objection as to Chapin is now insisted upon, but, even if it were, it would be fruitless, because the rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf.

So far as Ida C. Fisher is concerned, there can be no question of jurisdiction, inasmuch as the proceedings have taken place in the case in which she was adjudged bankrupt, and the court therefore clearly had the power to proceed summarily for the purpose of merely compelling her to give her signature on the transfer of the license. So far as Rollin B. Fisher is concerned, the objection as to want of jurisdiction is subdivided; that is to say, it is, on one hand, maintained that he was entitled to appropriate the license, or an interest in it, to his personal use, and that therefore the court could not, in the case of Ida C. Fisher in bankruptcy, proceed summarily against him with reference thereto. This objection is met, however, by the fact that Rollin B. Fisher is himself in bankruptcy, and his assignee submitted himself to the proceedings in the district court, which disposes of all substantial questions.

so far as Rollin B. Fisher is concerned. On the other hand, the more technical objection is made that the district court, in this proceeding relating to Ida C. Fisher, had no summary power to compel Rollin B. Fisher to perform any act,—especially that of indorsing the license in the manner which we have described. This, however, does not touch the merits of the case, and is purely a moot question, so far as we are concerned. Rollin B. Fisher has indorsed the license, and it has passed to a purchaser for value. Any decree that we might make could not rescind that, and would be futile. If, on the other hand, he had refused to make the indorsement, and the district court, in the case of Ida C. Fisher in bankruptcy, had proceeded against him for contempt by reason of that refusal, and had fined him or imprisoned him, and the fine had remained unpaid, or

the imprisonment was not fully accomplished, a practical issue might have arisen in some way for our determination. *Ex parte Baer*, 177 U. S. 378, 44 L. ed. 813, 20 Sup. Ct. Rep. 673.

In No. 315 (*Fisher v. Cushman*) the appeal is dismissed, without costs, except that, in accordance with the agreement of the parties, the expense of printing will be paid out of the fund in the registry of the District Court, the net proceeds of the transfer of the license.

In No. 317 (*Ida C. Fisher et al., Petitioners*) there will be a decree affirming the proceedings of the District Court, without costs, except that, in accordance with the agreement of the parties, the expense of printing will be paid out of the fund in the registry of the District Court, the net proceeds of the transfer of the license.

ILLINOIS SUPREME COURT.

Matilda EBNER, Admx., etc., of Andrew Ebner, Deceased, *Appt.*,
v.

A. N. MACKEY.

(186 Ill. 297.)

1. Rulings on the admission and rejection of testimony will not be considered if no exception was preserved to them.
2. A physician must, in the first instance, determine how often he ought to visit a patient, and, if the party employing him accepts his services, and does not discharge him or require him to come less frequently, or fix the times when he wishes him to attend, he cannot afterwards refuse to pay for visits on the ground that they were unnecessary.

(June 21, 1900.)

NOTE.—Physician's right to determine frequency of visits to patient.

A physician called to attend a patient is authorized to continue his visits such length of time as is necessary, and he may recover for such services. It is also his duty to attend, and he will be liable for negligence if he fails to attend, or abandons his patient without reasonable cause. The question as to the necessity of further visits is presumed to depend on the physician's judgment. The discontinuance of visits may be determined by the original employment, or by notice from the patient to the physician that his services are not needed, or by notice of the physician to the patient that he will not return, or by the judgment of the physician that further visits are not necessary. In the latter event the physician will be liable if the condition of the patient is such that an abandonment by the physician will probably work an injury.

In *EBNER v. MACKEY* it is held that a physician must in the first instance determine how often he ought to visit a patient, and if the party employing him accepts his services, and does not require him to come less frequently or fix the times when he wishes him to come, he cannot afterwards refuse to pay for visits on 61 L. R. A.

APPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Mercer County in favor of plaintiff in an action brought to recover for medical services for which decedent's estate was alleged to be liable. *Affirmed.*

Statement by the Court:

This was a claim by appellee, a physician, against the estate of Andrew Ebner, deceased, for medical services rendered Ebner and his wife. The claim, as sworn to and lodged with the county clerk for filing, was for \$370. Before claim day, \$50 was paid thereon. At the trial in the circuit court before a jury on an appeal from the county court, said credit was allowed, and a verdict was rendered and judgment was entered for \$320. The administratrix ap-

pealed from the judgment on the ground that they were unnecessary. This is sustained by the authorities. In this case the court said: "The physician being responsible for the want of care and faithful attention to his patients, a contrary rule would work great hardship to him, and subject him to undue perils." (Action for services.)

The employment of a physician continues while the sickness lasts, where he is employed to attend upon a sick person, and the relation of physician and patient continues until it is ended by the consent of both parties, or is revoked by the express dismissal of the physician. *Lawson v. Conaway*, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 564; *Potter v. Virgil*, 67 Barb. 578.

In the latter case the physician was called to attend the defendant's wife at his house, and thereafter the wife was removed by her father to his house without the knowledge or consent of the defendant, and the services of plaintiff were rendered at the residence of the father of the defendant's wife. (Action for malpractice.)

In the absence of special agreement, the engagement is to attend the case so long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is discharged by the patient; and he is bound to exer-

pealed to the appellate court. The appellate court has affirmed the judgment, and granted a certificate of importance.

Messrs. Connell & Thomason, for appellant:

In *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239, the court said, in a question of this kind any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice.

Messrs. George A. Cooke and James M. Brook, for appellee:

The physician is the proper and sole judge of the necessary frequency of the visits to

cise reasonable and ordinary care and skill in determining when his attendance should cease. *Lawson v. Conaway*, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 564. (Action for malpractice.)

Where a physician is employed to treat members of a family, he is the best and the proper judge of the necessity of frequent visits, and in the absence of proof to the contrary the court will presume that all the professional visits made were deemed necessary, and were properly made. *Todd v. Myres*, 40 Cal. 355. In this case the court said: "It would be a dangerous doctrine for the sick to require a physician to be able to prove the necessity of each visit before he can recover for his services. This is necessarily a matter of judgment, and one concerning which no one, save the attendant physician, can decide. It depends, not only upon the condition of the patient, but, in some degree, upon the course of treatment adopted."

And if there is no limitation in the employment of a physician, and he is called in generally, the presumption is that his service is under an implied engagement to attend the patient through that illness, or until his services are dispensed with. *Dale v. Donaldson Lumber Co.* 48 Ark. 188, 2 S. W. 703. In this case the court said: "A physician and his employer may make such contract as they see fit limiting the attendance to a longer or shorter period, or to a single visit, and the law will enforce the contract they have made." (Action for services.)

So, where a physician engages to attend a patient without limitation of time, he cannot cease his visits except, first, with the consent of the patient; or secondly, upon giving the patient timely notice so that he may employ another doctor; or thirdly, when the condition of the patient is such as no longer to require medical treatment, and of that condition the physician must judge at his peril. *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675. In this case it was further held that in case of a charity patient, even though the physician is not to be paid for his attendance, he is still bound in law to treat his patient with the requisite skill and the requisite care. The court said that if at his last visit he notified the plaintiff that he was going out of town, and indicated to her a physician who would attend her in his stead, his absence would be excused.

A physician called to treat a sick horse, and agreeing to call the next morning early, but neglecting to ever call again, is guilty of such negligence as will prevent a recovery for his services. *Boom v. Reed*, 69 Hun, 426, 23 N. Y. Supp. 421. (Action for services.)
51 L. R. A.

his patient, so long as the patient is in his charge.

Wood, Mast. & S. p. 448; Todd v. Myres, 40 Cal. 355.

Per Curiam:

In deciding this case, the appellate court delivered the following opinion:

"Complaint is made of the rulings of the trial court in the admission and rejection of testimony. No exception was preserved to any of these rulings, and their correctness is therefore not presented to us for decision.

"On the motion of defendant for a new trial, it was assigned as a ground for granting a new trial that the verdict was contrary to the law and the evidence. No reason is shown why the verdict is contrary to law. There was much conflicting evidence

The relation of physician and patient generally continues so long as medical attention is required, and the physician must exercise reasonable care in determining when the attendance may be safely discontinued; but when the patient comes to the office of the physician, from whom he receives proper treatment, and then fails to return for further treatment, in consequence of which he suffers injury, he is not entitled to maintain an action against the physician for such injury because it is his own default and misfeasance. *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094. (Action for malpractice.)

It is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit if they please; and while, if there be no such limitation, the physician can discontinue his attendance at his election after giving reasonable notice, yet, if he is sent for at the time of an injury by one whose family physician he has been for years, the fact of his responding will be an engagement to attend to the case so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued. *Ballou v. Prescott*, 64 Me. 306. In this case the burden of proof of abandonment was held to be upon plaintiff, and the burden of proving notice to discontinue visits was on the physician. (Action for malpractice.)

In *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239, an action against a railroad for personal injuries caused by negligence of the company, where the question was that a witness was improperly permitted to testify whether it was necessary for the physicians to have continued their attendance on plaintiff as long as they did, the court said: "Even if this was a question of skill, the physicians had testified to having attended on plaintiff, and from that testimony the inference is raised that it was necessary. But, in a question of this kind, any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice. When it comes to determine the nature or the effects of disease, it is different. These are scientific questions that none but those skilled in the science are competent to determine." Digitized by Google

as to whether all the services charged for were rendered, and as to whether the services rendered had not been settled for by Ebner in his lifetime. The jury determined these questions for claimant, and there was evidence to support the verdict. The books of claimant were in evidence, showing charges from day to day and time to time during a period of several years, in which time, it is conceded, claimant did often attend upon the parties professionally, and especially upon Mrs. Ebner. One witness for defendant gave certain dates in the summer of 1897 between which, she testified, Ebner and wife were in Colfax, Iowa. During this period claimant's books contained several charges against deceased, and it is argued that the jury should, in any event, have disallowed those charges. The jury saw this witness, and heard her testimony. She was contradicted by the daily entries in the claimant's books. There was a shorter period, the same summer, during which the books contained no charges against deceased. Some doubt was thrown upon the correct-

ness of the dates given by the witness by the testimony of another witness for defendant, who at two different times lived in the Ebner family, but did not live there during the summer of 1897, and yet remembered the fact of Mr. and Mrs. Ebner going to Colfax. The jury evidently concluded the witness was mistaken either as to the date or length of the stay at Colfax. We are unable to say they were wrong, or that another jury would reach a different conclusion upon the same evidence.

"The court gave the following instruction for claimant: 'The jury are instructed, as a matter of law, that the physician attending a patient is the proper and sole judge of the necessary frequency of the visits to his patient, so long as the patient is in his charge; and in an action for his services the physician is not required, under the law, to prove the necessity of his making the number of visits that he makes, and for which he is seeking compensation.' Upon this subject Wood on Master and Servant (§ 177) says: 'A physician is to be deemed

A party by placing his wife under the care of a physician, whom he knew, at a distance from his own residence, for medical and surgical treatment for a dangerous disease, impliedly requested him to do all such acts, and adopt such course of treatment and operations, as in his judgment would be most likely to effect her ultimate cure and recovery, with the assent of the wife; and the assent of the wife to an operation may be presumed from the circumstances. *McClallen v. Adams*, 19 Pick. 333, 81 Am. Dec. 140. (Assumpsit on account.)

In an action for malpractice, an allegation in the declaration, after stating employment and undertaking of the surgeon to attend, and unskillful setting of plaintiff's leg, charged that "defendant having ceased to attend upon the plaintiff and administer remedies for his said leg, . . . and the leg having become during that time more diseased and unsound, and thereby endangering the life of plaintiff, he was afterwards . . . forced and compelled to employ other surgeons," who amputated the leg. This was held to contain no averment that the defendant had refused to attend the plaintiff, or abandoned him. The court said: "There is a recital that he had ceased to attend and administer remedies; but that cessation may have been perfectly innocent and proper, occurring with good cause. If the plaintiff had intended to make it a ground of complaint that the defendant had refused to attend when requested, or improperly deserted or abandoned his duty, it should have been so stated in the *warr.*, that the defendant might have had notice of it, and come prepared to meet it." *Beatus v. Howard*, 3 Watts, 255.

In *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650, where a physician was employed at an accident by the conductor of a train, it was held that the railroad company, having notice of his employment and permitting him to render services thereafter without repudiating the employment or discharging him, was liable for such services.

In *White v. Mastin*, 38 Ala. 147, where a physician brought an action against W. for medical services rendered to L., and the physician had been attending L. before a despatch and letter from the defendant were shown to him, the court said: "Although the plaintiff may, at the outset, have rendered his services solely on

Lumpkin's responsibility, he was not bound to continue his services in the same way. He had made no special contract, which would have been broken by the cessation of his services. There is nothing in the ordinary relations between a physician and his patient which would prevent the former from discontinuing his services upon the account of the latter, and entering into a contract with another for the payment of the charges for his subsequent attendance. We perceive no reason why the assent of the patient to the making of such a contract should be necessary."

But it is not sufficient evidence to sustain a verdict for medical services rendered, and medicine supplied, that the plaintiff practised in the family of the defendant, and was seen coming and returning from the defendant's house, together with proof that the items charged were according to the customary rates. *Simmons v. Means*, 8 Smedes & M. 397; *Haslip v. Leggett*, 6 Smedes & M. 326.

And in *Re Smith*, 18 Misc. 139, 41 N. Y. Supp. 1093, where a physician charged \$412 for attending deceased, afflicted with an incurable disease, four visits each day for 103 days, not missing a day or visit, giving but little medicine, calling two other doctors from S. very often for counsel and advice, it was held that his charges were exorbitant, and ought not to be allowed in full, and that, where the value of services were involved, the testimony of expert witnesses did not control. The court said that, from the nature of decedent's illness and manner in which the charge was made,—that is, the doctor residing very near her and calling in to see her when he desired, then making a uniform or average charge of four visits a day at \$1 each,—a sum of \$350 would be a liberal allowance.

In *Ely v. Willbur*, 49 N. J. L. 685, 10 Atl. 385, 441, Paterson, J., dissenting, said: "But having made a mistake, or, what is the same thing, the care and skill he exercised having failed to detect the symptoms of the disease, and, by reason thereof, his attendance continuing for a longer time than would have been required under a correct diagnosis, the jury should have been instructed to have taken that fact into consideration." (Action for services.)

I. T.

the proper judge of the necessity of frequent visits to his patient, and the court will presume that all the professional visits made by him were necessary. Hence, in an action for his services, he is not called upon to prove the necessity of making the number of visits he did. The physician being responsible for the want of care and faithful attention to his patients, a contrary rule would work great hardship to him, and subject him to undue perils. To the same effect is *Todd v. Myres*, 40 Cal. 357. *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239, does not, as supposed, announce a contrary doctrine. There a person injured in a railroad collision brought suit for damages, and sought to recover, among other things, his expenses for medical attendance. Of course, he could not recover against the railroad company for all medical attendance he had chosen to have, but only for such as was necessary in curing his injuries. But where a physician is called by a party to treat him or his wife, and he takes charge of the case and attends from day to day, evidently in view of his responsibility, for skillful and proper treatment, he must, in the first instance, determine how often he ought to visit the patient; and so long as the party employing him accepts his services, and does not discharge him or require him to come less frequently, or fix the times when he wishes him to attend, he cannot afterwards be heard to say the physician came oftener than was necessary. There was no proof claimant came when he was forbidden to come, or that he was discharged and continued to attend thereafter. Deceased and his wife called claimant and accepted his services without question. Under the circumstances of this case, the instruction was proper. Some expressions in other instructions given for claimant may have been slightly inaccurate, but they were substantially correct. The jury were fully instructed for defendant. The instructions asked by defendant and refused, so far as not embraced in given instructions, were either erroneous, or so involved or confusing as to warrant their refusal. We find in the record no reversible error. The judgment is therefore affirmed."

We concur in the foregoing views, and in the conclusion above announced. Accordingly the judgment of the Appellate Court is affirmed.

Thomas LOWERY, Plff. in Err.,

v.

City of PEKIN et al.

(186 Ill. 387.)

An injunction is the proper remedy to

NOTE.—On the question of injunction to restrain trespasses, see notes to *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 1 L. R. A. 744; *Haines v. Hall* (Or.) 3 L. R. A. on page 612; *Corinth v. Locke* (Vt.) 11 L. R. A. 207.

For injunction against trespass to cut timber, see notes to *Carney v. Hadley* (Fla.) 22 L. R. A. 238.

31 L. R. A.

prevent a city from taking possession of an embankment made on its land for railroad purposes by one having a lease for ninety-nine years, and converting it into a public highway.

(June 21, 1900.)

ERROR to the Circuit Court for Peoria County to review a decree dismissing a bill filed to enjoin defendants from appropriating an embankment belonging to complainant for a public highway without compensating him therefor. *Reversed*.

Statement by Magruder, J.:

The original bill in this case was filed on July 19, 1898. A demurrer was filed and sustained to the original bill, and leave was granted to the complainant therein to amend the bill. Accordingly, on January 11, 1899, a supplemental and amended bill was filed. To this supplemental and amended bill a general demurrer was filed, and, the demurrer having been sustained, the bill was dismissed. The present writ of error is sued out from this court for reversing the decree of the circuit court, which dismissed the bill at complainant's cost for want of equity.

Thomas Lowery, plaintiff in error here and the complainant who filed the bill in the court below, alleges that he is the owner of 300 acres of land in Hollis township, Peoria county, underlying which is a large body of coal; that in the center of said tract he has a coal-mining shaft and tenement houses connected therewith for the use of the miners, the premises being known as the "Orchard Mines;" that he derived his title to the land by deed from one Peter V. Schenck on January 1, 1874, and has had open and exclusive possession of the premises, including the shafts and grounds, ever since that date; that Schenck had possession thereof for many years prior to that date; that the shaft is located about 1½ miles west of the Illinois river, directly opposite the city of Pekin, in Tazewell county, and at the foot of the bluffs on the westerly side of said river; that the intervening grounds between the shaft and the Illinois river were then and still are low, marshy, and wet lands, not susceptible of cultivation, or being used for driving over the same for more than eight months in each year; that while the grounds were operated by Schenck there was a large demand for coal to supply steamboats on the Illinois river, and, for the purpose of furnishing such supply and supplying coal to the inhabitants of Pekin for fuel, Schenck formulated and carried out the design of building an embankment and railway across said Illinois river bottoms to the westerly bank of the Illinois river opposite Pekin, and of erecting suitable docks there from which to supply coal to the boats; that, for the greater part of the distance between said river and the Orchard mines, Schenck owned the land proposed to be covered by the embankment in his own right, and, for the balance of the distance, the lands were owned and pos-

ceased by the city of Pekin; that there then existed opposite Pekin a ferry crossing the river at about the center of the city, and from the westerly side of the river there was a wagon road running thence to the north and south public road at Orchard mines; that the wagon road was not then worked or kept up, and had no certain and well-defined location, and Lowery does not know whether the same was ever located and laid out as provided by law; that the ferry was then owned by the city, and by it leased for a term of years to J. A. and T. J. McGrew, who operated it, and charged tollage therefor; that the erection of the proposed embankment and railway was regarded as a great benefit and advantage to the city of Pekin.

The bill further alleges that, on March 7, 1870, the city, in order to induce Schenck to erect said railway, made a contract with him in these words, *vis.*: "Whereas, Peter V. Schenck desires to build a railroad on the right of way adjoining to and upon the north side of the wagon road built on the west side of the Illinois river, and from said Illinois river to the bluffs on the west side of said river, so as to connect the coal bank of the said Peter V. Schenck with the Illinois river by rail, and to erect suitable docks and fixtures for the reception, handling, and shipment of coal therefrom, and desires to lay said railroad across and over the land, and build said docks on the land of the city of Pekin at the margin of said river; and whereas, it is deemed greatly to the advantage of said city and the inhabitants thereof to have said improvements built as aforesaid: Now, therefore, in consideration of the premises, and to encourage the easy completion of said roads and docks as aforesaid, the city of Pekin has demised and leased to the said Peter V. Schenck, his heirs and assigns, all of the right, title, and interest of said city in and to said right of way on and over said Illinois river bottom from the west bank of said river to the said bluff on the north side of the wagon road across said bottom as now constructed, and so much of the land along the margin of said Illinois river and on the west side thereof as is contained in the following boundaries, to wit [here follows a description of 8 acres of ground]: provided, that in constructing said railroad and docks, and in the use of said premises, said Peter V. Schenck is to so use and occupy the same as not to materially affect injuriously the said wagon road for ordinary travel, and not to obstruct said ferry or ferry landing at the place that said ferryboat is now landing at the foot of said road now constructed across said bottom; to have and to hold the same to him, the said Peter V. Schenck, his heirs and assigns, for the term of ninety-nine years, he and they paying taxes on so much of said land as is contained in this lease, and paying the expenses of the surveying said land and locating the same, and of preparing this lease. And it is understood that said lease is not adverse to the 51 L. R. A.

lease of the city of the ferry franchises and the contract of said wagon road to one J. A. and T. J. McGrew, but is with their consent and approbation. And it is further understood that said railroad and dock are to be built in a reasonable time from this date, all things considered; and, if not so built in said reasonable time, then the city assumes the right to act on this lease forfeited to the city,"—which lease was signed by the city by a duly-authorized committee consisting of five persons.

The bill further alleges that Schenck, in compliance with the terms of the lease, surveyed and located a right of way over said Illinois river bottom in a straight direction, and all on the northerly side of said wagon road as then located and used, so as not to interfere with said wagon road at any point or place, and built a large embankment of earth and timber of the average height of 6 to 8 feet, and of a width at the surface of about 7 feet, and placed thereon ties and laid down rails, so as to make a continuous railway from said Orchard mines to the westerly bank of the Illinois river; and upon said 8-acre tract he placed a dump and suitable docks, so as to deliver and store at said docks coal from his mines, and procured cars and motor power to convey the cars to said dump from his shaft; that Schenck in the construction of said works expended the sum of about \$18,000; that the wagon road at that time was upon the natural surface of the ground, and during a greater part of the year was under water, and impassable, but, after the building of the embankment, and by reason of the dam thereby created, was greatly improved, and capable of use for a greater portion of the time than it could be used theretofore; that the embankment and railroad were completed within a reasonable time after the execution of the lease, and in such a manner that the road and ferry were wholly unobstructed or uninjured, but were greatly benefited thereby; that while he owned the said shaft and premises Schenck delivered coal by means of said railroad to said docks, and maintained the embankment and railroad at his own expense; that on January 1, 1874, Schenck sold the grounds and premises, with the right of way and railroad and the leasehold interest at the coal landing and dumps and all the cars and motors to Lowery; that Lowery then took possession and continued to mine coal at the mines, and to use the railroad, and to carry coal across said Illinois bottom to the docks for a number of years thereafter; that about the year 1883 the demand for coal by steamboats became less, and was supplied mainly from other docks, and the Illinois river trade became lost to Lowery, and by reason of the fact that a large tollage was demanded for crossing of teams at the ferry Lowery was not able to supply coal to the people of Pekin at the same price at which it could be delivered to them from other mines, and was compelled to cease the operation of his railroad and the use of his docks, and the same

were suffered to lie idle owing to the lack of demand for coal; that about the year 18—, during his absence from Illinois, some persons to him unknown, claiming to act, as he is informed and believes, under the authority of the city of Pekin, raised by embankment the wagon road on the south side of Lowery's railroad to the same height as the railroad, and for that purpose used part and parcel of his embankment and grade; that in such raising of said wagon-road embankment the same was so negligently done that part of the railroad tracks and ties on the surface of Lowery's embankment was covered up or torn down and destroyed, and, he having then no use for said railroad, and being unable to use the same, took up the remaining iron therefrom to prevent its being lost or carried away; that the surface of said wagon road has since been maintained at the same height as Lowery's embankment, and he, having no present use therefor, has permitted his embankment and the surface of said right of way to be used at places by teams passing along and over said wagon road, but with full notice to said city and the authorities in charge of said road that said embankment; and so much of the surface thereof as is necessary for the passage of cars over the same, is his property; that the wagon road and embankment are entirely without the limits of the city of Pekin and in a different county from that in which the city is located; that said city has, since he ceased to operate his railroad, placed a free bridge over the river at the point aforesaid, and he charges that the city still maintains said bridge as a free bridge, and has asserted and claims ownership and supervision over said wagon road leading from said bridge to the public road at Orchard mines; that for about one third of said distance the grade and embankment of Lowery are located upon property which was owned in fee by Schenck, and was conveyed to Lowery, and the city never had, and has not now, any title thereto or right of way over and across the same, and the teams have been permitted to pass over the same freely by the license of said Lowery, and because he has no present use therefor that would be interfered with by said passage.

The bill further alleges that Lowery has the right to use and dispose of said embankment and right of way as he sees fit, and that said Schenck before him and he have observed and carried out the provisions of said lease at all times; that, as he is informed and believes, the city of Pekin has recently, without notice to Lowery, or any right or authority from him, given out that it is about to grade up said wagon road for a distance of about 6,000 feet from the westerly end of said bridge to Orchard mines, and to fill up said grade in a permanent and substantial manner with crushed stone and gravel, and has caused plans and specifications to be made for the construction of said permanent wagon road, so as to give it a width of 16 feet on the surface; that the city has let the contract to con-

struct said wagon road in accordance with said specifications to one James Dunbar, who is about to proceed with the construction thereof; that Dunbar, under the advice of the city, intends to utilize the entire grade and embankment of Lowery across said bottom, instead of keeping south of said embankment, and leaving the same for the use of Lowery under his lease and ownership in fee; that the city intends further to utilize the same, so far as it extends over Lowery's land; that the city has never notified Lowery of such intended use, or attempted to purchase said grade from him, or to take the same under the eminent domain act of Illinois, but proposes to do so forcibly and against his will, and without allowing him any compensation; that the city of Pekin and Dunbar will, unless enjoined, encroach upon and take absolute possession and control of said embankment, grade, and right of way of said Lowery and convert the same to its own use or the use of the public for an approach to said bridge, and hold and use the same as they may see fit, and thus prevent the use thereof by Lowery, and prevent him from selling or disposing of same to his own use; that thereby the purpose of said embankment will be entirely lost to Lowery, and he will be deprived of his property without due process of law, and without compensation. The bill prays that, because Lowery has no adequate remedy at law, and no power to resist the invasion of said city and of said Dunbar, they may be enjoined from taking possession of said embankment and from digging up, grading, leveling, macadamizing, or permanently improving the north side of said embankment of the width of 8 feet, or from disturbing the surface thereof in any way; and, in case the city has taken and used any part thereof, he prays that the city and said Dunbar may be compelled to abandon the same, and that Lowery's damages may be ascertained under the law of eminent domain, and that the city may be required to pay such damages.

The supplemental and amended bill alleges that since the filing of the original bill, and during its pendency, the defendants have graded, macadamized, and improved the said wagon road between the bridge landing and the north and south highway at the mines, and in so doing have included in said wagon road the embankment and right of way of Lowery, so that no part thereof remains save what is included in said wagon road as the same is now constructed, and on that portion of the line where Lowery owns the fee they have taken the whole of said embankment owned by him; that the city of Pekin has thrown the same open to the public as a public highway, and the same is being so used by the public in traveling from said free bridge westward over the river bottom; that this has been done by the defendants against the will of Lowery, and with full knowledge by them of his rights; that he (Lowery) has no adequate remedy at law for the

wrongful taking possession and use of said grade and embankment and of said property of which he owns the fee; that his said grade and land are so situated that he cannot inclose the same and retain possession thereof so as to keep the public from going upon the same, and that he cannot now use the same to carry coal from said shaft to the river without great loss, owing to the fact that there is no present market value for coal at the river; that said property has at present prospective value, and within the time named in the lease the said embankment, grade and privileges therein contained will be of great value to Lowery, his heirs or assigns. The bill further alleges that said city of Pekin, well knowing that Lowery has been unable to utilize the said right of way, grade, and embankment for fifteen years or more last past, and that he cannot now utilize the same, or recover substantial damages for said trespass, has taken adverse possession thereof for the use of the public, and has caused the same to be graded and improved, and threatens that it will continue to use and control the same until Lowery is prevented from recovering his possession and from further using said embankment; that he is in danger of losing his property, and all the money he has expended thereon, by reason of limitations, and unless the defendants are compelled to remove the improvements, rock, stone, and material placed by it on said right of way, or to acknowledge his rights by the exercise of the right of eminent domain, or by agreement with him; that the defendants refuse to acknowledge that he has any right in or to said grade and embankment. The amended and supplemented bill prays that, inasmuch as Lowery has no adequate remedy at law, and for the reason that his title to said right of way, embankment, grade, and premises is in peril of being lost to him by such wrongful acts and by virtue of the limitation law of the state, a writ of mandatory injunction may issue against the defendants requiring them to remove from said embankment all stone, macadam, gravel, and other material placed thereon, in order to make the same suitable for the traveling public to use as a highway, and that, unless the defendants remove the same, he be permitted to remove the same, and that the city be enjoined from using his embankment and grade, or casting any cloud upon his title to the same, without first resorting to due process of law.

Messrs. Jack & Tichenor and N. W. Green, for plaintiff in error:

Injunction was a proper remedy.

Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L. R. A. 696, 51 N. E. 758; *Bond v. Pennsylvania Co.* 171 Ill. 508, 49 N. E. 545; *Chicago v. Ward*, 109 Ill. 392, 38 L. R. A. 849, 48 N. E. 927; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Eearl v. Chicago*, 136 Ill. 285, 26 N. E. 370; *Zearing v. Raber*, 74 Ill. 407; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Field v. Barling*, 149 Ill. 556, 24 51 L. R. A.

L. R. A. 406, 37 N. E. 850; *Schworer v. Boylston Market Assn.* 99 Mass. 285; *Salisbury v. Andrews*, 128 Mass. 336; *Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Peoria v. Johnston*, 56 Ill. 45.

Where it appears that the trespass is of a continuing nature, for which complainant has no adequate legal remedy, and that if the defendant is allowed to persist therein it may become the foundation of an adverse right or ripen into a title by prescription, equity will interfere by injunction to prevent its continuance.

Newaygo Mfg. Co. v. Chicago & W. M. R. Co. 64 Mich. 114, 30 N. E. 910; *Poirier v. Fetter*, 20 Kan. 47; *German Evangelical Cong. Trustees v. Hoessli*, 13 Wis. 348; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Carpenter v. Capital Electric Co.* 178 Ill. 29, 43 L. R. A. 645, 52 N. E. 973.

The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity.

1 High, Inj. 3d ed. § 372.

It is not necessary that the easement claimed by the grantee be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial for such purposes.

Cihak v. Klehr, 117 Ill. 643, 7 N. E. 111; *Smith v. Young*, 160 Ill. 163, 43 N. E. 486; *Horner v. Keene*, 177 Ill. 390, 52 N. E. 492; *Schworer v. Boylston Market Assn.* 99 Mass. 285; *Salisbury v. Andrews*, 121 Mass. 336.

The case is akin to a case in which one of the owners of a party wall has caused an opening to be made in the wall for the admission of light and air. The court will interfere by mandatory injunction and require the opening to be closed, because "if allowed to continue for a period of twenty years the privilege of the adjoining owner would mature into a perfect legal right under the doctrine of prescription."

Graves v. Smith, 87 Ala. 450, 5 L. R. A. 298, 6 So. 308; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831; *Matteson v. Wilbur*, 11 R. I. 545; *Eckerson v. Crippen*, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Newaygo Mfg. Co. v. Chicago & W. M. R. Co.* 64 Mich. 114, 30 N. E. 910; *Johnson v. Rochester*, 13 Hun, 285; *Poirier v. Fetter*, 20 Kan. 47; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. ed. 521; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484.

Messrs. Henry Clay and Prettyman & Velde, for defendants in error:

Injunction will not lie in this case.

Ashmore Highway Comrs. v. Green, 156 Ill. 504, 41 N. E. 154; *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071; *Owens v. Grossett*, 105 Ill. 354; *Thornton v. Roll*, 118 Ill. 350, 8 N. E. 145; *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Chicago Public Stock Exchange v. McLaughry*, 148 Ill. 372, 36 N. E. 88; High, Inj. 3d ed. § 609.

To warrant the interference of equity in restraint of trespass two conditions must

coexist: First, complainant's title must be established; and, second, the injury complained of must be irreparable in its nature. High, *Inj.* 3d ed. § 701; *Traphagen v. Jersey City*, 29 N. J. Eq. 206.

So, it is requisite that a complainant seeking the aid of a court of equity by injunction shall not have been guilty of laches or delay in the assertion of his rights; for, while delay may not be proof of acquiescence in the wrong for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction.

High, *Inj.* 3d ed. §§ 7, 786, 1542.

An actual and continued change of possession by the mutual consent of parties will amount to surrender by operation of law; and that, whether the possession is delivered to the landlord himself or to another in his behalf.

Taylor, Land. & T. 8th ed. § 515; *Talbot v. Whipple*, 14 Allen, 177; *Wood v. Partridge*, 11 Mass. 492.

A bill to quiet title will lie in this state in only two cases: First, where the complainant is in possession of the lands; and, second, where he claims to be the owner, and the lands in controversy are unimproved and unoccupied.

Gage v. Abbott, 99 Ill. 366; *Gould v. Sternburg*, 105 Ill. 488.

Magruder, J., delivered the opinion of the court:

A wagon road existed, running westward from the west side of the Illinois river opposite the city of Pekin to a public road running north and south at the Orchard mines, owned by the plaintiff in error. An embankment was constructed by Schenck, the grantor of the plaintiff in error, along the north side of this wagon road westward from the bridge over the Illinois river to the mines in question. The right of way upon which this embankment was built was upon ground two thirds of which was owned by the city of Pekin and one third of which was owned by the plaintiff in error, Lowery. Lowery, by the conveyance from Schenck, acquired the title to the right of way over the ground owned by the city through a lease for ninety-nine years made by the city to Schenck in 1870. The city of Pekin, according to the allegations of the bill, has appropriated the embankment owned by plaintiff in error upon the right of way north of the wagon road, and made it a part of the public highway owned by the city. The embankment, as built by Schenck and subsequently conveyed to Lowery, was from 6 to 8 feet in height and 7 feet wide upon the top thereof. A railroad was constructed upon the embankment, running from the mines to the docks on the river, and was used for carrying coal by Lowery for about nine years. Originally the wagon road owned by the city ran along on the south side of the embankment at the foot of it, and upon the surface of the ground. The city raised the wagon road by building another embankment alongside of the one con-

structed by Schenck, so that the top surface of the two embankments together was 16 feet wide. The city thus has a public highway running from the bridge to the north and south public road at the mines, which is 16 feet on the top thereof, and one half of which consists of the embankment belonging to Lowery. The demurrer admits all the allegations of the bill to be true. If these allegations are true, the city of Pekin has appropriated so much of the right of way and embankment of Lowery as belonged to him, and as was constructed by his grantor, without paying any compensation therefor. The city itself was Lowery's lessor, as it leased to him two thirds of the right of way for the express purpose of enabling him to build railroad tracks thereon, and to build docks at the river, with which those railroad tracks should connect. We can see no reason why the city should thus appropriate the property of a private citizen without paying him therefor. He had a right of way over property of the city itself through a lease for ninety-nine years, which the city gave him. This easement thus granted to him could not be interfered with by the city without violating the terms of its own agreement with him, as embodied in the lease.

It is said that the city cannot be enjoined from thus using and holding the possession of the property of plaintiff in error for the purposes of a public highway upon the alleged ground that plaintiff in error, if he has suffered any wrong, has a remedy at law, either in ejectment for the recovery of the possession of his property, or in trespass to recover damages thereto. But this is not a case where it is sought to enjoin a simple trespass. This is a case where a municipality, under claim of right, is unlawfully trying to take the property of a private citizen. It is well settled that injunction is a proper remedy where cities or public officers, under color of power or claim of right, are illegally attempting to injure, or take the property or impair the rights of, a citizen. *Smith v. Bangs*, 15 Ill. 399; *Peoria v. Johnston*, 56 Ill. 45; *Carter v. Chicago*, 57 Ill. 283; *Bryan v. East St. Louis*, 12 Ill. App. 390. The injury here complained of is one of a continuing or permanent nature, for which an action at law does not afford a complete and adequate remedy. *Carpenter v. Capital Electric Co.* 178 Ill. 29, 43 L. R. A. 645, 52 N. E. 973; *Sterling's Appeal*, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105. The plaintiff in error has here a right of way over certain property belonging to the city,—that is to say, he has an easement in certain real estate,—and the action of the city in taking possession of his embankment and making it a part of the public highway obstructs such easement, and therefore equity has jurisdiction to enjoin such obstruction, inasmuch as the injured party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101; *Carpenter v. Capital Electric Co.* 178 Ill. 29, 43 L. R. A. 645, 52 N. E. 973. It is well settled that, where a right of way is obstructed, or an easement is interfered

with, injunction will lie. *Chicago General E. Co. v. Chicago, B. & Q. R. Co.* 181 Ill. 605, 54 N. E. 1026; *O'Connell v. Chicago Terminal Transfer R. Co.* 184 Ill. 308, 56 N. E. 355; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

For the reasons above stated, we are of the opinion that the circuit court erred in sustaining the demurrer to the bill and dismissing the same for want of equity. Accordingly, the decrees of the Circuit Court is reversed, and the cause is remanded to that court with instructions to proceed in accordance with the views herein expressed.

Rehearing denied Oct. 4, 1900.

Caleb T. FRAZER, Impleaded, etc., Appt.,
v.

City of CHICAGO.

(186 Ill. 480.)

1. The depreciation of the value of real property caused by the establishment of a smallpox hospital in the neighborhood under statutory authority does not constitute a taking or damaging of private property for public use without just compensation within the meaning of Const. art. 2, § 13.
2. The establishment of a smallpox hospital by a city under statutory authority cannot, in the absence of carelessness or negligence or an abuse of the police power in any way, be a public nuisance, nor can it be a private nuisance unless it becomes such in its subsequent use or unwarranted operation.

(June 21, 1900.)

A PPEAL by complainant Frazer from a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover damages for an alleged injury to complainant's property by the erection of a smallpox hospital. *Affirmed.*

The facts are stated in the opinion.

Messrs. Miles S. Gilbert and William C. Gilbert for appellant.

Messrs. Charles M. Walker and Thomas J. Sutherland, for appellee:

The exercise of the police powers does not involve liability on the part of the city, nor the nonexercise, nor the unreasonable exercise, of such powers. This is upon the theory that whatever damage may result from the exercise of its police powers by a municipality is at once compensated by the general benefits which such exercise is intended and calculated to secure, and also upon the theory that the city cannot be put into a po-

NOTE.—For Injunction against maintenance of pest house, see *Baltimore v. Fairfield Improvement Co. (Md.)* 40 L. R. A. 494.

As to liability of city for damages caused by such establishments, see *Clayton v. Henderson (Ky.)* 44 L. R. A. 474.

As to power of municipal corporation to provide pest house, see *Thomas v. Mason (W. Va.)* 26 L. R. A. 727, and *note*.
51 L. R. A.

sition of constant risk in and about the exercise or nonexercise of such powers.

The injury, if any, suffered by plaintiff is general to the whole community, and of the same kind, and only differs in degree, as to the property of different persons, as their property is further removed from the hospital, and hence its location gives no right of action to anyone.

Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473; *Little v. Lincoln*, 106 Ill. 353; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395.

This placing of the hospital at the point named was the exercise of the police power, and hence no liability arises therefrom.

Arms v. Knoxville, 32 Ill. App. 604; *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480; *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; 2 Beach, Pub. Corp. chap. 30, §§ 1248, 1249; *Train v. Boston Disinfecting Co.* 144 Mass. 529, 11 N. E. 929; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha*, 47 Neb. 564, 41 L. R. A. 481, 66 N. W. 624; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Coates v. New York*, 7 Cow. 585; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The establishment of the smallpox hospital was as much the exercise of the police power as the establishment of a pound-house.

New Orleans v. Kerr, 50 La. Ann. 413, 23 So. 384; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71.

The city has the right by reason of its police power to forbid the slaughtering of cattle except within certain limits.

18 Am. & Eng. Enc. Law. 748; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

It also has the power to fix the limits within the city, where such business may be carried on.

Villavaso v. Barthet, 39 La. Ann. 247, 1 So. 599.

It may also control the location of cemeteries.

18 Am. & Eng. Enc. Law, p. 749; *Sohier v. Trinity Church*, 109 Mass. 1.

If the location of slaughterhouses and of burying grounds should incidentally injure neighboring property, no right of action would arise on behalf of such property owners.

Nor does the Constitution of Illinois, which provides that private property shall not be damaged for public use without just compensation, in any way apply to such damage as is caused by the just exercise of the police power.

Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Boston & M. R. Co. v. York County*.

Comrs. 79 Me. 386, 10 Atl. 113; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25,*24 L. ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Chicago v. Union Bldg. Asso.* 102 Ill. 394, 40 Am. Rep. 598.

There is no complaint of a nuisance, as the property of plaintiffs is vacant and unoccupied. But even if occupied by buildings the rule would not be changed.

Arms v. Knoxville, 32 Ill. App. 604; *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480; *Sedgw. Stat. & Const. Law*, 435.

All property and persons in the state are subject to be affected by the exercise of the police power.

Culver v. Streator, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810; *Arms v. Knoxville*, 32 Ill. App. 604; *Blake v. Pontiac*, 49 Ill. App. 543; *Pennsylvania R. Co. v. Braddock Electric R. Co.* 152 Pa. 116, 25 Atl. 780; *Tiedeman, Pol. Power*, p. 12; 1 Dill. Mun. Corp. p. 212; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 02 Am. Dec. 625; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Campfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; 2 Beach, Pub. Corp. chap. 30, § 1248; *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480; 2 Hare, Am. Const. Law, 766; *Anderson, Law Dict. title Police*; *Sedgw. Stat. & Const. Law*, 435; *Tiedeman, Pol. Power*, 12; *Potter's Dwarr. Stat.* 458; *Rancroft v. Cambridge*, 126 Mass. 438; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 26 Atl. 122, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha*, 47 Neb. 549, 41 L. R. A. 481, 66 N. W. 624; *New York Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Coates v. New York*, 7 Cow. 585.

The exercise of the police power by the city, being a governmental function, can raise no liability against such city, either in favor of private corporations or individuals.

Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Phillips, J., delivered the opinion of the court:

Appellants brought suit against the city of Chicago, seeking to recover for damages to their property by reason of the erection, maintenance, and intended maintenance by it of a smallpox hospital on property belonging to the city, situated on the east side of Lawndale avenue, within the city. The property of plaintiffs is unimproved, and is situated on the west side of Lawndale avenue, between West Thirty-Third and West Thirty-Fifth streets, and is directly opposite 51 L. R. A.

blocks 7 and 8 in Cass's subdivision,—property owned by the city, on which it built its hospital, which was opened for use December 10, 1896; said property being acquired by the city, and said smallpox hospital being erected, after plaintiffs acquired title to their lands on the west side of Lawndale avenue. Plaintiffs' declaration consisted of five counts, and, without giving the substance of each count in detail, charges that the hospital was erected within 50 feet of, and facing, Lawndale avenue; that the hospital has received, in the two years since it has been opened, 100 smallpox patients; that Chicago has a population of 2,000,000; that there are annually a large number of people afflicted with the disease known as "smallpox;" that the maintenance of this hospital for the purpose of isolating those so afflicted has damaged, and will greatly damage, plaintiffs' lands, in a way not common to the general public; that smallpox is a highly contagious disease, and nearness of the hospital frightens persons, and renders plaintiffs' property much less adapted for investment purposes, and limits the use which plaintiffs might otherwise make of their lands; that such acts of the defendant constitute a permanent injury for the benefit of the public, within the meaning of the section of the Constitution prohibiting the damaging of private property for public use without compensation, and unreasonably limit the use to which plaintiffs' lands might be put, whereby plaintiffs have sustained special damage not common to the general public; that it became necessary to collect all persons afflicted with smallpox into one place, to guard against the spread of the disease, and to facilitate treatment, and the collection of such patients at the place described renders ingress and egress to and from plaintiffs' property upon and over Lawndale avenue (by which public highway alone egress and ingress were then and are now possible) unsafe and dangerous to travel upon foot or in carriages or other vehicles, and greatly interferes with the private property rights which plaintiffs, as owners of land adjoining said highway, have as appurtenant to their premises, rendering said land much less adapted for investment purposes, for leasing, and for subdivision into city lots, for building sites, for the erection of dwellings for rent, and much less suitable for manufacturing sites and for residence, and that thereby the market value of plaintiffs' lands has been and is greatly decreased, to wit, \$15,000. A general demurrer to the declaration was sustained, and, plaintiffs electing to stand by their declaration, judgment was entered dismissing the suit, and against plaintiffs for costs, to reverse which this appeal is prosecuted.

Appellants contend that the acts set forth in their declaration constitute a taking or damaging of private property for a public use, within the intent and meaning of § 13 of article 2 of the Constitution, providing that private property shall not be taken or damaged for public use without just compen-

sation. The position of the appellee is that, a necessity existing for the establishment of a smallpox hospital, it was within the police power of the city to locate the same on its own property, and that any loss suffered by the plaintiffs is *damnum absque injuria*, or that, in contemplation of law, the loss sustained by the plaintiffs is compensated for in the benefits received thereunder, and that no compensation can be had for the injuries sustained. The case at bar presents no taking of private property. Neither is there a physical injury. Nor does it fall within that class of cases where, notwithstanding there has been no taking or physical injury, together with resulting damages, yet the intrinsic value of the property is lessened by reason of access being interfered with or its accessibility is prevented or impaired. The real injury alleged, and for which plaintiffs seek a recovery, is the menace to the health of the inhabitants in the vicinity of the hospital, or, rather, to those inhabitants who in the intended future use of plaintiffs' property might become residents in the vicinity thereof, and who, by reason of its location, would be deterred from purchasing plaintiffs' property, and the consequent loss in the speculative value thereof. Neither does it appear from the declaration that the city has been careless or negligent in the maintenance of the hospital, or that by reason of any act of omission or of commission on the part of the city it has become a nuisance to any greater extent than is inherent to the location and use of such an institution. Counsel for appellants, in their brief, state: "We are not here complaining of any negligence of the city. We assume that the pest house is rightfully located and well conducted." The demurrer admits the facts well pleaded in the declaration. Does the declaration set forth a cause of action? The 27th clause of § 1 of article 5 of the city and village act expressly gives power to the city "to erect and establish hospitals and medical dispensaries, and control and regulate the same." The establishing of this smallpox hospital was therefore clearly within the police power of the city, and it is clear, therefore, that in the absence of carelessness or negligence, or of an abuse of that power in any way, the hospital could not be a public nuisance. Nor could it be a private nuisance unless it should become such in its subsequent use or unwarranted operation, having in view the peculiar conditions under which it was established and maintained. In *Rigney v. Chicago*, 102 Ill. 64, this court said (page 80): "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*." In *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, the court said: The distinction is 51 L. R. A.

well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. In the one case no private action lies unless it be expressly given; in the other there is an implied or common-law liability for the negligence of the officers in the discharge of such duties. In *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480, the court, in speaking with reference to the police power, said: "Municipal corporations have exercised this power *eo nomine* for time out of mind, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the Constitution presupposes the existence of the police power, and it is to be construed with reference to that fact." In *Sedgwick on Statutory & Constitutional Law* (p. 435) it is said: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Appellants concede the well-settled rule that private property, itself a nuisance and obnoxious to the health or safety of a community, may be abated by a municipality, under its police power, without being liable for resulting damage to the owner thereof, but insist that this case presents a condition where private property, itself unoffending, and owned and acquired without any infringement of the property or personal rights of others, has been injured to a degree greater than the property of others so held and owned by them, and that the guaranty of the Constitution that private property shall not be damaged for public use without just compensation therefor applies. Conceding that the declaration shows special injury to the appellants in excess of that shared by them with the general public, it could only be under this constitutional provision that a recovery could be here maintained. The law is well settled that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with

the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it. *Rigney v. Chicago*, 102 Ill. 64. In support of appellants' contention that the acts complained of here are actionable under our Constitution, reliance is placed, among other cases, on the *Rigney Case*, 102 Ill. 64; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; and *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138. There is a marked difference in the use by a city of its property carefully, prudently, and without negligence, in the reasonable exercise of its police power, and that of the change of grade of streets, the building of a viaduct, the closing of a street or alley, or the inconvenience caused by the use and operation by a railroad company of its property. In the case of the change of grade the measure of damages allowable is the difference in the value of the property before and after the making of the improvement, taking into consideration the increased value of the improvement to the property itself. Nor, as above indicated, can there be any recovery for damages sustained, shared by the public in common. Supposed damages growing out of the proper exercise of the police power must be considered *damnum absque injuria*, in the theory of the law that the plaintiff is compensated for the injury sustained by sharing in the general benefits which are secured to all by reason thereof. As stated by Dillon in his work on Municipal Corporations (vol. 1, § 141, p. 212): "Every citizen holds his property subject to the proper exercise of this [the police] power, either by the state legislature directly, or by public or municipal corporations, to which the legislature may delegate it. . . . It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. . . . If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

But, finally, appellants contend that it is an unreasonable, unusual, and extraordinary use of property to utilize it for the segregation of contagious diseases, and cite in support thereof *Kobbe v. New Brighton*, 20 Misc. 477, 45 N. Y. Supp. 777; *Baltimore v. Fairfield Improvement Co.* 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081, and *Com. v. Alger*, 7 Cush. 86. Under the express delegation of power by the legislature, we cannot hold that the application of property for the use of a smallpox or other hospital is such an unusual or unreasonable use of property as would take it out of the police power of the city, so as to render it liable for such application, when, as here, it is conceded that the pest house is rightfully located and well conducted. In the case of *Baltimore v. Fairfield Improvement Co.* 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081, the 51 L. R. A.

complainants sought by injunction to restrain the city of Baltimore from placing and keeping on a 20-acre tract of land owned by the city a woman afflicted with leprosy, which land of the city adjoined lands of the complainants. There is a wide difference between the establishing and maintaining of a hospital for the treatment of disease, and in appropriating a piece of property for the keeping of a single patient by an unskilled laborer and his family, having no knowledge of the disease of leprosy, with which the patient was afflicted. The facts appearing in that case might well have justified the interference by the court, by injunction to restrain the use, having reference to all the surrounding conditions, and yet not militate against the view we have taken, that annoyance or damage resulting from the rightful location and proper conducting of the hospital in question offers no basis for relief in damages. As was said in that case: "The evidence shows . . . that the health authorities propose to place this woman in the charge of a laborer and his wife. . . . They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed." In commenting on the right to the exercise of the police power, the court, with reference to an unreasonable exercise thereof, says: "Whatever immunity a municipality may have in exercising a public as contradistinguished from a strictly corporate power, it does not result from some collateral act, or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor the necessary result of an exercise of the power to build a hospital, but, if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act." And this case recognized the doctrine that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result of the doing thereof, no redress can be had. The court says: "The statute law of this state confers upon the mayor and city council plenary power to establish, both within and beyond the city's limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases. . . . The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it in the exercise of the police power of the state is beyond question or controversy. Within the scope of the power thus granted, the whole authority of the state is included and delegated. *Harrison v. Baltimore*, 1 Gill. 264. And, therefore, whatever the state may directly do in furtherance of these

objects the municipality clothed with the delegated power from the state may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly, and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity, and rests upon the state's sovereignty; but it cannot,—or, at all events, will not, in the absence of an explicit legislative declaration,—be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property of an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance." We can see no difference, in principle, between the right of a city to establish and maintain a smallpox hospital, and to erect and use jails, fire-engine houses, calaboosees, and the like. Greater care might be required in the maintenance of one than the other, and different considerations would undoubtedly enter into the selection of a site of a pest house than of the fire-engine house or jail; but the city would be liable only for an abuse of authority or an unwarranted exercise of discretion in locating or maintaining the same, having reference to the present necessities, the crowded condition of the locality in which they are placed or maintained, and other pertinent facts and circumstances. The declaration does not seek to charge any act of omission in this regard.

The demurrer was properly sustained, and the judgment of the Circuit Court of Cook County is affirmed.

Rehearing denied October 9, 1900.

Ludwig C. EWERTSEN, Impleaded, etc.,
Appt.,
v.

Erich GERSTENBERG et al.

(186 Ill. 344.)

1. A purchaser of a lot with notice of restrictions in the original plat of the lands, which was referred to and made a part of a deed in the chain of title, and has been constantly recognized by the different lotowners as a common source of title, is not released from the binding force of the restrictions merely because they are not expressly reserved in the conveyance to him or in others of the deeds in his chain of title.
2. An encroachment of a building upon a space reserved for a courtyard in a plat of city lots will not be pre-

NOTE.—For restrictions as to buildings upon land dedicated, see also *Chicago v. Ward* (Ill.) 38 L. R. A. 849.

For restrictions in deed as to building line, see *Clapp v. Wilder* (Mass.) 50 L. R. A. 120. 51 L. R. A.

vented by injunction, when all others who have constructed buildings on the same side of the block have encroached on such space, though to a less extent, and without any attempted hindrance on the part of the complainants, while it seems clear that the character of the property is somewhat changed, and it is being used to a large extent for business purposes, even if the complainants' lots are still vacant.

3. The limit of encroachment previously made by other buildings on a space reserved for courtyards on a common plat will not be taken as the limit beyond which a new building will be prevented from extending upon such space, where there has been no uniform limitation adopted or acquiesced in in lieu of that originally fixed by the plat, while, by general consent or acquiescence, that has been so far abandoned, and the reserved space so far appropriated to other uses, as to make it inequitable to enforce the restriction by injunction against the owner of the new buildings.

(June 21, 1900.)

A PPEAL by complainant Ewertsen from a decree of the Superior Court for Cook County in favor of plaintiffs in a suit to enjoin the placing of a building within 30 feet of a public street in violation of a restriction contained in the title deeds. *Reversed.*

The facts are stated in the opinion.

Messrs. Hamline, Scott, & Lord and George W. Hess, for appellant:

It does not appear from the evidence that there was any restriction attaching to the lots owned by Ewertsen against building to the lot line.

A restriction or limitation upon property conveyed in fee must be made out by proof of facts of the most convincing character.

Hutchinson v. Ulrich, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556; *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687.

The complainants rely upon the plat of Wrightwood. That plat, having been executed and acknowledged by an attorney in fact, at a time when the act of 1833 was in force, was a nullity.

Gosselin v. Chicago, 103 Ill. 623; *Rusk v. Berlin*, 173 Ill. 634, 50 N. E. 1071; *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602.

A private easement in one tract of land in favor of another can only be acquired by grant, and where there is any doubt as to the restriction so claimed it will be resolved against the grantor and in favor of the owner of the fee.

Tinker v. Forbes, 136 Ill. 231, 26 N. E. 503; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Deater v. Tree*, 117 Ill. 532, 6 N. E. 506.

The fact that restrictions were contained in the deed from Case's devisees to the complainants, but were not contained in the deeds to Ewertsen, is evidence that it was not intended that a building line should be adhered to.

Clark v. McGee, 159 Ill. 518, 42 N. E. 965; *Child v. Douglas*, 2 Jur. N. S. 950.

Even though the existence of these restric-

tions were clearly established by the evidence, injunction would not follow as of course.

The court will be guided by the same rules as would apply to bills for specific performance.

Chicago, B. & Q. R. Co. v. Reno, 113 Ill. 39; *Chicago & A. R. Co. v. Schoeneman*, 90 Ill. 258.

The court, having found that the building line had been abandoned, had no power to create arbitrarily a new and different one.

The alleged reservation was a space to be used solely for court yards, and it was not to be built upon. Covered porches and steps of solid masonry are violations of this restriction; and on Orchard street, adjoining the complainant's property, such projections are built nearly to the street.

Reardon v. Murphy, 163 Mass. 501, 40 N. E. 854; *Ogonts Land & Improv. Co. v. Johnson*, 168 Pa. 178, 31 Atl. 1008; *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786; *Atty. Gen. v. Algonquin Club*, 155 Mass. 128, 29 N. E. 209; *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961.

There was such change in the environment as made the granting of the injunction inequitable and unjust.

Bedford v. British Museum, 2 Myl. & K. 552; *Sayers v. Collyer*, L. R. 24 Ch. Div. 180; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *DeGray v. Monmouth Beach Club-house Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691; *Bangs v. Potter*, 135 Mass. 245; High, *Inj.* § 1158; 1 Jones, *Real Prop.* § 613; *Star Brewery Co. v. Primas*, 163 Ill. 462, 45 N. E. 145.

It is not necessary that the change in environment shall be on the street where complainants' property is situated.

Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365.

Injunction should not be granted where it would not benefit the complainants, but would seriously oppress the defendant.

Ooughlin v. Barker, 46 Mo. App. 54; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Sayers v. Collyer*, L. R. 24 Ch. Div. 180; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Bangs v. Potter*, 135 Mass. 245.

Messrs. Lackner, Butz, & Miller and Major McGregor for appellees.

Carter, J., delivered the opinion of the court:

Upon the final hearing of the issues made upon the bill filed by the appellees, the superior court entered a decree in substance as follows: "That the defendant Ludwig C. Evertsen is the owner of lots 1 and 2 in block 1, in Jerome I. Case's subdivision of the north 418 feet of outlet F in Wrightwood, being a subdivision of the S. W. ¼ of section 28, township 40 N., range 14 E. of the third P. M., in the city of Chicago, county of Cook, and state of Illinois; that complainants are the owners in fee simple 51 L. R. A.

of lots 29 and 30 in said block 1, which are unimproved by buildings of any description; that the remaining defendants are interested in the subject-matter of this suit substantially as set forth in the bill of complaint; that defendant Ludwig C. Evertsen was at the time of the commencement of this suit about to begin the erection of, and since the commencement of this suit has begun and partially erected, a building upon said lots 1 and 2; that a part of said building has been erected upon the east 18.9 feet of said lot 1; that complainants are entitled to an easement for air, light, and prospect in said east 18.9 feet of said lot 1, which easement requires that the east 18.9 feet be reserved and appropriated for a court yard, and shall not be built upon. It is therefore ordered that defendant Ludwig C. Evertsen and other defendants be restrained from proceeding with the erection of that portion of said building which rests upon said east 18.9 feet of said lot 1. It is further ordered that Ludwig C. Evertsen remove all that part of said building now resting on said east 18.9 feet of said lot 1, and that the defendant Ludwig C. Evertsen and all other defendants be perpetually enjoined from building upon said east 18.9 feet of said lot 1." The subdivision Wrightwood was made in the year 1860, and the map or plat thereof was recorded in the recorder's office of Cook county on November 26th of that year. Said outlet F was a part of said subdivision, and contained 17.27 acres. On the plat of said outlet and others contained in the said subdivision, lines were drawn 30 feet inside of, and parallel with, the boundary lines of such outlots. The certificate of the owners to said plat of said lands stated that "said parties certify that they have mapped and platted the same, as on the above map represented, into outlots, blocks, and lots, with avenues, streets, and courts as above shown, and that all the deeds or other conveyances of any part of said lands and premises heretofore made and hereafter to be made by them, or either of them, referring to any map or plat of the premises above platted, or any part thereof, had and shall have reference to the above plat or map, and to future subdivisions of the same. All the spaces between the front lines of the lots and blocks and the blue lines drawn, respectively, 30 and 50 feet back from the margins of the streets, avenues, and courts, are reserved and appropriated solely for court yards, and are not to be built upon." Afterwards in the same year, the owners of said Wrightwood addition made a partition deed, by which deed Timothy Wright, one of the part owners, became the sole owner in fee simple of said outlet F. Reference was made to said map or plat of Wrightwood in said deed, and it was declared to be subject to the provisions of said plat, and to the certificates thereto, regulating courts and court yards and the use thereof. In 1891 Jerome I. Case, then being the owner of the north 418 feet of said outlet F, made a subdivision

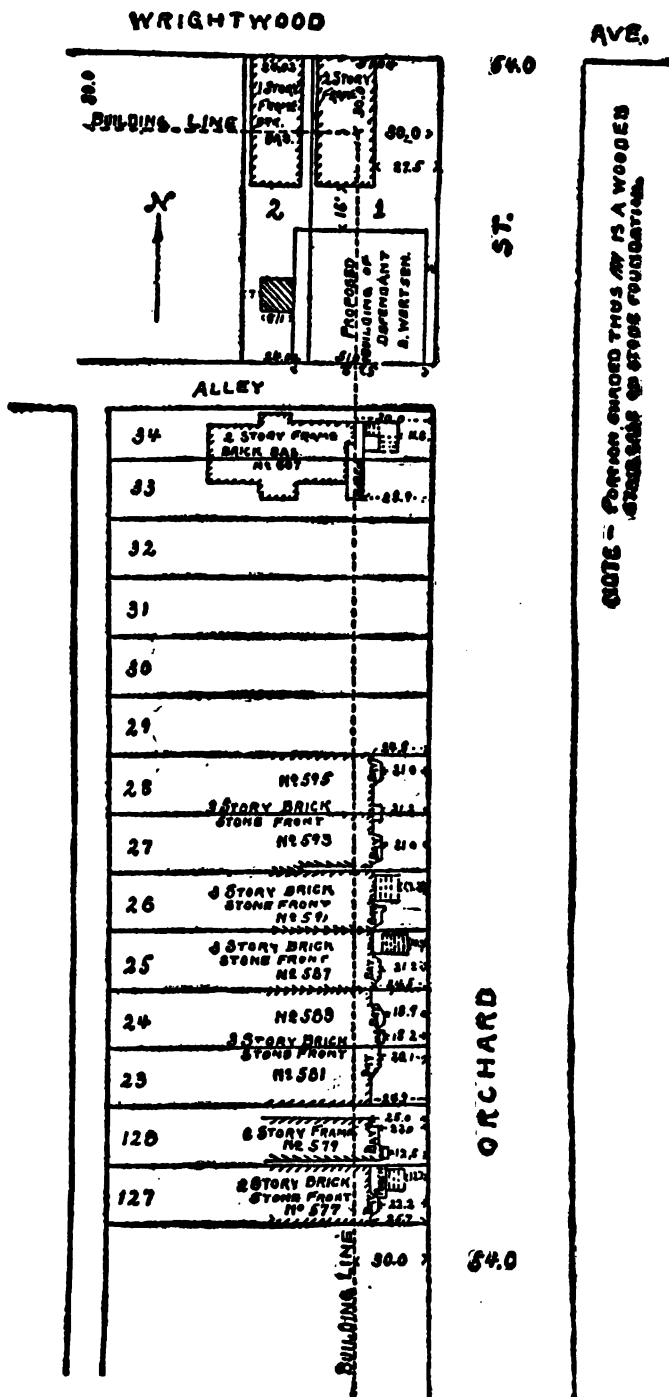
of the same into lots, blocks, streets, and alleys, and made and recorded a plat thereof, with a line drawn thereon marked "Building Line," 30 feet within and from the outside or street lines of such lots, in the same manner and at the same places as indicated upon the plat of said outlot F as shown in the original addition. The plat on the following page shows most of the east half of block 1 of said Case's subdivision, the building line, the location of buildings on certain lots, and the buildings of Ewertsen, the construction of which was enjoined by the decree. It also shows the encroachments which have been made upon the building line, and upon the space between such line and the street which had been set apart for a court yard, on the west side of Orchard street, and a part of Wrightwood avenue.

The defendant Ewertsen, the owner of lots 1 and 2, and the complainants, the owners of lots 29 and 30, as well as other owners of lots in said block 1, derived their titles by mesne conveyances from Jerome I. Case, who derived his title by mesne conveyances from Timothy Wright. The deeds in the chain of title to complainants' said lots provided, in substance, "that a space of 30 feet in depth along the east line of said lots 29 and 30, and fronting on Orchard street, shall never be built upon or in any manner obstructed or incumbered by buildings of any description, but shall be forever left and reserved an open area or space, in accordance with the lines shown upon a plat of the subdivision," etc.; referring to said original plat. Some of the deeds to the other lots, from 23 to 34, inclusive, contained similar provisions, but no such provision, nor any reference to any building line, was contained in any deed in the chain of Ewertsen's title to lots 1 and 2, except the provisions in said partition deed and in said plats and their certificates, and except what may be properly implied from references in other deeds made to the plat; and the first contention of appellants is that said restriction as to the building line and the open space between that line and the street does not apply to said lots 1 and 2, and that Ewertsen had the lawful right to build to the street line. The building Ewertsen began to construct was to be an apartment building, three stories high, of brick and stone, fronting on Orchard street, 4 feet from the street line, and extending back upon the rear ends of said lots 1 and 2. As shown by the above plat, it extended over the building line 26 feet. If it were put back to the building line, or even to a line 18.9 feet from the street, as decreed by the court below, there would not be sufficient depth to the two lots east and west for the building as planned. That fact would be immaterial, however, if the alleged restriction is binding upon Ewertsen, as the owner of said lots, or constitutes an easement in said lots in favor of the other lot-owners. But was any such restriction in the use of said lots 1 and 2 imposed or created by said plats and partition deed, and 51 L. R. A.

reference thereto in the deeds in Ewertsen's chain of title, as alleged by the complainants? We are of the opinion that there was. As said, however, in *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556: "Where real property is conveyed in fee, restrictions in the use are not favored; but, where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grantee, courts will enforce the same." And we there further said: "All doubts must be resolved in favor of natural rights, and against restrictions thereon. . . . In the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions."

It is not necessary to consider the point made by the appellants, that the original plat, having been acknowledged by an attorney in fact and not by the owners, could not, under the law as it then was, create any legal restrictions upon the use of the property; for we are satisfied from the evidence that this plat was referred to and made a part of the partition deed and subsequent conveyances, and has been constantly recognized by all the lot owners as a common source of title, and that Ewertsen had notice of it and of said restrictions, and is now bound by them, unless these restrictions have ceased to exist, or are no longer enforceable against him or his said lots, in equity, for reasons hereinafter stated. His property was not relieved from their binding force merely because they were not expressly reserved in the conveyance to him, or in others of the deeds in his chain of title. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. 236; *Smith v. Heath*, 102 Ill. 130; 5 Am. & Eng. Enc. Law, 2d ed. § 10.

Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Coughlin v. Barker*, 46 Mo. App. 54; *Bedford v. British Museum*, 2 Myl. & K. 552; *Sayers v. Collyer*, L. R. 24 Ch. Div. 180; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Jackson v. Stevenson*, 166 Mass. 496, 31 N. E. 691; *Bangs v. Potter*, 135 Mass. 245; *High, Inj.* § 1158; *Columbia College v. Thacher*, 51 N.



Y. 311, 41 Am. Rep. 365. These several grounds for denying equitable relief, applicable to the case at bar, will be considered without reference to the separate heads under which counsel have classified them.

It is apparent, as claimed by counsel for appellants, that the restrictions as to building were imposed, and the spaces for court yards were reserved, in order that the property might be better adapted and made more desirable for residence purposes. We cannot suppose that the owners would plat lands with a view to their use for business purposes, and impose restrictions of such a character as to make them practically unfit for such purposes; and while the lot-owners, by observing such restrictions, might maintain them and the general residence character of the property, still, if they did not do so, but yielded to the advancing pressure of trade, and violated and disregarded the restrictions, and built upon the reserved court yards, it is plain to be seen that such restrictions might, in the lapse of time, not only cease to be of any value whatever, but become a mere hindrance to the proper use of the property, and an annoyance to the lotowner. It is not intended, of course, to be said that the use of the property in question in this case has changed to the extent mentioned; but the facts as agreed upon show that much of the property in the vicinity of the lots here in question is now used for business purposes,—that is, for stores and buildings of that character. It is clear from the agreed facts that the restrictions as to building with reference to the building line established by the original plat, and as to building upon the space reserved for court yards, have not generally been regarded by the lot-owners. It is agreed that the lots fronting on the south side of Wrightwood avenue, from Orchard street to the next street west, all of which were subject to the same restrictions as those fronting on Orchard street, have been improved by the erection thereon of business buildings which extend to the street line, and over and upon the whole of the 30 feet reserved for court yards. Ewertsen's lot 1 is on the corner of Wrightwood avenue and Orchard street, and fronts north on said avenue, and his lot 2 is next west of lot 1. Upon lot 1 and the west part of lot 2, fronting on Wrightwood avenue, business buildings, have been erected (as many others have been on that street) extending substantially to the street line, leaving about 25 feet of the front of the corner lot unoccupied; and it is upon the rear of these lots, extending south along Orchard street, that Ewertsen was proceeding to erect his apartment building, fronting east on Orchard street, when restrained by injunction in this case. It is apparent that not only as to Wrightwood avenue, on its south side, but as to many other of the streets of this addition, which need not be referred to further, the character and uses of the property had in some instances completely, and in others partly, changed from

51 L. R. A.

residence to business property, and by common consent or acquiescence of the lotowners the reserved court yards had been abandoned, and the space reserved for them appropriated to the same uses as the rest of the property. A two-story building, used as a store, had been erected on the northwest corner of Wrightwood avenue and Orchard street, only 18 feet north of the north line of the avenue, and a public-school building belonging to the city had been erected on the northeast corner, extending to the Orchard street line. On the opposite side of Orchard street from Ewertsen's proposed apartment building, but 25 feet southward, towards complainants' lots 29 and 30 (but being on the east side of the street), there had been erected a large three-story apartment building, with stone front, only 3 feet from the east line of Orchard street. It is also agreed that the eight lots immediately (in consecutive order) south of the complainants' lots, and fronting the same way on Orchard street, have been improved with large two and three story residences, the fronts of which extend over said building line and upon said space reserved for court yards from 7 to upwards of 11 feet, besides the space occupied by porches, stoops, and steps. The plat above shows the extent of these encroachments. Orchard street has not, as yet, except as above stated, and except as to certain corners, been devoted to business uses. The evidence shows that one of the complainants, owning said vacant lots 29 and 30, has lived only a block and a half from that part of Orchard street for ten years prior to the trial below, during which time the public-school building, the apartment building, and the other buildings on that street which had been constructed over said building line and upon the space reserved for court yards have been erected, and that he never took any steps to prevent the obstruction of such court yards, or to preserve the easement which he now asserts he has in such spaces, as owner of lots 29 and 30.

While the facts show that there are many buildings having their fronts 30 feet back from the street line, we find no evidence, either in the testimony or in the agreed facts, of any uniform observance by the property owners, or of any number of them, of the alleged building line, or of any other, or of the right of the lotowners to keep unobstructed the said spaces so reserved for court yards, but there was evidence to the contrary. Under these circumstances, ought a court of equity to enjoin Ewertsen from encroaching with his building upon said space, when all others who have constructed buildings on that side of the block have done so, though to a less extent, perhaps, than he seeks to do, and without any attempted hindrance on the part of the complainants? We are of the opinion that it would be inequitable to grant such relief. To construct this building fronting on Orchard street would no more injuriously impair the alleged easement than to construct

a store building on the corner of the same lot fronting on Wrightwood avenue, which on that side is already appropriated to such business purposes, and the easement there wholly abandoned. Other corners of Orchard street with cross streets have been built upon and devoted to business uses, and it seems clear that the character of the property at such corners has changed from that of residence to that of business property, and such lots have to a large extent been actually appropriated to business purposes. While the action of the property owners on Wrightwood avenue alone would not bind the property owners on Orchard street, so as to deprive them of the beneficial use of the court yards upon their street, had they been there preserved, such action is important as showing a general change in the character and uses of the property in the vicinity subject to the same restrictions, and, in connection with the disregard thereof by the property owners on Orchard street, as showing an abandonment of such restrictions. It certainly cannot be contended that all other lotowners could disregard the restrictions, and invade and build upon said open space to the extent that suited their own interests, convenience, or pleasure, and thus destroy the beneficial interest of the appellant therein, and still retain the equitable right to enforce such restrictions against him.

If it be said that the property owners on Orchard street, who have disregarded the building line, and appropriated to their own unrestricted use so much of the space so set apart for a court yard as they desired, by building thereon, have not joined in the bill, and that the complainants' lots are vacant and unoccupied, still it is shown that one of the complainants resided in the immediate neighborhood, and that they were the owners of the lots in question while these encroachments were being made; that they are chargeable with knowledge of them, and took no steps to preserve from destruction by others the restrictions they now seek to enforce against the appellant. We think the complainants should be held to have acquiesced in what has been done, and to occupy no better position now than other lotowners. The building on lot 28, next south of complainants' property, extended 9 feet over the building line, and left but 21 feet of said open space unobstructed. Other buildings, in consecutive order, adjoining on the south, encroached still more; one leaving but 18.9 feet of said space unobstructed by its walls. Complainants acquiesced in these encroachments, notwithstanding the buildings were nearer to their said lots than appellant's building will be when constructed. The court below clearly recognized the inequity of compelling the appellant to reserve the full 30 feet in front of his said building, when other lotowners had appro-

priated to their own use, some one third, and others the whole, of such space in front of their premises, by building upon it, destroying altogether its uniformity, and to a great extent its value, and decreed that appellant should reserve 18.9 feet of said space unobstructed, for such court yard. The only basis for fixing this precise limit was that, disregarding porches which had been built on this space to houses on the west side of Orchard street, the nearest approach of any house to the street was 18.9 feet; and it is argued that that much of the court yard remained unobstructed and unaffected. We do not regard the evidence as being sufficient to authorize the court to establish such a new restriction or limitation. There was no uniform limitation adopted or acquiesced in when the one originally prescribed had been abandoned. We do not mean to say that an easement abandoned in part will be held as abandoned altogether; for where it is abandoned *pro tanto* only, and a material and beneficial part remains, it will be protected. But, while such restrictions are sometimes treated as easements, it is apparent that the value of a restriction of this character depends very largely on the uniformity of its observance in the improvement of property affected by it. In the case at bar it cannot be said that there has been any uniform observance of the restriction in the vicinity of the property in question affected by the restriction, and we are of the opinion that the value of the easement—treating it as such—for all practical purposes has been destroyed. As to the property of appellant, the restriction would seem to have become of no value whatever, and it would be a great hardship to enforce it against him, when all corresponding benefit has been taken away from him by the action of others, when to so enforce it would destroy the beneficial use of his property, and confer no substantial benefit on other property owners or the complainants. In other words, we are of the opinion that the restrictions against building, so far as they affect this part of Orchard street, have by the general consent and acts of the property owners, acquiesced in by the complainants, been so far disregarded and abandoned, and the reserved space so far appropriated to other uses, as to make it inequitable to enforce them against appellant in the use of his said lots. The most that can be claimed for complainants is that their right to enforce the restrictions in equity is doubtful; but as we have seen, all such doubts should be resolved against restrictions of the free use, for lawful purposes, of property in the hands of the owner in fee.

The decree will be reversed, and the cause remanded, with directions to dismiss the bill.

Rehearing denied October 4, 1900.

51 L. R. A.

MARYLAND COURT OF APPEALS.

Henry F. WINGERT, *Appt.*,

v.

Laura K. ZEIGLER.

(91 Md. 318.)

The omission of a revenue stamp required by act of Congress of June 13, 1898, by mere inadvertence, from an assignment of a mortgage, does not make the assignment void or defeat the title of a purchaser on foreclosure, where the necessary stamps are affixed and canceled by an internal revenue collector after the sale.

(June 14, 1900.)

A PPEAL by the assignee of a mortgage from a decree of the Circuit Court for Washington County setting aside a sale by him of the mortgaged property under a power contained in the mortgage upon the ground that the assignment was invalid for want of an internal revenue stamp, and that therefore he had no authority to make the sale. *Reversed.*

The facts are stated in the opinion.

Mr. Henry F. Wingert, in propria persona:

The provision of the United States statute that no instrument or document not duly stamped as required by the internal revenue laws of the United States shall be admitted or used in evidence in any court until the requisite stamps have been affixed thereto applies to courts of the United States.

Carpenter v. Snelling, 97 Mass. 452; *People ex rel. Barbour v. Gates*, 43 N. Y. 40.

The various acts of Congress, imposing duties for internal revenue, all provide for restoring the validity of instruments by affixing a stamp and canceling the same before offered in evidence, and such instrument shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued.

Cooke v. England, 27 Md. 14, 92 Am. Dec. 618; *Dowler v. Cushman*, 27 Md. 354.

An innocent omission to stamp an instrument will not render it inadmissible in evidence if subsequently stamped in compliance with the law.

Tobey v. Chipman, 13 Allen, 123.

Written instruments requiring an internal revenue stamp are not null and void, unless the omission to stamp was with intent to evade the act of Congress.

Ibid.; *Govern v. Littlefield*, 13 Allen, 127, note; *Willey v. Robinson*, 13 Allen, 128, note; *Black v. Woodrow*, 39 Md. 194; *Carson v. Phelps*, 40 Md. 73.

In the absence of clear affirmative proof,

NOTE.—As to effect of omission to stamp an instrument on which the law requires a stamp, see *Knox v. Ross* (Nev.) 48 L. R. A. 805, and note.

As to effect on criminal prosecution of omission of stamp from instrument, see *Thomas v. State* (Tex. Crim. App.) 46 L. R. A. 454, and note.

51 L. R. A.

fraudulent intent to evade the law will not be presumed.

Carson v. Phelps, 40 Md. 73; *Campbell v. Wilcox*, 10 Wall. 422, 19 L. ed. 974.

The law provided for supplying the defect by affixing a stamp; and the payment to the collector of the penalty prescribed by the act of Congress.

Cooke v. England, 27 Md. 28, 92 Am. Dec. 618; *Dowler v. Cushman*, 27 Md. 354; *Carson v. Phelps*, 40 Md. 73.

Mr. Alexander Neill for appellee.

Boyd, J., delivered the opinion of the court:

On the 14th of November, 1899, a mortgage was assigned to the appellant, Henry F. Wingert, who advertised the property under a power of sale contained in the mortgage, and on December 12, 1899, sold it to Laura K. Zeigler, the appellee. The sale was duly reported to the circuit court for Washington county, and exceptions were filed by the purchaser on the ground that at the time of the sale the assignment of the mortgage was not stamped as required by the United States revenue laws. On the 12th of January, 1900, the collector of internal revenue for the district of Maryland certified that, satisfactory evidence having been furnished him that the failure to affix and cancel stamps to denote the tax due at the time of the assignment was owing to inadvertence, and was not wilful, stamps of the proper value had been affixed and canceled by him, which certificate was noted on the original record by the clerk. The court below set the sale aside, and from that action this appeal was taken.

A question of importance, and one concerning which the courts differed in passing on former internal revenue laws of the United States, was referred to at the argument; that is, how far Congress has the power to declare invalid transfers of property, made in accordance with state laws, by reason of the fact that the instruments used in making such transfers were not stamped as required by the revenue laws of the United States. That has never been determined by this court, and we do not deem it necessary to do so now, but we only refer to it in order that we may not be understood, by what we hereinafter say in reference to the statute before us, as intending to concede that such power is vested in Congress under the Constitution of the United States. It will be time enough to pass on it when it becomes necessary, if that shall ever occur, and we do not now mean to intimate any opinion on the subject.

Section 13 of the act of Congress approved June 13, 1898 [30 U. S. Stat. at L. 448, chap. 448, § 13], entitled "An Act to Provide Ways and Means to Meet War Expenditures and for Other Purposes," provides "that any person or persons who shall register, issue, sell, or transfer, or who shall cause to be is-

sued, registered, sold or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect," etc. This is followed by some important provisions for the correction of failure to stamp, which will be referred to later on in this opinion, and will not now be stated. Schedule A includes assignments of mortgages, and, as we have seen, this assignment was duly stamped by the collector within twelve months, and his certificate was recorded by the clerk. None of the facts are disputed, and the only question, therefore, to be determined, is whether the subsequent action of the collector in stamping the assignment so corrected the effect of the omission to stamp it when made as to entitle the holder of the mortgage to have the sale ratified. No other objection to the validity of the sale is suggested, and it is not shown or even claimed that the fact that the assignment was not originally stamped in any way affected the price which the property brought. Indeed, that could not well have been attempted, as no one but the purchaser has objected to the sale, nor is it suggested that the rights of any other person have in any way intervened; and the real purpose of our inquiry must be whether the appellee would by the ratification of this sale acquire such title as she would have had if the assignment had been duly stamped when made.

In order to ascertain the scope of the act, and the effect of the failure to stamp an instrument included in it, such as the one before us, it will be necessary to examine carefully, and somewhat critically, the provisions of the statute. The only language used in it which in terms might seem to indicate the intention of Congress to wholly invalidate an instrument not stamped as required is the concluding clause of the portion of § 13 quoted above, which, after providing for the penalty, says, "and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect." That language of itself is undoubtedly open to the construction that it was intended by Congress to declare an instrument embraced by the law invalid and of no effect unless it is stamped,—at least, until it is properly stamped; but, in the connection in which it is used, there is another interpretation which can readily be given it, which is far more consonant with justice and the evident purpose of the law. It says "such" instrument, etc., and, when we look to see what "such" refers to, we

find it is an instrument that the person whose duty it was to stamp it has left unstamped "with intent to evade the provisions of this act." It is scarcely possible that Congress intended that one who deliberately and intentionally violated the law might escape by paying "a fine not exceeding fifty dollars," while one who was perfectly innocent of so doing should have his title deed or other valuable paper declared invalid and of no effect. Under the statute, it is the duty of the grantor in the deed, or the party issuing, selling, or transferring the instrument, document, or other paper, to affix the stamp; and, if the construction contended for be followed, a designing grantor, taking the chances of a prosecution, might impose on an innocent purchaser, whose title would be worthless, although he was absolutely free from any suspicion of wrongdoing or intention of evading the law. We cannot reach the conclusion that such was the intention of Congress, when we find the law itself to be so suggestive of the other interpretation. In *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339, Justice Gray reviewed the various acts of Congress on this subject, and cited authorities to show that the provision, "and such instrument, document or paper shall be deemed invalid and of no effect," required a reference to the previous provisions in the section to ascertain the meaning of the word "such" holding that it only applied to those on which stamps had been omitted with intent to evade the provisions of the law. The agreement sued on in that case was executed after the act of 1866 took effect, which used the same language as that in the act of 1898,—"and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect." The court considered the effect of the insertion of the words "not being stamped according to law," and held that it did not change the meaning of the provision embodied in previous laws, when taken in connection with the other provisions. In *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499, that case was expressly affirmed. In *Black v. Woodrow*, 39 Md. 194, this court held that an instrument subject to the act of 1866 was not void or inadmissible in evidence, if the omission to stamp it was without intent to evade the provisions of the act. Many other authorities might be cited, including decisions of the Supreme Court of the United States, to show that in regard to some of the earlier acts of Congress such was the interpretation; and we think this provision in the present law should be so construed, and that it was intended to apply only to those cases where the stamp was omitted to evade the provisions of the law.

But if it had been conceded that the law should be construed to declare any instrument invalid and of no effect so long as it is not stamped, although omitted innocently, there are other provisions in the statute which conclusively show that, when one is stamped under such circumstances as this assignment was, the error is corrected, and,

excepting as to the rights of others acquired in good faith before such subsequent stamping, the instrument is to be treated as if it had been originally stamped according to law. Section 13, after stating what we have quoted above, provides that, in all cases when the stamp is not affixed on certain instruments mentioned, any party having an interest therein that when it shall appear to the collector, who shall, upon payment of the price of the proper stamp and of the penalties prescribed, affix the stamp, "and the same shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued." It then further provides that when it shall appear to the collector, to his satisfaction, that an instrument was not duly stamped "by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp, or to evade or delay the payment thereof," then, if the instrument, or a properly proven copy thereof, "shall within twelve calendar months after the making or issuing thereof" be taken to the collector, and the stamp tax paid, he can remit the penalty and cause the instrument to be stamped. And when it is so stamped the officer having charge of the record is authorized to make a new record thereof, "or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law," thus conclusively showing that it was not intended to make the record of every unstamped instrument null and void; for, if it was, the act would unquestionably have required a new record, and would not have authorized the correction of the original one, made contrary to law. But it does not stop there, for it adds "and the original instrument, or such certified copy or the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped." If Congress had intended to give it effect only from the time it was legally stamped, surely such language would not have been used as that just quoted; for it would have been clearer and simpler to have said that it should only be valid from and after the time it was so stamped, if such was the intention. If that had been done, it might in some cases have worked great injustice. For example, under our state law a mortgage must be recorded within six months from its date, unless authorized by an order of court to be recorded after that time. If, more than six months after one is recorded, it is ascertained that through some mistake or inadvertence it was not properly stamped, and the mortgagee then complies with the provisions of § 13,—has it stamped by the collector within twelve months, and that fact noted on the original record by the clerk,—must it be said that the original record was invalid because the mortgage was not then stamped? If so, then, although the United States has been satisfied, and the laws of the state complied with, the mortgagee can have no bene-

fit of the mortgage without the aid of a court of equity, and then only under the conditions prescribed by § 33 of article 16 of the Code. We do not think such a construction of the statute necessary to enable the government to enforce the collection of the tax, or within the intention of Congress, as gathered from the law itself. It may well happen that an honest mistake may be made, especially by laymen, as to what tax is required. The courts of this country differed widely as to some of the requirements of the former revenue laws, and doubtless there will be differences as to the present law, between judges, lawyers, and officers of the government whose duty it is to enforce it.

But there is still another provision in this section which greatly strengthens the contention of the appellant, and that is the last one. After providing for methods of correcting the omission to stamp instruments, etc., this section concludes: "But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid." It is difficult to understand why Congress should have inserted that saving clause, if it did not intend that the subsequent stamping should have a retroactive effect. If the law means that the instrument only becomes valid and operative from and after the time it is stamped, what possible use was there in making the reservation in favor of rights acquired before stamping? Was it not manifestly inserted because Congress understood that the previous provisions of the section might give such effect to an instrument subsequently stamped as it would have had if originally stamped, even against the rights acquired in good faith, unless that reservation was inserted? It may be well to add that §§ 14 and 15 of the act of 1898 do not strengthen the appellee's contention, but, if they affect it at all, rather weaken it. They do not contain provisions that are new to the internal revenue laws. The first part of § 3421 of the Revised Statutes of the United States of 1875 virtually corresponds with § 14, and it includes the provision of § 15, prohibiting the recording of instruments, etc., unless they are stamped; but there is this marked difference between them: The law as codified in that section (3421) provided that the record of an instrument not properly stamped "shall be utterly void, and shall not be used in evidence," while § 15 of the present law only says it "shall not be used in evidence;" the inference being that the change was made purposely, to exclude the provision as to its being void. This statute, it is true, prohibits the record of an instrument not properly stamped, and any one violating it is liable to the penalty imposed, but it does not in terms make a record void, and we do not think that the intention to do so can be gathered from it.

It is said, however, on behalf of the appellee, that it is not contended that the instrument is absolutely void, but that the

statute prohibits the use of it until it is stamped, and hence that, inasmuch as this assignment was not stamped until after the sale, it was of no effect, and the appellant was without authority to sell under the power in the mortgage when the sale was made. But that argument avoids the main question in the case, and proceeds on the theory that the instrument is of no use excepting from the time it is stamped, and has no retroactive effect. When the sale was ready for ratification, and the court was called upon to act upon it, there was no legal obstacle in the way of using the assignment in evidence to ascertain the authority of the appellant to sell. Independent of the act of Congress, the authority was vested in him when he made the sale, as he had complied with the requirements of the laws of this state, and under that act he had done what, by its very terms, enabled him to use it in the court below "in the same manner and with like effect" as if it had been originally stamped,—that is, as if it had been stamped when made,—subject only to the qualification that no right had been acquired in good faith before the stamping. It is not pretended that any such right had been acquired. Hence we must give the assignment the "like effect" it would have had if it had been stamped when made. We have in this state many instances of similar legislation, in what are called "curative statutes," to correct errors in deeds, mortgages, etc., defectively executed or acknowledged. Without multiplying examples, see sections 78 to 82, inclusive, of article 21 of the Code, for a number of them. They save the rights of third parties which have been acquired in good faith, and the power to pass such laws has been sustained over and over again by this court and its predecessors. The principal difference between that class of legislation and this act of Congress is that the latter authorizes the defect to be cured by the same statute that creates the disability, if the methods prescribed for that purpose are pursued, while the former corrects the error by subsequent statutes.

We are of the opinion, then, that the record of this assignment of the mortgage was not void by reason of not being stamped, but, at most, was only prohibited from being used in evidence before it was stamped, and

when that was done by the collector, upon being satisfied that the stamp was omitted through inadvertence, and not wilfully, and the clerk noted that fact upon the original record, as authorized by the act, the right to use the assignment, as if it had been stamped when it should have been, was restored, and related back to the time it was made, subject only to any rights in it, or the property secured by the mortgage, bona fide acquired in the meantime. Inasmuch as no such rights are alleged to have been so acquired, we will not discuss the effect and extent of that provision, beyond what we have said. Although the cases which were decided by this court under previous laws are not wholly applicable, several of them do reflect upon the retroactive effect of such subsequent stamping. In *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618, the suit was brought on an agreement which was not stamped until the day of trial,—over two years after it was made. The court held that its validity was restored by payment of the penalty and stamp tax, and it was admissible in evidence, although not stamped until after the suit was brought. In *Carson v. Phelps*, 40 Md. 73, Carson on the 27th of April, 1868, executed a deed purporting to convey to himself, as trustee, some lots of ground in trust for the purposes therein named, but did not stamp it. He died insolvent in May, 1869, and a creditors' bill was filed against the property included in the deed of trust; and the parties interested in that deed paid the stamp tax and penalty to the collector on the 11th of July, 1870. This court held that the defect of a want of stamp had been supplied by the affixing of the stamp and the payment of the penalty to the collector, and the deed was sustained as a priority over the general creditors, who were such prior to its execution. Other cases might be cited to show that the result of many decisions has been to give the subsequent stamping of instruments under the United States revenue laws a retroactive effect, but we will not prolong this opinion by doing so. The decree of the court below will be reversed, and the cause remanded, in order that the sale may be ratified.

Decree reversed and cause remanded; the appellees to pay the costs.

PENNSYLVANIA SUPREME COURT.

James T. HAMILTON *et al.*

v.

PITTSBURG, BESSEMER, & LAKE ERIE
RAILROAD COMPANY, *Appt.*

(190 Pa. 51.)

1. Anticipated profits from contemplated use of property taken cannot be considered in estimating the damages to be awarded in eminent domain proceedings.*
2. Damages in an eminent domain proceeding to obtain land for railroad pur-

poses cannot be enhanced by reason of the danger of fire because of proximity of the proposed road to a building used for storing highly inflammable material, but must be limited to the cost of removing the building to a safe place.

3. Evidence of the value of the contents of an adjacent building is inadmissible in a proceeding to condemn land for a railroad right of way on the theory that the risk of fire will be increased, since if the risk is great, the use of the building should be discontinued, and if not, the evidence is purely speculative.
4. Evidence of absence of benefit to the

*See note on next page.

landowner from construction of a railroad through the land is inadmissible in a proceeding to condemn the right of way, but it must be limited to the question of benefit to the property.

3. The court should, in an eminent domain proceeding, call the attention of the jury to the particular points in dispute on the evidence, and point out to them their plain duty as to a finding of fact from the weight of it, and as to the application of the law to the facts so found.

(February 20, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Butler County in favor of plaintiffs in a proceeding to assess the damages for the taking of a right of way for railroad purposes over plaintiffs' property. *Reversed.*

NOTE.—*Damages in eminent domain cases as affected by loss of profits.*

- I. *Scope of note and nature of subject.*
- II. *Early rule confining damages to the actual taking.*
- III. *Rules under provisions for compensation for property taken or injured.*
 - a. *General statement of.*
 - b. *Where property is taken, in whole or in part, for railway purposes.*
 - c. *Where tangible property is taken for other than railway purposes.*
 - d. *Where property taken consists of a franchise or privilege.*
 - e. *Where property is injured, but not taken.*
- IV. *Loss of profits from suspension of business while moving.*
- V. *Summary.*

I. Scope of note and nature of subject.

This note is confined strictly to cases involving loss of profits as such. While questions as to injury to, and loss of, business are closely akin to questions as to loss of profits, the object of most, if not all, business being profit, since most litigation grows out of business, and as most questions of value grow out of business utility, it is realized that to include questions as to loss and injury to business would involve covering nearly the whole field of law as to damages in eminent domain proceedings.

Unlike the general question of the right to recover damages for the loss of profits, the question with relation to eminent domain proceedings is purely one of construction of constitutional and statutory provisions, depending entirely upon the legal meaning of constitutional provisions as to compensation for property taken or damaged for public use, and of statutory provisions providing for, or authorizing, such taking. These provisions give rise to two rules, the early rule depending largely upon provisions for compensation for property taken under which consequential damages were rigidly excluded, and the later rule, now existing in a large majority of the states of the United States, depending principally upon provisions for compensation for property taken or injured or damaged.

The general common-law rules as to damages apply, however, so far as to exclude mere speculative values and profits from consideration. This is held, in effect, in *St. Louis, K. & N. W. R. Co. v. Knapp, S. & Co. Co.* (Mo.) 61 S. W. 300.

51 L. R. A.

The requests for instructions and answers thereto, which became the basis of the third and fourth assignments of error, were as follows:

1. If the jury find that the machinery and buildings of the plaintiffs' bottling works were not touched by the railroad company, and the operations of the works not interfered with, and the productiveness of the plant not in any way diminished, and the land actually taken by the railroad company was unoccupied, the jury cannot assess damages by reason of the appropriation upon the theory that the value of the bottling plant has been impaired. Answer: Affirmed, with this explanation, that the question for you is not the value of this property as a bottling plant, but its value on the market for any purpose, and the dim-

II. Early rule confining damages to the actual taking.

Under the early rule based upon provisions for compensation for property taken, it was the property taken for which compensation was allowed, and that only, and nothing was allowed for injuries which did not amount to an actual taking.

Anticipated profits are not property in the ownership or possession of him who owns the article out of which the profits are expected to grow, within the meaning of a constitutional provision that property shall not be taken for public use without due compensation. *Munn v. People*, 69 Ill. 80.

So, the measure of damages to be allowed by commissioners appointed under the provisions of *Battle (N. C.) Rev. chap. 72*, to view the premises and assess the damages caused by the erection of a dam across a stream, whereby the water was ponded back so as to interfere with the wheel of a mill further up the stream, is the value of the injury sustained by the ponding back of the water upon the mill, and in making their estimate the commissioners should not consider the loss of toll resulting from the near presence of the new mill, and the consequent diminution of patronage. *Burnett v. Nicholson*, 86 N. C. 99.

And the owner of a plantation on which are a private wharf and landing, from which he derived large profits, over which plantation the legislature authorizes a road leading to a public wharf thereon to be made and constructed, is entitled only on a proceeding for the assessment, under the statute, of the value of the premises taken, as well as the damages generally to the same, to the value of the land taken for the wharf, landing, and road, and to compensation for such additional fencing as the making of the road renders necessary to the plantation; and to compensation for such inconvenience as the road occasions. He cannot recover compensation for the loss of profits arising from his private wharf. *Eddings v. Seabrook*, 12 Rich. L. 504; *Fuller v. Edings*, 11 Rich. L. 239.

So, the owner of land upon a river bank, upon which was a ferry landing and wharf, a strip of which along the river bank was condemned for the purpose of the erection thereon of a county bridge across the river, was held, in *Moses v. Sanford*, 11 Lea, 781, to be entitled to recover, under a constitutional provision that property shall not be taken without just compensation, the value of the land taken, and the damages for the injury to the adjoining land as a wharf landing, but not for the loss suffered from the depreciation of the profits of the ferry

inuation of such value by the operation and construction of the road.

2. If the jury find that the value of the land appropriated by the railroad company is unoccupied ground, though within the exterior lines of the 5 acres upon which the bottling plant of plaintiffs is located, and is not used in the actual business of the plant, it is no part of the plant, and the jury cannot assess damages upon the theory that the bottling plant has been impaired. Answer: Affirmed, with the same explanation as before; it simply amounts to this, that you are not assessing this as a bottling plant or any other kind of plant; you are not assessing it for that particular purpose, but for whatever purpose, for that or any other purpose it is valuable in the market.

The further facts appear in the opinion.

franchise caused by the opening of the bridge, where the franchise itself was not impaired by the existence of the pier.

It seems plain that under this rule, if property is merely injured by proximity to a public improvement, and no part of it taken, no compensation can be recovered.

III. Rules under provisions for compensation for property taken or injured.

a. General statement of.

Many of the states have constitutional provisions for compensation for property taken or injured or damaged for a public use; and it is unquestionably competent for the legislature of a state to provide for compensation for an injury though no property is taken, even though the Constitution provides only for compensation for property taken. Under these provisions, consequential damages are recoverable; but, as the right to compensation is for the property or for injury thereto, the damages are usually confined to the market value of the property, if the whole is taken; or if only part is taken, to the market value of the part taken, and the depreciation in value of the part injuriously affected, but not taken; and if there is no taking, but the property is injuriously affected, to the depreciation in value on account thereof, excluding everything in the way of profits to be made in business carried on on the land, unless it consists of a use of the land itself. This would appear to be the theory of the principal case. The rule is quite prevalent, and seems to be growing in favor, however, that if the profits of a business carried on on land are so connected with it and of such a nature as to have an effect upon the market value of the land, they may be considered, not as an element of damages, but as evidence bearing on the question of market value.

b. Where property is taken, in whole or in part, for railway purposes.

The taking of property for railway purposes furnishes the greatest number of cases enunciating and illustrating the rules above stated.

Thus, the general rule is that just compensation to the owner of private property taken or damaged for railway purposes is to be measured by the fair cash market value, and if it is devoted to some particular use, and in consequence of such use had an intrinsic value, the owner is entitled, in order to get just compensation, to recover whatever the land is worth, for the use or purpose to which it might be devoted. But 51 L. R. A.

Messrs. Levi McQuistion and J. O. Vanderlin for appellant.

Mr. Clarence Walker for appellees.

Dean, J., delivered the opinion of the court:

The defendant in the construction of its steam railroad appropriated for its road-bed $\frac{1}{10}$ of an acre of plaintiffs' land in the borough of Butler. The appropriation was out of a tract of 5 acres on which the plaintiffs maintained buildings for the manufacture of bottles. The strip taken was about 45 feet wide, but no building was touched upon; the land taken was not at the time actually used by plaintiffs for any purpose. The railroad through the tract was constructed upon steel trestles about 20 feet in height, which were about 6 feet from the building used for storage of material

this rule would exclude all evidence as to the amount of business done, or which could be done, on the property, or the probable profits arising therefrom. *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974.

That the compensation to be awarded in proceedings for the condemnation of land, or of an interest therein, for railroad purposes, is the market value of the land or interest condemned at the time of the taking, and the profit from the business of the owner of the land or interest is not to be considered in estimating the damages, was held in *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139; *Jacksonville & S. R. Co. v. Walsh*, 106 Ill. 253; *De Buol v. Freeport & M. River R. Co.* 111 Ill. 499; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97, 8 N. E. 720; *Re New York, W. S. & B. R. Co.* 35 Hun, 633; *Re Newton*, 45 N. Y. S. R. 18, 19 N. Y. Supp. 573.

And it is not permissible to arrive at the value of the land by proof of the annual net profits derived from a particular use. *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139.

Or of the amount of business done and the probable profits arising therefrom. *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253.

And evidence as to the sales of liquor in a saloon and hotel and the profits accruing from such sales, and as to the number of guests that stopped at the house daily, is inadmissible in a proceeding under the Illinois eminent domain act for the recovery of damages for the taking of a hotel for railroad purposes. *Ibid.*

The inquiry should be confined to the market value. *Ibid.*

So, under N. Y. Laws 1850, chap. 140, authorizing proceedings for the condemnation of land for railroad purposes, the compensation to be awarded is limited to the market value of the interest or estate in the land condemned; and all consequential damages arising out of the interruption of business, inability to perform contracts, loss of profits and goodwill, are excluded as not being within the legislative intent in determining the measure of damages. *Re New York, W. S. & B. R. Co.* 35 Hun, 633.

And in *Chicago, M. & St. P. R. Co. v. Hock*, 113 Ill. 587, 9 N. E. 205, the objection was raised, in a proceeding for assessing damages for lands taken for railroad purposes, that loss of profits sustained by a land owner by the interruption of his business was taken into consideration, and regarded as a valid objection; but the case was determined upon the decision that loss of profits formed no part of the judgment.

The theory of these cases is that the profit for any period would depend upon many and

and as a packing room. The decided weight of the evidence showed the vacant land, as land, was not worth in the market for any purpose \$1,000 per acre. The plaintiffs claimed that their property as a whole had been largely depreciated in market value by the construction of the railroad. Under the general railroad act and supplements viewers were appointed who assessed plaintiffs' damages at \$17,321; from this award defendant appealed to the common pleas, where, after hearing, the jury assessed the damages at \$18,625. We now have this appeal by defendant, who assigns six errors. The third and fourth are to the answers of the court to defendant's second and third written points; both were affirmed; but as they were directed to the subject of damages as specially suffered by a bottle factory, the court properly said in explanation that the

question was not as to the value of the property in the market solely as a bottling plant, but also whether its market value for any purpose had been depreciated by construction of the railroad. Nor did this in any way prejudice defendant's case, for the tendency of plaintiffs' evidence was to swell damages by reason of the special character of the plant, while the theory of defendant was that the general market value of the property had not suffered by the construction of an additional railroad. There is nothing of merit in these two assignments, and they are overruled.

The first assignment is much better supported. James T. Hamilton, one of plaintiffs, testified that the value of the property when defendant entered upon it was \$75,000, and that by reason of the entry it had depreciated \$30,000; that they contem-

varying circumstances,—such as the nature of the season, the price of labor, the condition of the market as to supply and demand in respect to the particular article; and that a valuation derived from such evidence would be conjectural and speculative, and would not form a proper basis for an estimate of damages.

But all legitimate evidence tending to establish the market value of the property is proper, including the purpose for which the property was used and designed, its location and advantages as to situation, etc. *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97, 3 N. E. 720.

And in arriving at the fair market value, it is proper for the jury to consider whether the lands were adapted to the particular use to which they were devoted, and profitable and valuable for that use; and while the profits or supposed profits arising from the business are not a proper element of damage, it is improper to go further and instruct the jury that they should not take into consideration the character of the business transacted on the property. *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97, 3 N. E. 720.

And, in order to arrive at the market value, it is proper to show that the land is valuable for grazing, raising grain or other products for which the land may be used, but the probable profits arising from a wine cellar on the lands taken, are too remote. *De Buol v. Freeport & M. River R. Co.* 111 Ill. 499.

So, under this rule the measure of damages where only part of a lot or tract is taken is the market value of the property taken, and the difference between the market value of the property not taken, where the whole constitutes one parcel or tract, immediately before the improvement is made, and the market value immediately afterwards, leaving the question of profits out of the consideration unless they grow out of the use of the land, or have a bearing upon the market value of the land.

Thus, the market value of lands, a part of which has been appropriated for railroad purposes, which may be recovered for such taking, does not include estimated profits of future trade or business to be conducted thereon. *Pennsylvania R. Co. v. Eby*, 107 Pa. 166; *St. Louis, K. & N. W. R. Co. v. Knapp, S. & Co. Co.* (Mo.) 61 N. W. 300.

The damages for which the owner of a tract of land is entitled to compensation, on account of a part being taken for a railroad right of way, are those resulting directly from an invasion of his rights of property, and do not include a decrease in the custom and profits of *St. L. R. A.*

a mill situated upon the land, a part of which was taken, caused by grading and change of the mill road. *Selma, R. & D. R. Co. v. Camp*, 45 Ga. 180.

And a wharf owner petitioning for an assessment of damages caused by the location of a railroad upon its wharf and land, as a landowner for the taking of a portion of its land, though itself a railroad corporation, is not entitled to have the court take into consideration, for the purpose of enhancing damages, the fact that it is a carrier of goods, and has a railroad extending far into the interior, and is doing a large and profitable business which might be affected by the taking. *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 805.

But while there can be no recovery for loss of business or loss of profits in a proceeding for recovery of damages resulting to property from the taking of a portion thereof for railroad purposes, if the property has a special capacity for the purpose of flower gardening, and that value is depreciated and lessened by the taking of a portion thereof, the owner is entitled to recover a sum equal to such depreciation of value. *Chicago & E. R. Co. v. Dresel*, 110 Ill. 89.

The measure of damages for land taken for railroad purposes is the difference between the market value of the land before and after the appropriation of the right of way, and the use to which it has been or may be applied, is proper for the consideration of the jury in making their estimate; but they cannot take into consideration any supposed loss of profits in the business carried on on the land. *Pittsburgh & W. R. Co. v. Patterson*, 107 Pa. 461; *Driver v. Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726.

And evidence as to the use to which lots not taken, were devoted, and of the business carried on upon the premises, and the effect of the taking of the lot in question on the business, may be given as bearing upon the question of the market value of the property before and after the taking. But the use to which the property had been applied is of no importance beyond its influence upon the question of market value. *Driver v. Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726.

So, in estimating the value of farming land, a part of which is sought to be taken for railway purposes, its productiveness, or the income which the owner may derive from it, is always to be considered on the question of its real value. *Weyer v. Chicago, W. & N. R. Co.* 68 Wis. 180, 31 N. W. 710.

And the true question on a proceeding for

plated putting additional buildings upon the part cut off by the railroad, at an expense of \$10,000, and by reason of such improvement with their then supply of gas for fuel, they estimated a saving of \$1,300 per month in the cost of their product. Then this question was put:

Q. In that \$30,000, you take into consideration the future profits you might make by reason of the increase of the plant?

A. Yes, sir.

Defendant's counsel at once moved to strike out this testimony, based on the expectations from the contemplated building and the hoped-for future profits from the estimated monthly saving, as speculative and uncertain. The court overruled the motion because in its opinion it was impossible

to separate the estimate of the witness based on facts within his knowledge and the estimate based on wholly speculative profits. We think the motion should have been granted at once, and this should have been followed by most peremptory instruction to the jury to disregard the estimate. A careful perusal of this witness's whole testimony discloses no substantial basis for the depreciation of \$30,000; the expected increased profits from a future saving by enlargement of the plant was utterly unreliable, and his answer to defendant's interrogatory impliedly admits that his opinion is based on this expectation alone. We have over and over again ruled such testimony incompetent; one of the later cases is *Pittsburg & W. R. Co. v. Patterson*, 107 Pa. 464. The very most that can be said in its favor is, that such profits might pos-

the assessment of damages for a strip of land, taken for a right of way across property upon which a hotel was situated, is, How much was the salable value of the lands and the improvements thereon, from which the strip for right of way was severed, diminished by the taking? And the loss of profits in the business of the hotel, the loss of business patronage, the inconvenience or danger in the use of the drives around the premises, the annoyance arising from smoke from the engines and noise of the engine whistles, and increased exposure to fire, may all be considered in estimating the value of the opinions of witnesses as to the depreciation in value, and in determining from the testimony how much the property is diminished in value, and to aid in measuring the actual loss; but nothing is to be directly allowed as damages for loss of profits in the business of the hotel, or in loss of business or patronage, either presently or prospectively. *Lafin v. Chicago, W. & N. R. Co.* 33 Fed. Rep. 415.

So, if lots across which a strip of land is condemned for the right of way of a railroad were available for dock purposes, and taking the strip spoiled them for that purpose, their value when improved by the building of docks, the profits which might be derived therefrom, or the value of the lots at some future time, as when business or the wants of the community might make profitable the making of docks or slips on the property, would be merely conjectural and remote, forming no element in estimating the damages to be paid. But if the fact that such lots were located with a frontage on a river at a place where they could at some future time, when demanded, be made available as dock property, enhances their present market value in their present condition and state of improvement, that fact would be competent and proper to be shown, and to be considered by the jury in estimating the damages, and the fact that there might be no present demand for docks upon such lands is of no effect. *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764.

And the admission in evidence of a plat of a proposed improvement of lots fronting upon a river, consisting of a slip showing the water fronts of proposed docks along the river, in a proceeding for the condemnation of the right of way of a railroad across such lots, cannot be regarded as erroneous, where the court instructed the jury that the plat was received merely as an illustration of one of the uses for which it was claimed the property was adapted, and that it should not be considered to enhance or increase the damages by showing that such construction of a slip or dock would be a profitable investment. *Ibid.*

51 L. R. A.

And the exhibition in evidence before the jury of plans of a certain structure a landowner had contemplated, for a number of years past, erecting on the premises, in a proceeding to condemn a strip of land across such property for railroad purposes, is clearly improper, where the object of such evidence was to enhance the damages by showing that such a structure would be a profitable investment; but not so if it was offered merely as an illustration of one of the uses to which the property was adapted and expressly limited to such purpose. *Chicago & E. R. Co. v. Blake*, 116 Ill. 166, 4 N. E. 488.

The destruction of a training track used by the owner for profit, by the condemnation of a strip of land across the owner's farm for a railway right of way, was also held, in *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 345, to be a proper subject for consideration by the jury in estimating the damages to be allowed for the land taken, what the training track was worth to the owner being the true measure of damages. This decision seems to have been based upon the theory that the business out of which the profits lost arose, consisted of a use of the land taken, the court saying that if the owner has adopted a peculiar mode of using his land, by which he derives a profit, and he is deprived of that use, justice requires that he be compensated for the loss.

But injury to business, loss of profits, etc., are not to be estimated as a distinct element of damages. *St. Louis, K. & N. W. R. Co. v. Knapp, S. & Co. Co. (Mo.)* 61 S. W. 300.

And *Re Furman Street*, 17 Wend. 649, holds that the use to which the owner of land has applied it can be taken into consideration in a proceeding for assessment of damages only for the purpose of ascertaining its present value. His intention as to its future use and enjoyment cannot be regarded. But this was not a railroad case.

In any event when the owner or occupant of property condemned for railway purposes has been allowed the full cash market value of his property, taking into consideration the use to which he has devoted it, he has received just compensation therefor; and consideration of matters of personal inconvenience to the owner,—loss of profits, damage to personal property, and cost of removal,—is not permissible, unless a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property in view of its present use. *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974.

So, the jury, in a proceeding instituted by a

sibly be made; but that they would be made depends upon so many contingencies that a verdict which purports to be the truth cannot be based upon them. Experience and observation both teach us that paper future profits are oftener illusory than real. Assume, with this witness, that to-day his fuel would cost no more for a large additional output, how can he undertake to fix for years the cost of labor and materials for operating his plant? How can he determine that in the future rival manufacturers will not have advantages in some other location superior to his, and undersell him in the market? How can he determine that his present supply of natural gas will continue, that it will not soon give out, and instead of being sufficient to run additional furnaces will not be sufficient to run his present ones? The testimony on this sub-

ject was wildly speculative, and should have been excluded or promptly stricken out.

The second assignment of error is also sustained. The plaintiffs proposed to prove that the wareroom, a wooden structure, was located within 6 feet of the railroad; that in this were stored large quantities of manufactured goods, hay, and pine boxes for packing, and that the property in consequence was continually in imminent danger of destruction by fire from the operation of the road. The offer was objected to as irrelevant and speculative; the court, apparently with some hesitation, overruled the objection, saying that while the quantities and kind of property plaintiffs actually kept in the wareroom from time to time was not relevant, yet the purpose of the wareroom, the packing and storage of goods, hay

railway company to condemn a leasehold interest in lands for railway purposes, can only allow the claimant the fair market value of his property, and cannot take into account his loss of profits or damages to his business. *King v. Minneapolis Union R. Co.* 32 Minn. 224, 20 N. W. 135.

And the chances of a beneficial renewal of a lease cannot be considered in assessing damages in a proceeding to take land for railroad purposes, which land was occupied by a lessee, where there was no provision for a renewal in the lease, and no evidence upon that point in the case, as, whether a renewal could have been secured upon any terms beneficial or otherwise, is wholly a matter of conjecture. *Ranlet v. Concord R. Corp.* 62 N. H. 561; *Emery v. Boston Terminal Co.* (Mass.) 59 N. E. 763.

Where the business carried on upon leased premises by a lessee is taken or destroyed by an appropriation of a part of the premises for railroad purposes, the actual profits and income are matters too remote to be weighed in determining the market value of the lease in assessing damages. *Ranlet v. Concord R. Corp.* 62 N. H. 561.

And the measure of damages for lands held under a lease for a particular period, taken for railroad purposes, may properly be put at the amount the lessee would have to pay for rent for that period, where no other damage than the taking was proved, but the future profits which he might have made from using it for gardening purposes are too uncertain and cannot constitute a measure of damages,—especially in the absence of evidence that it would be used for such purpose. *Booker v. Venice & C. R. Co.* 101 Ill. 333.

And *Cobb v. Boston*, 109 Mass. 438, holds that evidence as to the annual profits of the business as a grocer of the occupant of premises, taken by a city under Mass. Stat. 1867, chap. 308, should not be admitted by commissioners appointed to assess damages for the taking. The only question is as to the value of the unexpired lease of the occupant, and not as to the profits of his business or the inconvenience of removing to some other place. But this was not a railroad case.

But in estimating the value of the interest of a lessee in lands the jury may take into account its desirable location for any legitimate business, and the fact that a business has been established there, so far as such considerations would affect the value of the property, or what a purchaser would be willing to pay for it. *King v. Minneapolis Union R. Co.* 32 Minn. 224, 20 N. W. 135.

To permit the jury, in a proceeding to condemn a leasehold interest in land for railway purposes, to take into consideration the fact that a manufacturing business was established and in operation upon the premises, and that it might be worth more for that business than for any other, does not constitute an allowance to the owner for his loss of business or loss of future profits of the manufacturing business, but simply gives him the marketable value of his premises for the use for which it is best adapted, and for which it would bring the most. *Ibid.*

So, in *Pile v. Pile*, L. R. 8 Ch. Div. 36, 45 L. J. Ch. N. S. 841, 35 L. T. N. S. 18, 24 Week. Rep. 1003, it was held that where the owner of business premises mortgaged them with the machinery and fixtures, and afterwards a railroad company sought to take a part for a right of way, but before the price was fixed the mortgagor died and the mortgagees entered into possession, and a receiver was appointed for the mortgagor's estate, which proved to be insolvent, who carried on the business with the consent of the mortgagees, an award of a sum due from the railroad company for the right of way belongs to the mortgagees, and a portion thereof designated as an award in respect to the loss of profits in carrying on the business will be deemed to be in the nature of compensation for the value of the goodwill of the business, which passes with the premises, and could not be claimed by the executors as belonging to the mortgagor's estate, to be divided among his general creditors.

See also cases in the next subdivision, which, though relating to lands taken for other than railway purposes, are governed by the same rules.

c. Where tangible property is taken for other than railway purposes.

The rule as to the allowance of profits prevented, as damages for the taking of lands for other than railroad purposes, would seem to be no different from, and to be based on, the same principles and reasons as those applicable to lands taken for railway purposes, and the cases are separated only for the purpose of convenient reference. The small number of cases in this class, therefore, and the fact that the rules applicable to each class of cases are the same, render it desirable that the previous subdivision of this note with reference to the rule where property is taken for railway purposes should be read in connection with this subdivision.

Thus, where premises consisting of a plot of land with a store thereon are taken in condemnation proceedings by a city, the whole premises being taken, persons who have car-

and pine boxes as a part of the necessary operations of the room, was relevant. After stating the purpose of the building this question was put: "Q. In the use of this wareroom what material do you necessarily have to have on hand, and in what quantities? The defendant's counsel repeated his objection, to which the court replied: "It simply goes to show how much danger there is; he is not asking any damages for these particular goods." So the objection was overruled, and the witness answered: "We use packing hay principally; we buy the packing hay in carloads and boxes." The plaintiffs, also against the objection of defendant, gave evidence that the value of the goods in the warerooms was \$40,000. Also that the cost of the building was \$1,700. There was also testimony, that very many locomotives would pass this combustible

building filled with inflammable material each day, and that by reason of the grade many sparks would be thrown off, and there was constantly great danger of fire to this \$41,500 worth of property 6 feet from the passing locomotives.

As to risk from fire incident to the lawful operation of a road, there are two theories upon which the claimant for damages can properly argue such risk is material evidence in his favor. 1. He can claim the danger is so imminent, that no man of common prudence would maintain his building in such proximity to the railroad. In that case he is entitled to the cost of removal of his building and its reconstruction in a safe place. 2. If the danger be not great, either from the fireproof character of the structure, or its distance from the railroad, yet if it can still be said there is some

ried on business as merchants thereon for many years are entitled to show the general character of the business, and to prove the value of the land taken for any purpose for which it might properly be used, and to recover for such value, though they had put the property to a different use. But they are not entitled to prove the profits they had made in their business during a term of years, as the profits realized do not tend to show the value of the property itself, as they would naturally depend upon the judgment, forethought, and business skill of the persons in charge, and the use of capital, and the condition of trade. *Re Gilroy*, 26 App. Div. 314, 49 N. Y. Supp. 798.

And the size and capacity of a mill, and the extent of the water power, are admissible in evidence in a proceeding for their condemnation for aqueduct purposes; but the amount of the business done by the owner at the mill and the profits derived therefrom by him cannot be put in evidence, as they do not properly tend to prove the value of the mill, the market value thereof being the question before the commission. *Re Newton*, 43 N. Y. S. R. 18, 19 N. Y. Supp. 573.

So, where, according to a plan of proposed public improvement, its completion must unavoidably result either in the total exclusion of a lease-holder from such premises, or render the same so inconvenient as to be valueless to him for the purpose for which they were leased, he may abandon his lease and vacate the premises whenever, in the execution of the projected plan of construction, the work has so far progressed as to virtually destroy his lease, and prevent the enjoyment by him of his estate, and thereupon sue and recover from the city causing the improvement, for the diminution during the remainder of his unexpired term in the market value of the premises for rent, caused by the construction of such improvement. But the profits of the business carried on upon the leased premises are not recoverable as damages. *Fause v. Atlanta*, 98 Ga. 92, 26 S. E. 489.

An instruction, however, in a proceeding to establish a park and assess the damages therefor for taking land upon which a spring was situated, authorizing the jury to take into consideration, in connection with all the other evidence, the special value of the spring if any, together with all the lawful uses, such as the sale of the water or piping to supply families to which the owner might put the spring and water as a source of profit, simply authorizes the jury to take into account the spring, for the uses it may have, in estimating the value

of the land, and is not objectionable as authorizing the jury to indulge in speculation as to profits from the sale of water. *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045.

And an estimate by the superintendent of a railroad in a proceeding to assess damages for land taken and for injuries sustained in the alteration of a highway laid out across the railroad, as to the comparative profits of travel to and from a place where a station was located, in its original condition and in its proposed changed condition, and as to a probable increase of business in consequence of the change, would have no tendency either to diminish or enhance the amount for which the verdict of the jury should be returned, and should be excluded. *Boston & M. R. Co. v. Middlesex County*, 1 Allen, 324.

See also *Re Furman Street*, 17 Wend. 649, and *Cobb v. Boston*, 109 Mass. 438, *supra*, III.

d. Where property taken consists of a franchise or privilege.

The rule that the measure of damages for taking property by the right of eminent domain is the market value at the time of the taking, to arrive at which the jury cannot take into consideration the past annual net profits derived from a particular use of such property, has no application, where the property taken is of a peculiar character, as a bridge, which constitutes the corporate franchise of the company owning it, which can hardly be said to have a market value. In such case the property and franchises of the bridge company are represented by its stock, and the market value of the stock may be said to represent the market value of the property taken as nearly as it can be ascertained. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407.

In the above case it was said that the value of a franchise depends upon its productive capacity, and that therefore the income from the bridge is a necessary and proper subject of inquiry; and the court below permitted proof of the receipts for five years preceding the taking, but did not permit the inquiry to be extended back to the time of the organization of the bridge company, and the ruling was supported by the supreme court on appeal.

So, a person owning land on both sides of a stream, who built a bridge across it for the use of the public, and charged tolls, after which the county in which it was situated took the land of the owner and erected another bridge, thereby preventing the collection of his toll, is entitled to just compensation, to ascertain which the cost of erection and the income derived

risk from fire by reason of the lawful operation of the road, he can claim that that fact depreciates the market value of the land entered upon. In the first case it is the loss of the improvement; in the second, a disadvantage in the use. This is settled by numerous authorities, among them *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. 374, 100 Am. Dec. 574; *Pittsburgh, B. & B. R. Co. v. McCloskey*, 110 Pa. 436, 1 Atl. 555, and *Setsler v. Pennsylvania S. Valley R. Co.* 112 Pa. 56, 4 Atl. 370. The claim of plaintiffs here, in view of the propositions of evidence, the purpose of it, and the effect of it, was to establish that a combustible building filled with high inflammable material was in daily danger of destruction from fire, because of the lawful use of locomotives. No man of common prudence would maintain that building in

that situation if plaintiffs' own testimony be believed. His damage then, arose, not from a disadvantage in the use, but a direct expense in removing the building and reconstructing it elsewhere. As from the testimony its total cost for material and labor in its first construction was only \$1,700, the cost of removal with the use of the old material would not probably exceed this. However this may be, the matter was subject of proof to as approximate a certainty as any other disputed question, for the cost could not be fanciful or speculative. If the building was not in any imminent danger, then the risk was not one to be compensated as an independent item of damage, but a mere disadvantage which might depreciate the market value of plaintiffs' land and be considered by the jury in their comparison of the benefits and dis-

from the bridge, together with all the other facts and circumstances calculated to enhance or diminish the value of the property taken or damaged, may be looked into. *Dougherty County v. Tift*, 75 Ga. 815.

And where a ferry is destroyed by the erection of a bridge, the income derived by the owner of the ferry from tolls received in the preceding years is competent evidence in a proceeding under a village charter, authorizing the construction of the bridge, providing for the compensation of owners of ferries, etc., that might be injured by the erection of the bridge or any damages they might sustain thereby, to show the value of the franchise. *Columbia Delaware Bridge Co. v. Gelsse*, 38 N. J. L. 39.

The erection of a bridge, however, within half a mile of a ferry, operating under a franchise, giving the proprietor the exclusive privilege of transportation across the river within half a mile of the ferry, though it would naturally diminish the profits of the ferry franchise, was held, in *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 397, not to be a taking of the franchise within the meaning of a constitutional provision that "private property shall not be taken or damaged for public use without just compensation;" but the property of the owner would be damaged thereby within the meaning of that provision.

But the fact that the proprietor of a ferry franchise landed his boats upon the land of another, and not at his own landings, and was a trespasser in so doing, was held, in *Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223, not to render it improper for the jury, on the trial of an issue *quantum damnificatus*, to ascertain the damage to the ferry franchise, arising from the construction and operation of a bridge contiguous thereto, to consider the revenues derived from the exercise of the ferry franchise.

So, a proceeding under Pa. act March 24, 1869 (*Famph. Laws*, 523), to relieve a turnpike road in a city from toll and throw it open to the public, is not one to take the stock of the turnpike corporation, but one to take its property; and the fact that the stock has no market value, or that the property itself is unproductive, cannot be taken into consideration in estimating the damages to which the turnpike company is entitled. *Re Kensington & O. Turnp. Co.* 97 Pa. 260.

And the right of the national government under its power to regulate commerce, to condemn and appropriate a lock and dam in a river belonging to a navigation company, placed there under a charter right lawfully granted by a state, not merely to improve the river, but to

exact tolls for the use of the improvements, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation, and just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property taken. *Monongahela Nav. Co. v. United States*, 148 U. S. 812, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

When in the exercise of eminent domain by the taking of the tangible property of a person he is actually deprived of a franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived. *Ibid.*

And what property is needed for public purposes is a question of a political and legislative character. But the question as to what shall be just compensation for the taking thereof is one for judicial inquiry; and the determination of Congress in an act directing the taking for public use of a lock and dam of a navigation company, that the franchise of such company to collect tolls shall not be considered in estimating the sum to be paid for the property, does not conclude the court in estimating the sum to be paid for the property. *Ibid.*

e. Where property is injured, but not taken.

The right to compensation for an injury by a public improvement to property, no part of which is taken, is governed by the rules applicable where a part of one's property is taken, to the part not taken, the measure of damages being the difference in the market value immediately before and immediately after the making of the improvement, excluding all questions as to profits, unless they are profits made from a use of the land, or so connected with the subject-matter as to affect the market value of the land.

Thus, the profits of a business for the past, and conjectural profits for the future, are too speculative and uncertain to furnish a basis for ascertaining the market or cash value of property injured, in a proceeding to assess damages occasioned by the construction of a public improvement. *Sanitary Dist. v. McGuiri*, 86 Ill. App. 392; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415.

This rule was applied to the construction of a drainage channel which obstructed access to the property injured, and caused water to flow back into the basement of the building situated thereon, in *Sanitary Dist. v. McGuiri*, 86 Ill. App. 392. And to a depreciation in value of property from the construction of a viaduct in

advantages. In neither case was evidence of the large value of the contents of the building admissible. If the wareroom was practically useless in that situation, as is the inevitable inference from plaintiffs' opinion of the great danger, then they were bound in common prudence to remove both before destruction. If the danger was such as to amount to a disadvantage merely, then the value of the contents was immaterial because wholly speculative. What quantity of material will be stored in a building when a possible future accidental fire occurs, cannot be foreseen; therefore its present value as a fact from which to determine its value on the happening of a problematical event in the future, is a mere conjecture or guess. No fire insurance company accepts risks on such a basis; their contracts for indemnity are always contingent upon

its immediate neighborhood, in *Lehigh Valley Coal Co. v. Chicago*, 28 Fed. Rep. 415.

And the improper admission of evidence over objection, of the profits derived from a landowner's business, in a proceeding for damages to his property occasioned by the construction of a drainage channel interfering with access to and flooding his property, and the erroneous refusal to exclude such evidence on motion before the argument, are not cured by an instruction to the jury that there can be no recovery for loss of business or loss of profits. *Sanitary Dist. v. McGuirl*, 86 Ill. App. 392.

And where evidence as to the profits of a business is admitted on cross-examination in such a proceeding, and commented on by the attorney for the landowner in argument, to which the attorney for the other party objects, a remark of the judge, "Do you dispute that there is such evidence in the record?"—is well calculated to influence the jury to award, by their verdict, a larger amount than they would otherwise have awarded, and is improper, though the court instructed the jury that there could be no recovery for loss of business or loss of profits. *Ibid*.

So, the valuation of property injured in the exercise of eminent domain in changing the grade of a street, must be made immediately before and immediately after the damage is inflicted, and the measure of damages recoverable is the difference between those valuations, unaffected by any subsequent changes in the circumstances or conditions of the property, and future profits of a business cannot be considered for any purpose whatever in estimating the damages. *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 46 L. R. A. 724, 44 Atl. 265.

The jury, in a proceeding to estimate the injury sustained by the owner of a mill from a dam raised by a navigation company, is required to ascertain the real damage to the mill in ordinary events, and is not to be governed by the consideration of the profits which the owner might have derived from an accidental rise in the value of grain which he made a practice of grinding, taking place at that particular time, as damages based on such a consideration would consist of the profits on a speculation in such grain. *Schuylkill Nav. Co. v. Freedley*, 6 Whart. 109.

The measure of damages occasioned by backing water on land by the erection of a dam by a navigation company, in a proceeding instituted under the act incorporating the company, providing for such proceeding in case of the failure of the parties to agree as to the damage, is the difference between what the property

would have sold for as affected by the injury, and what it would have brought unaffected by it, and evidence as to the diminution of the custom of a mill, and of the value of a tavern stand situated thereon arising from such causes, not to be used for the purpose of ascertaining the decreased value of the property at the time of the injury, but as a substantive ground of damages, is inadmissible. *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362.

And evidence as to the profits in any branch of manufacture carried on on the premises is not allowable, as they mainly depend upon the amount of capital invested and the number of workmen employed, and the extent of the business carried on. *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411.

Likewise, the charter of Milwaukee, chap. 10, § 18, providing that all damages, costs, and charges arising from the change of grade of a street shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected or injured in consequence of the alteration of such grade, is intended to provide compensation to the owner of the adjacent estate, in his capacity of owner, for injuries caused to his land or lands and buildings by permanently lessening their value and impairing or destroying their usefulness. And merely structural damage and costs and charges can be allowed thereunder; and no allowance of damages can be made for the value of the use of the mill during the time it was necessarily idle, because a change in the grade in the street rendered it necessary to raise the mill. *Stadler v. Milwaukee*, 84 Wis. 98.

So, the measure of damages in a proceeding for condemnation by a corporation for conducting pure and wholesome water to a city or village from a stream of water, which in part ran by a brick-yard, the water of which was needed to moisten the clay for making the brick, and which stopped the manufacture for some time, causing the manufacture of about 1,000,000 less brick than would have been manufactured if the water supply had not been diverted, is the diminished rental value of the premises for the purposes of the business during the period of the diversion, and not the profits which the owner would have received from the 1,000,000 brick that would have been made but for the diversion, where the clay remained in the bank and the brick were never made. And proof that the lessee might have used the water from a river bounding another side of the yard with equal facility is admissible as tending to show the rental value of the premises as they existed after the diversion of the stream. *Van Buren*

under our interpretation of the statute, this risk cannot constitute an independent subject of damages to be itemized by the jury, but it is only a disadvantage to be considered along with other disadvantages in arriving at the market value of the land immediately after the construction of the road. Is there an increased risk from accidental fire? Is it of such character as to depreciate the selling value of the land? As we have noticed in the first proposition of plaintiff, the destruction of the property is almost certain; in the second, such a result is very remote; it is improbable that it ever will occur. Yet there was placed before the jury, as subject to risk, the value of property to the amount of \$41,500. This was an invitation to them to allow sufficient damages for the insurance of this amount, not only against a remote risk, but of a

wholly uncertain value at the date of a possible fire. The value of the property was wholly irrelevant, and could only serve to divert the mind of the jury from the true test, the market value of the land immediately before and immediately after the construction of the road. If counsel for defendant chooses on cross-examination to draw from the witness the items which enter into his calculation of depreciation from this particular risk, that is his lookout. Here the plaintiffs not only proposed to prove an irrelevant fact, the value of the contents of the wareroom at the date of the entry upon the land, but, against objection of defendant's counsel, adduced testimony in support of the proposition. This was manifest error, and could not fail to unjustly prejudice defendant.

As to the fifth assignment, there was no

v. Fishkill & M. Waterworks Co. 50 Hun, 448, 8 N. Y. Supp. 336.

And a landowner in the receipt of considerable income and profit from the letting of saddle horses to travelers who desired to ascend a mountain by a bridle path, constructed at a considerable expense by him, is not entitled as such landowner, in a proceeding to assess damages under the right of eminent domain, to recover for the probable injury which his business would suffer from competition caused by the building of a carriage way to the summit of the mountain. Mount Washington Road Co.'s Petition, 35 N. H. 135.

And prospective profits which a railroad company expects to derive from the business of grain elevators, owned by lessees on railroad property contiguous to the road, of which the railroad company would be deprived by the opening of streets across the railroad, which would destroy the approaches to the elevators, thereby injuring their business, and thus ultimately affecting the company's profits, cannot be allowed in determining the just compensation to be paid the railroad company for the land taken, where the railroad company had no property rights in the elevator approaches. Illinois C. R. Co. v. Lottant, 187 Ill. 87, 47 N. E. 62.

Such losses are remote, uncertain, and purely speculative, and incapable of an intelligent estimate. *Ibid.*

So, the measure of damages suffered by the owner of a leasehold estate for years, from the erection of an elevated railroad in the street upon two sides of his premises, is the difference in the rental value of the property with the railroad in the street and free from it; and the omission of the railroad company to institute proceedings for the condemnation of the rights of the owner of the leasehold, as provided for by the statute, does not enhance or increase the liability of the railroad company so as to warrant a recovery against it, by such owner, of damages for loss of his business as a physician, to be estimated on the diminution of its net receipts, or its profits. Taylor v. Metropolitan Elev. R. Co. 18 Jones & S. 311.

And in Marshall v. Chicago, 77 Ill. App. 351, which was an action for damages to a lessee of property for the construction of a railroad contiguous thereto, the court said it must not be understood as holding that the loss of business and prospective profits was a proper element of damages. But the decision was based solely upon the allegations of the declaration to the effect that the plaintiff's leasehold was damaged for public use.

But the productive capacity of property, con- 51 L. R. A.

sisting in this case of a mill, for any portion of the time for which damages are to be ascertained, is admissible in a proceeding to assess compensation and damages for taking water of a river for the purposes of supplying a borough, as a circumstance to be considered, but not as affording a rule of damages in itself. Norwalk v. Blanchard, 58 Conn. 461, 16 Atl. 242.

Likewise, lessees of property injured by the construction of a viaduct over the tracks of a railroad where it crosses a public street in a city are entitled to recover for the diminished rental value of the property rented from the time the work was commenced down to the time when the easements were acquired, and evidence in a proceeding for the assessment of damages therefor, showing their respective businesses while the improvement was being made, and its effect after its completion, is competent, not on the theory that the loss of the profits was an element of damages, but on the question of the value of the property for business purposes. Re Grade Crossing Comra. 17 App. Div. 54, 44 N. Y. Supp. 844, Affirmed in 154 N. Y. 550, 49 N. E. 127.

And in determining the depreciation of the market value of property caused by the construction of a viaduct, the situation of the property, the uses to which it is put, the character and extent of the business carried on on it, and the facilities for doing the business, may all be considered. Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415.

So, a property owner, complaining of a damage to his property by the appropriation of the street upon which it abutted for the erection of an elevated railway, may prove his damage by showing, by reference to the general course of values in property situated in the neighborhood, that his property has suffered either by actual depreciation or by being prevented from sharing equally in the benefits accruing generally to the vicinity from a general appreciation of value. Levin v. New York Elev. R. Co. (N. Y.) 59 N. E. 261.

And it is entirely competent to interrogate a witness on cross-examination in a proceeding to assess damages alleged to have been occasioned by the construction of a drainage channel, flooding petitioner's property and interfering with access thereto, as to the elements of his estimate,—as to how he figured value and damage, and to inquire whether he included the profits of the business in his estimate, and, if so, how much profit; but the fact that evidence as to the profits of the landowner's business was thus called out by the cross-examination on behalf of the other party does not justify the court in

error on part of the court in its rulings on the admission of the evidence. The question to Albert Hamilton, one of plaintiffs, then on the witness stand, was: "Is the construction and operation of this road in any way beneficial to your property, or to you as owner?" This was properly objected to; the subject of inquiry was the benefit to the land, and the court rightly said the question must be restricted to that subject; the witness then answered, it was of no benefit to them or to the land. The court did all it could do to confine the answers to what was relevant, and failed only because of the apparent persistency of the witness in answering an improper question put by his counsel. The error of counsel and witness could only be cured by striking out the incompetent testimony, or by properly cautioning the jury against it. The

refusing to strike out such evidence. *Sanitary Dist. v. McGuire*, 86 Ill. App. 392.

And in *Schuykill Nav. Co. v. Farr*, 4 Watts & S. 862, it was said that if the diminution of the custom in a mill and tavern was the immediate or necessary consequence of the alteration, by a navigation company, of a dam in a stream upon which they were situated, it could not be said that it might not be used as a means of ascertaining the extent of the injury.

So, while the right to compensation provided for by constitutional provisions cannot be limited by statute, it may be extended, and statutory provisions with reference thereto which do not attempt to limit the right are controlling.

Thus, the owner of lots and a place of business, in front of which and a public street a railroad is constructed under an ordinance granting a right to construct it upon payment of all damages to the property owners, is entitled to damages for interruption to his business during such time as would have been necessarily employed in accommodating himself to another place of business equally eligible and his removal thereto, to be ascertained by proof of the probable and reasonable profits which might have been made upon sales, had there been no interruption to the business. *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607. This decision would seem to be based upon a construction of a provision of the ordinance requiring the payment of all damages, which is probably deemed to include more than the constitutional provision for compensation for property taken or injured.

For a similar holding not based on a particular statute, see *Commissioners of Parks & Boulevards v. Moesta*, 91 Mich. 149, 51 N. W. 903, and *Patterson v. Boston*, 20 Pick. 159, 23 Pick. 425, *infra*, IV. and other cases cited in that subdivision.

So, the owner of land consisting in part of building land and in part of land on which he had built a reservoir in order to supply mills which might be built on his other land, is entitled to compensation, under 8 Vict. chap. 18, § 68, providing that in estimating compensation for taking land the jury or arbitrators are to take into consideration the damages occasioned by severance from other lands of the owner or otherwise injuriously affecting such other lands, for the taking of the part consisting of building land by a railroad,—not only for the value of the land taken, but for the prospective profits to be derived from supplying from his reservoir water to the mills which might be built on the land taken, the mills on such lands being 51 J. R. A.

question, as the court properly said, was not one of benefit to plaintiffs, but to the land; they already had access to two railroads, and said they wanted no more, therefore the new road was of no benefit to them. It was immaterial what they wanted. What would purchasers in the market want, was the test to determine whether the land had been benefited. As a general rule the manufacturer thinks his property specially benefited by the construction of competing roads, and in offering to sell he uses the fact of accessibility to several as a special inducement to purchasers to buy. So it is wholly unimportant whether these plaintiffs wanted another railroad; the single question was whether this one specially benefited a manufacturing property to which was carried by rail raw material, and from which was carried to market the fin-

the only ones which he could supply. And evidence of such profits is proper, and receivable in such case for the purpose of arriving at what was the real sum to be awarded, making all proper deductions, the profits being spoken of in the same way as the rents and profits of an estate. *Ripley v. Great Northern R. Co.* L. R. 10 Ch. 435, 31 L. T. N. S. 869, 23 Week. Rep. 685.

And in *Cameron v. Charing Cross R. Co.* 16 C. B. N. S. 430, 33 L. J. C. P. N. S. 313, 10 Jur. N. S. 635, 10 L. T. N. S. 381, 12 Week. Rep. 803, it was held that expectation of profits from the exercise of one's abilities in business carried on upon lands is an interest in the land, so that loss of trade occasioned by the obstruction of a passageway leading to a thoroughfare in which one's shop is situated, whereby customers are prevented from coming there, is a particular damage in respect to which the party is entitled to compensation under lands clauses consolidation act 1845, § 68, entitling a party whose lands are taken for the construction of a railroad or injuriously affected thereby to compensation.

And *Senior v. Metropolitan R. Co.* 2 Hurlst. & C. 258, 32 L. J. Exch. N. S. 225, 9 Jur. N. S. 802, 8 L. T. N. S. 544, 11 Week. Rep. 836, held that loss of trade, profits, and goodwill occasioned by the obstruction of a highway during the execution of the works of a railroad company is an injurious affecting of the tradesman's interest in his premises, which entitles him to compensation therefor under that act.

In *Ricket v. Metropolitan R. Co.* 5 Best & S. 149, 34 L. J. Q. B. N. S. 257, 11 Jur. N. S. 260, 12 L. T. N. S. 79, 13 Week. Rep. 455, however, it was said that the cases to the contrary—*Senior v. Metropolitan R. Co.* 2 Hurlst. & C. 258, 32 L. J. Exch. N. S. 225, 9 Jur. N. S. 802, 8 L. T. N. S. 544, 11 Week. Rep. 836, and *Cameron v. Charing Cross R. Co.* 16 C. B. N. S. 430, 33 L. J. C. P. N. S. 313, 10 Jur. N. S. 635, 10 L. T. N. S. 381, 12 Week. Rep. 803, *supra*, and the same case in the court below—were all founded upon the supposed effect of the judgment in the exchequer chamber in *Chamberlain v. West End of London & C. P. R. Co.* 2 Best & S. 617, 32 L. J. Q. B. N. S. 173, 9 Jur. N. S. 1051, 8 L. T. N. S. 149, 11 Week. Rep. 472; and that if that judgment has been misunderstood, these cases, so far as they are founded on that misconception, are to be corrected; and that in the latter case the damages were given on account of injury done to the plaintiff's houses by the railway works, and there was no claim, and could be none, in respect of loss of actual profits by the obstruction, because the

ished product. These plaintiffs may have owned securities in the other roads; may have had friendly relations with their officers and managers, and for other reasons may not have desired increased facilities for shipment on a new road. If the new road added to the market value of this property, specially, as distinguished from the benefit to all property by such an improvement, the defendant had a right to a proper consideration of the fact, without regard to plaintiffs' wishes in the matter, and the jury should have been so instructed in the plainest terms.

There is nothing in the charge of the learned judge of the court below which conflicts with the oft-repeated rules of law applicable to such cases. In the abstract it is rigidly correct, and if it had been addressed to a jury of lawyers would probably have controlled them in their conclu-

sions upon the evidence. But what defendant had a right to expect, nay, to demand, was not alone a perfunctory statement of the law, which the jury seems not to have understood, or if understood to have disregarded, but also a calling of their attention to the particular points in dispute on the evidence, and then pointing out to them their plain duty as to a finding of fact from the weight of it; then their duty to apply the law to the fact so found. The inadmissible evidence as to future profits and the inconsistent theories of plaintiffs by which was lugged in the large value of the contents of the wareroom, which was inadmissible on either theory, probably had much to do with what seems to us a verdict decidedly against the weight of the evidence.

The judgment is reversed, and a venire facias de novo awarded.

houses had never been inhabited and some of them never completed, and that it is certain that the houses themselves were found to be injuriously affected, and for that injury the compensation was awarded, the principle of that case being that a house is affected by the relation of its situation to the adjoining highway.

And in *Ricket v. Metropolitan R. Co.* 5 Best & S. 149, 34 L. J. Q. B. N. S. 257, 11 Jur. N. S. 260, 12 L. T. N. S. 75, 13 Week. Rep. 455, *supra*, and L. R. 2 H. L. 175, 36 L. J. Q. B. N. S. 205, 16 L. T. N. S. 542, 15 Week. Rep. 987, it was held that the loss of profits and custom of a public house situated in a street or passage between which and another street or passage was a public footway opposite the public house, caused by the act of a railroad company, in the exercise of its power under the English railway act of forming a tunnel under the latter passage or street, and putting up a hoarding on each side of the street, and placing steps to enable foot passengers to pass up one side and down the other over the hoarding, which obstruction diminished the number of foot passengers passing to and fro along the street upon which the public house was situated, thus causing the traffic of the house to fall off, and which traffic never returned after the footway was restored, is not an injurious affecting of the house within the meaning of § 68 of the lands clauses consolidation act of 1845, for which the owner is entitled to compensation, where no lands had been taken.

And tenants of public houses, in the neighborhood of which a dock company empowered by the statute to make a new entrance to its dock, and to purchase houses, lands, etc., had purchased houses and taken them down, and stopped up ways on the lands, and provided sluices, bridges, and roads, etc., communicating with the docks and works, are not entitled to compensation under the act empowering such work, providing for compensation of any person who should be injured in his estate or interest thereby, on the theory that the pulling down of premises and obstructing of access had diminished the resort of persons to their houses, and thereby reduced their profits and business. *Rex v. London Dock Co.* 5 Ad. & El. 163, 6 Nev. & M. 390, 2 Hurlst. & W. 267.

But lessees of adjacent property injured by the construction of a viaduct over the tracks of a railroad where it crosses a public street are parties interested in the land within the meaning of an act providing for the compensation of owners or persons interested in the lands

taken or injured, and entitled to recover for the diminished rental value of the property. *Re Grade Crossing Comrs.* 17 App. Div. 54, 44 N. Y. Supp. 844, Affirmed in 154 N. Y. 550, 49 N. E. 127.

IV. *Loss of profits from suspension of business while moving.*

Some of the cases have permitted evidence of, and a recovery for, profits lost by the suspension of business, where it has to be moved during the time required for obtaining another situation, and for moving. This allowance is based upon the theory that, as the loss of profits from the suspension of business while moving would enter into the consideration of the price to be charged by an owner voluntarily selling, it should also be considered in determining the market value in case of a compulsory sale under eminent domain proceedings.

Thus, landowners doing a lucrative business upon their land, in which the locality and its surroundings has some bearing on its value, are entitled to recover in railroad condemnation proceedings, apart from the money value of the property itself, such a sum that they will lose nothing by the interruption of their business and its damage by the change. *Grand Rapids & I. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294.

And evidence of the average monthly profits of a business conducted on premises held under lease, sought to be condemned for railroad purposes under the Illinois eminent domain act, is not subject to objection when limited to the question of the losses which would be incurred by the suspension of business transacted on the premises during the time necessarily consumed in moving. *Atchison, T. & S. F. R. Co. v. Schneider*, 127 Ill. 144, 2 L. R. A. 422, 20 N. E. 41.

So, a landowner should be permitted, in a proceeding to take lands for the purpose of widening a street, to recover for loss of profits occasioned by the interruption of his business, which he can show with reasonable certainty will occur during the time it will necessarily be interrupted. *Commissioners of Parks & Boulevards v. Moesta*, 91 Mich. 149, 51 N. W. 908.

And the damages to the lessee of a store for years, who covenanted to keep the premises in repair, the front part of whose lot was taken and the front wall of the building cut off by the city for the purpose of widening the street, which he is entitled to recover of the city for being deprived of the use of the store, are to be computed for such time as would be reasonably

necessary to remove his goods and make the repairs and move back again, and he is to be remunerated for the loss of the value of the store to him for that period, and for the diminished value of the premises caused by the taking of part for the residue of the term. But he is not entitled to damages for loss of custom occasioned by his being obliged to occupy a less advantageous place of business while the repairs were being made. *Patterson v. Boston*, 20 Pick. 159.

Nor for imaginary or speculative losses arising from the removal occasioned by customers leaving him and resorting to other stores, loss of goodwill, run of custom, and the like. *Patterson v. Boston*, 23 Pick. 425.

So, a landowner running a brewery upon his land is entitled to compensation where his lands are taken for the purpose of making a new dock and other works connected therewith under Stat. 7 & 8 Vict. chap. 103, § 117, providing for compensation for any damages sustained, not only for the premises actually taken, but for losses which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on. *Jubb v. Hull Dock Co.* 9 Q. B. 443, 3 Railw. Cas. 795, 15 L. J. Q. B. N. S. 403, 11 Jur. 15.

In the above case *Rex v. London Dock Co.* 5 Ad. & El. 163, 6 Nev. & M. 390, 2 Hurlst. & W. 267, *supra*, III. c, was distinguished upon the ground that in that case no part of the premises had been taken or touched.

So, in *Metropolitan West Side Elev. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276, which was a proceeding to condemn certain leasehold interests in real estate for the purpose of the construction of an elevated railway, the owner of such interest claimed to be entitled to the cost of removal and loss of profits during the time of removal and of establishing in another place. The court refused to determine whether the damages should have been confined to the fair market value of the leasehold interest condemned, where the trial had proceeded substantially through its entire course, until the evidence was concluded, upon the theory, apparently adopted by all parties, that the claimant was entitled to be reimbursed for the damages which the evidence might fairly show he had sustained; and said, that it had never held that the rule that the measure of damages is the market value of the property condemned was without exception, and that cases may not arise when proper observance of the constitutional provision that private property shall not be taken or damaged for public use without just compensation may not require the payment of damages actually sustained other than those measured by the value of the property taken, but the contested question in the case was as to the cost of removal of personal property from the premises taken.

And see also, on the question of damages for interruption of business, *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607, *infra*, III. c.

A lessee of a wharf, however, is not entitled, on an assessment of damages for the taking of the wharf under the right of eminent domain, to recover compensation for the loss of the earnings and the profits of his business for the period for which the business was temporarily suspended or interrupted by removing from the old to another location, where the taking was on January 5, and his lease expired on May 1, when he would have had to leave, and could have recovered nothing for being forced to do so. *Emery v. Boston Terminal Co. (Mass.)* 59 N. E. 763.

And a railroad company which, instead of taking premises consisting of a hotel, condemned for the construction of their road, when they

ought to have taken them, and have had the compensations at once assessed, allowed the matter to stand over for two years, can only be held liable to a lessee from year to year for the value of his interest in the premises and the goodwill, and not also in respect to the depreciation in his profits during the two years since the company should have taken possession, caused by the works of the railroad and the pulling down of the neighboring houses, where the tenant holds by, instead of applying to a court of law and insisting upon the company proceeding with the purchase, as he might have done by law. *Reg. v. Vaughan*, L. R. 4 Q. B. 190, 38 L. J. M. C. N. S. 49, 17 Week. Rep. 115. In this case the statute entitled the tenant to compensation for any loss or injury. But the case seems to have gone upon the theory that the loss of profits was, under the circumstances, the tenant's own fault.

And in *St. Louis, K. & N. W. R. Co. v. Knapp, S. & Co. Co. (Mo.)* 61 S. W. 300, it was held that loss of profits and expense of moving are not to be estimated as distinct elements of damage.

And in *Becker v. Philadelphia & R. Terminal R. Co.* 177 Pa. 252, 35 L. R. A. 583, 35 Atl. 617, it was held that loss of profits, caused by the removal of a business, is not an element of damages to be paid for by a railroad company for the taking of the land on which the business was formerly carried on. And see also *Cobb v. Boston*, 109 Mass. 438, *supra*, III. b.

And attention is here called to the cases holding generally without apparent qualification that loss of profits is not an element of damage in eminent domain proceedings.

In any event, however, the loss and expense of removal cannot be considered unless a sufficient foundation therefor has been laid, so that their consideration will simply aid the jury and court in determining the fair cash value of the property in view of its present use. *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974.

V. Summary.

While at first blush the decisions on this subject appear to be conflicting, it seems to be well established that the measure of damages in eminent domain cases is the market value of the property taken without reference to the question as to what profits might be made by using the property for business purposes, the question as to whether profits would have been realized being uncertain and contingent; and when only part of the property is taken, or where it is merely injured and not taken, the measure of damages as to the part not taken, or as to the whole where the property is merely injured but not taken, is the depreciation in the market value of the property, and not the profits which might have been made in business carried on on the property but for the taking or injury.

Profits are to be considered, however, not as an element of damage, but as evidence bearing on the question of market value, whenever they arise from a use of the land taken or injured, or whenever they are so connected with the land in question as to affect its market value.

These rules apply equally whether the person seeking compensation is the owner or a lessee, the diminution of the value of his interest being the measure in the latter case.

But profits are to be considered where the property to be taken consists of a franchise, as the value of a franchise is governed largely by its productive capacity.

The rule has also been acted upon to some extent, and might be deemed to be general, though there are decisions to the contrary, that the

profits which might have been made during the period required for removing to another proper situation, where moving is rendered necessary, are to be allowed, the theory being that a voluntary seller would take that matter into consideration in fixing the price of his property, and that therefore it should be considered in case of an involuntary or compulsory sale, a taking

of property for public use, due compensation having been made, being in effect an involuntary and compulsory sale.

It would appear that under any circumstances a recovery for loss of profits would be impossible when compensation for the taking of property is provided for only as distinguished from the taking or injury thereof. F. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Frank FULLER, Appt.,
v.

Barton HUFF *et al.*

(104 Fed. Rep. 141.)

1. The term "health food" cannot be a technical trademark, either with or without the word "company," as the term is descriptive of quality.
2. A mark, name, or phrase that has been so used by a person in connection with his business, or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him cannot be used by others so as to lead purchasers to believe that the articles for sale are his, or so as to obtain the benefit of the market he has built up thereunder.
3. The use of the name "health food" to describe foods which the manufacturer had previously called "sanitarium foods" may be prevented by injunction at the suit of another manufacturer which had used the name for eighteen years before, even if the defendant may have been innocent in adopting the same name, where, after it had learned of the complainant's prior use, it continued to use the term in spite of remonstrance, with a guaranty to its purchasers against suits, though the packages plainly state the name of the manufacturer, and do not imitate or resemble in external appearance the packages of the complainant.

(July 5, 1900.)

APPEAL by complainant from a decree of the Circuit Court of the United States for the Southern District of New York in favor of defendants in a suit to enjoin the use of the words "Health Food Company." *Reversed.*

The facts are stated in the opinion.

Before Wallace, Lacombe, and Shipman, Circuit Judges.

Mr. Charles G. Coe, for appellant:

The trademark has become of such value to the complainant that its use by another, either in the identical form or in a similar form, distinguished only by an immaterial prefix, should be enjoined as an invasion of the goodwill thus acquired in the name by the complainant.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 468, 27 L. R. A. 42, 39 N. E. 490;

Merchants' Detective Asso. v. Detective Mercantile Agency, 25 Ill. App. 256; *Newby v. Oregon C. R. Co.* Deady, 609, Fed. Cas. No. 10,144; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L. R. A. 182, 42 Pac. 142; *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. Rep. 651; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; *American Waltham Watch Co. v. Sandman*, 96 Fed. Rep. 350; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *Atwater v. Castner*, 32 C. C. A. 77, 50 U. S. App. 394, 88 Fed. Rep. 642.

The use of the prefix "sanitarium" or the name "Battle Creek," in connection with the complainant's tradename, "Health Food Co.," does not enable the defendants, under the law, to escape infringement.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. Rep. 97; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Royal Baking Powder Co. v. Mason, Price & Stuart*, Trademark Cas. 86; *New Home Sewing Mach. Co. v. Bloomingdale*, 59 Fed. Rep. 234; *Shepard v. Stuart, Price & Stuart*, Trademark Cas. 193; *Hohner v. Graiz*, 52 Fed. Rep. 871; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. Rep. 167; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Lee v. Haley*, L. R. 5 Ch. 155; *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Hogg v. Kirby*, 8 Ves. Jr. 215; *Sanders v. Jacob*, 20 Mo. App. 96; *Mossier v. Jacobs*, 66 Ill. App. 571; *International Soc. v. International Soc.* 59 N. Y. Supp. 785; *Van Auken Co. v. Van Auken Steam Specialty Co.* 57 Ill. App. 240; *Cady v. Schultz*, 19 R. I. 193, 29 L. R. A. 524, 32 Atl. 915; *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603; *S. Hoves Co. v. Hoves Grain-Cleaner Co.* 19 App. Div. 625, 46 N. Y. Supp. 105; *Weinstock, L. & Co. v. Marks*, 103 Cal. 529, 30 L. R. A. 182, 42 Pac. 142; *Noel v. Ellis*, 89 Fed. Rep. 978; *W. A. Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.* 28 Misc. 45, 58 N. Y. Supp. 979; *Block*

NOTE.—For protection of tradenames, even when there is no valid trademark, see also *Weener v. Brayton* (Mass.) 8 L. R. A. 641; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* (N. Y.) 17 L. R. A. 129; *Scott v. Standard Oil* 51 L. R. A.

Co. (Ala.) 31 L. R. A. 374; *American Waltham Watch Co. v. United States Watch Co.* (Mass.) 43 L. R. A. 826; and *Pillsbury-Washburn Flour Mills Co. v. Eagle* (C. C. App. 7th C.) 41 L. R. A. 162.

7. *Standard Distilling & Distributing Co.* 95 Fed. Rep. 978; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83.

The claim that the defendants had no intention to deceive is immaterial under the law.

Tarrant v. Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. Rep. 959; *Taendsticksfabriks Aktiebolagat Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904.

The defendants are not innocent infringers, because they continued to infringe after being notified to cease infringing.

Orr v. Johnston, L. R. 13 Ch. Div. 434; *Singer Machine Mfg. Co. v. Wilson*, L. R. 3 App. Cas. 376; *Army Society v. Army Society of India*, 8 R. P. C. 426; *Cochrane v. MacNish* [1896] A. C. 230.

It is not required that the complainant should prove that persons have been actually deceived. Liability of deception is sufficient.

Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; *Taendsticksfabriks Aktiebolagat Vulcan v. Myers*, 139 N. Y. 367, 34 N. E. 904.

Messrs. Thomas B. Kerr and Drury W. Cooper, for appellees:

Trademarks may be divided into two general classes, as follows:

1. Symbols, names, words, or phrases which have no natural relation to the articles upon or in connection with which they are used, being neither descriptive of the same or their qualities, nor indicative of the geographical locality of their origin, but owing their significance and value to their arbitrary selection and use in connection with the articles to which they have been applied. These are true trademarks, in which an absolute legal right may be acquired by adoption and use.

2. Symbols, names, words, or phrases which, being descriptive of quality, characteristics, or material, or indicative of place of origin, or in common use, or having been abandoned to the public, are not capable of exclusive appropriation. When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his, or so as to obtain the benefit of the market he has built up thereunder.

Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. Rep. 651; *Reddaway v. Banham* [1896] A. C. 199; *Anheuser-Busch Brewing Assn. v. Piza*, 24 Fed. Rep. 149; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828.

Such deceptive use of trademarks and tradenames which are not capable of exclusive appropriation, but which have become identified with the goods of others, is known as "unfair competition," and will be prohibited by the law.

It is incumbent, then, on any person desiring to use such trademarks or trade

names to use them in such a way that his goods will not be confused with those of others.

If his goods are plainly marked with his name or other mark clearly denoting that they are of his manufacture, and not of others', and are put up in dissimilar packages, or other means are adopted which will prevent confusion between them and those of others, his right to use such marks or names in fair and open competition cannot be denied.

No one can claim protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made by him.

Delaware & H. Canal Co. v. Clark, 13 Wall. 322, 20 L. ed. 583.

The addition of the word "company" or its abbreviation "Co." to "Health Food" does not make the phrase a legitimate tradename capable of exclusive appropriation.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166.

Shipman, Circuit Judge, delivered the opinion of the court:

The complainant, Frank Fuller, a citizen of New Jersey, commenced in the year 1875, under the name of "Health Food Company," to sell in the city of New York cereal products prepared for food, and has continued to the present time in that business and in the use of the same name, under which he has extensively advertised his goods by circulars, and in newspapers and magazines, at a cost of from \$75,000 to \$100,000. He has established agencies in Brooklyn, Chicago, Boston, Washington, Philadelphia, St. Louis, and Oakland. The name "Health Food Company" is displayed prominently upon the packages in which the various articles are presented to the consumers. About fifty different articles have been thus placed upon the market. The business has become large, and the name is unquestionably valuable to the complainant. In October, 1876, John H. Kellogg took charge, and has continued to be in charge, of the institution popularly known as the "Battle Creek Sanitarium," but incorporated in pursuance of the laws of the state of Michigan, in 1867, under the name of the "Health Reform Institute." This corporation is the owner of a large sanitarium, having branch institutions at various places, and has established in this country and elsewhere sub-organizations for the promotion of charitable and missionary work. The Battle Creek Sanitarium recommended to its patients particular kinds of cereal foods, and entered upon the business of manufacturing and selling these articles under the name of "Sanitarium Foods." In 1881 nineteen different articles were made. In 1888 the business of food manufacture was made a separate department, under the name of "Sanitarium Food Company," which advertised itself in April, 1893, as "Sanitarium

Health Food Company." The reason for this, and a subsequent change of name, which preserved the words "Health Food Company," is stated by Kellogg in his deposition as follows:

"In April, 1893, our advertisement appears in Good Health, over the business name of 'Sanitarium Health Food Company.' This name we were led to adopt by the action of one of our old employees, who, leaving the institution, set up in business in the same town, advertising himself under the name of the 'Battle Creek Health Food Company.' As quite a large proportion of our mail had for years been addressed to us as the 'Battle Creek Health Food Company,' we found this action a serious annoyance, and objected to it, with the result that an arbitration was agreed upon, the result of which was that the party referred to was required to change his name, which he did, adopting the title the 'Battle Creek Bakery Company.' We then added the word 'Health' to our business announcement, making it 'Sanitarium Health Food Company.' Our salesmen, however, in introducing our foods, so constantly made use of the term 'Battle Creek Sanitarium' in describing our foods, to distinguish between our institution and numerous other sanitariums, we finally, some two or more years ago, still further extended the business title of our food department to its present form, —the 'Battle Creek Sanitarium Health Food Company.' Our purpose in adopting the words 'health food' in our name was to protect ourselves against parties who sought to pirate the extensive business which we had built up, by assuming a name similar to ours, and making similar goods in the same town."

Their packages and cartoons have the name "Health Food Co." in conspicuous type, prefixed by the word "Sanitarium," and in smaller type the words "Battle Creek, Michigan," under the name. The packages do not imitate or resemble in external appearance the dress of the packages of the complainant.

In October, 1896, a retail grocers' food exhibition was held at the Grand Central Palace in New York city. The complainant exhibited his products at a booth, under the prominently displayed name, "Health Food Company." About 15 or 20 feet distant the defendant, Barton Huff, a citizen of the state of New York, as agent of the Health Reform Institute, exhibited its wares, and upon its booth was a placard containing the words "Health Food Company," in large letters, under the words "Battle Creek Sanitarium." The complainant remonstrated with Huff against the use of "Health Food Company" as an infringement of the complainant's right, and threatened a suit. Huff said that he would bring the representation to the attention of the officers of the Health Food Department, but the use of the name did not cease. The food business of the defendant under its last name is extensively advertised, and, when

the testimony was being taken, was said to amount to from \$260,000 to \$300,000 annually. The circuit court dismissed the bill upon the ground that the defendant's name was clearly distinguishable from the complainant's business name, and was not an unlawful appropriation. 99 Fed. Rep. 439.

The term "health food" means healthy food, or health-producing food, and is therefore descriptive of quality, and cannot be a technical trademark, either with or without the word "company," any more than the words "nutritious wine" could be a valid trademark. If a case against the defendant exists, it is one of unfair competition; and the law upon the subject of the adoption by a competitor of names or words descriptive of quality, which have previously become tradenames, and which adoption will constitute unfair competition, is correctly stated by the counsel for the defendant as follows: "When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith, and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his or as to obtain the benefit of the market he has built up thereunder."

The same statement of the law is contained in the case of *Reddaway v. Banham* [1896] A. C. 199, decided by the House of Lords in 1896, in which it was held that one person was not entitled to pass off his goods as those of another by selling them under a name likely to deceive purchasers, whether immediate or ultimate, into the belief that they were buying the goods of the former, although the name was, in its primary sense, merely a true description of the goods. The subject of the unlawful use by competitors of the name under which a rival has previously presented himself to the public and has gained a business reputation, although the name is not strictly a trademark, and is either geographical or descriptive of quality, has been frequently of late before the courts, which have demanded a high order of commercial integrity, and have frowned upon all filching attempts to obtain the reputation of another. *Lee v. Haley*, L. R. 5 Ch. 155; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. Rep. 167; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; *Block v. Standard Distilling & Distributing Co.* 95 Fed. Rep. 978.

The question, therefore, is, Is the real defendant's use (for it is manifest that the Michigan corporation is the real defendant) of the words "Health Food Company," in connection with the words used as a prefix and suffix, such a use as is likely to deceive consumers into the belief that they were buying the complainant's goods? It is to be observed that the frequent insignia of an

intent to deceive, *etc.*, the copy or the imitation, more or less close, of the dress of the competitor's packages, are absent in this case; but if a tradename has been so identified with the business of a manufacturer as to inform the public that the name upon goods means that they are the product of that person, and another subsequently adopts and displays the name, it is not material that he has not also adopted the particular dress in which his predecessor has presented his goods. *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589. The complainant had used the name for eighteen years before the defendant assumed it, had acquired an extensive business under it, and had established agencies for his goods in six or seven eastern and western cities, while all that the consumer knew of the complainant's goods was that they were presented to him as the products of the Health Food Company. The defendant announced its goods in 1881 as "Sanitarium Foods," advertised them also as "Invalid Foods," and waited until 1893 before they were presented as the products of the Sanitarium Health Food Company. The reason for the adoption of this name was a desire to forestall its use by anyone else, thus recognizing the benefit from the name and the advantage from priority in its use. Three years after, it knew that it had long been prominently used by, and was the sole business name of, the complainant. The defendant now so coveted the name as to determine not to relinquish it, and continued its use despite remonstrance. The benefit to the corporation was derived from the familiarity with the name on the part of that portion of the public which used this class of goods. It is said, however (and the circuit court yielded to the defense) that the name is presented to the public with such accompanying assertions in regard to the manufacturer of the goods and the place of the manufacture that the consumer need not be deceived. In the class of cases in which a manufacturer is using his own name, or the name of another person which has become generic, this defense is of great value, because it is the duty of the user to make any inevitable harm as light as possible. *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002. The question in this case is, however, whether the simple use of the name, although with prefixes or suffixes, is not "likely to deceive purchasers." The history is

significant in regard both to the motive of the Michigan corporation in retaining its occupancy of the name and the probable effect of a permanent retention. After it had presented its goods to the public for years under the name "Sanitarium Foods" and "Invalid Foods," there was no necessity for an abandonment of the former names, under which it had confessedly obtained success, and by which it was well and favorably known by its customers. The adherence to the new name to the extent of guaranteeing protection to its purchasers against suits indicates the pecuniary benefit which was expected to ensue from the adoption of a name to which consumers had long been accustomed, and the persistence in the use also indicates the pecuniary injury which was liable to come upon the complainant. The case is not one where the Michigan corporation must use to a certain extent the name of the complainant, and it is not, therefore, one of *damnum absque injuria*. It is the case of an unnecessary use of a name long previously used by another in the same business, and in the recent decisions, by courts of last resort, upon the right to the use of tradenames, although geographical or descriptive in their primary meaning, great importance is given to mere long-continued and exclusive priority of use. *North Oshshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141. It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists. *Taendstieksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993; *National Biscuit Co. v. Baker*, 95 Fed. Rep. 135.

Although the intent of the defendant's principal when it commenced to use the name "Health Food" may have been innocent, the continuance, after it had learned of the complainant's prior use indicates its deliberate intention to use the name without reference to the complainant's possible prior rights. *Orr v. Johnston*, L. R. 13 Ch. Div. 434.

The decree of the Circuit Court is reversed, with costs, and the cause is remanded to that court with instructions to enter a decree for injunction against the defendant Barton Huff in accordance with the prayer of the bill, with costs.

GEORGIA SUPREME COURT.

City of ATLANTA *et al.*, Plffs. in Err.,

v.

George STEIN.

(111 Ga. 789.)

*A municipal corporation, though not

*Headnote by LUMPKIN, P. J.

NOTE.—As to provision requiring contractor to employ none but union laborers, see *Adams v. Brennan* (Ill.) 42 L. R. A. 718.
51 L. R. A.

required by its charter to let contracts for public work to the lowest bidders, and though clothed, as to such matters, with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is *ultra vires* and illegal because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.

(August 9, 1900.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to enjoin the performance of a contract by defendants which was made in accordance with an ordinance requiring all city printing to bear a union label. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. A. Anderson and J. T. Pendleton, for city of Atlanta:

The charter of the city of Atlanta does not require the mayor and general council to let any of the public work of the city by contract.

It was clearly within the authority of the mayor and general council of the city of Atlanta to pass and enforce the ordinance in question, having reference only to its own work.

15 Am. & Eng. Enc. Law, pp. 1086, 1088.

The mayor and general council of the city of Atlanta have a large discretion in municipal matters.

Peebles v. Byrd, 98 Ga. 688, 25 S. E. 677.

Messrs. Lumpkin & Colquitt and C. T. Ladson also for plaintiffs in error.

Messrs. C. W. Smith and Arminius Wright, for defendant in error:

Ordinances restricting an award of contract for city printing to union shops are illegal.

Holden v. Alton, 179 Ill. 318, 53 N. E. 556.

Municipal corporations are creatures of the legislative will, and can exercise no power except such as the state has conferred upon them.

Zanone v. Mound City, 103 Ill. 556; *Chicago v. Rumpff*, 45 Ill. 91, 92 Am. Dec. 196.

Ordinances to be valid must be reasonable, and must spring from an honest exercise of legislative discretion.

People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L. R. A. 775, 49 N. E. 229; *Nagle v. Augusta*, 5 Ga. 549.

Where power is conferred upon a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, it cannot, in the exercise of that power, enact ordinances that are unreasonable or oppressive, or such as will create a monopoly.

Tugman v. Chicago, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Zanone v. Mound City*, 103 Ill. 552; *Cairo v. Feuchter*, 159 Ill. 155, 42 N. E. 308.

A bill will lie at the suit of any taxpayer to enjoin action by public agents or officers which will lead to the misapplication of public money, or the payment of such money on illegal contracts, or without the authority of law.

Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Hunnicutt v. Atlanta*, 104 Ga. 1, 30 S. E. 500; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183.

Taxation cannot be exercised in aid of private enterprises for the benefit of individuals, though in a remote or collateral way the public may be benefited by it.

Citizens' Sav. & L. Asso. v. Topeka, 20 51 I. R. A.

Wall. 656, 22 L. ed. 455; *Duraack's Appeal*, 62 Pa. 495; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L. R. A. 522, 42 N. E. 837; *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

Lumpkin, P. J., delivered the opinion of the court:

The mayor and general council of the city of Atlanta adopted the following ordinance: "An Ordinance Requiring the Union Label of the Allied Printing Trades Council on All City Printing.

"Sec. 1. Be it ordained by the mayor and general council that all printing, of whatever character, used for or by the city of Atlanta, shall bear the Allied Printing Trades Council union label of Atlanta, Georgia, as registered with the secretary of state.

"Sec. 2. Each and every city official when advertising for bids for printed matter shall specifically state in said advertisement and shall notify bidders that all bids shall be made in accordance with this ordinance.

"Sec. 3. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed."

This ordinance went into effect March 9, 1900. In obedience to its requirements, the city comptroller made a contract with the Pease Printing Company, a member of the union, to do certain printing at an agreed price. Stein, a citizen and taxpayer of Atlanta, filed an equitable petition to enjoin the municipal authorities and the Pease Company from carrying this contract into effect, and the former from further enforcing the ordinance mentioned. At the hearing it appeared that there were in the city four union and fifteen nonunion printing establishments, and that the comptroller, solely because of this ordinance, refused to entertain bids for printing from the proprietors of any of the latter. The evidence was conflicting as to the value of the work embraced in the contract with the Pease Company, but the preponderance of it was to the effect that it was worth less than the price to be paid that company; and that the city, if the nonunion printers had been allowed to compete for it, could have made a more advantageous contract. The charter of the city does not require the mayor and general council to let contracts for public work to the lowest bidders, but, under its provisions, the municipal authorities are, as to such matters, invested with a wide discretion. The injunction was granted, and the defendants excepted. As the contract was made strictly in pursuance of the ordinance, the validity of the former depends upon that of the latter. If, therefore, the ordinance was void, and it was right to enjoin the further enforcement of it, there was certainly no error in preventing by injunction the consummation of the contract. The fall of the ordinance necessarily carries with it the agreement, which had no other source of vitality. In our judgment, the ordinance was void, and the

injunction was properly granted. It cannot be seriously denied that the ordinance tended to defeat competition and encourage monopoly. Indeed, the evidence introduced before the trial judge fully warranted a finding that such was not only the tendency, but the actual effect, of the ordinance. It is not within the power of municipal authorities to enact legislation of this kind. On the contrary, with all respect to the members of the city council, we are constrained to hold that so doing is an unwarranted act, which calls for judicial interference. We cannot agree with the able and distinguished counsel for the city that "the ordinance attacked and enjoined below amounted only to a direction by the mayor and general council to the ministerial officers of the city to place the orders for public printing with printers using a union label." This ordinance is something more than a mere "direction." It has the form, and was intended to have the effect, of law; and, if valid, would, until repealed, bind the members of the council as much as it would the subordinate officials of the city. These members could not, with propriety, disregard it so long as they permitted it to stand upon the municipal statute book; and the mere power to repeal it certainly did not prevent its operation on all concerned. If, in the absence of such an ordinance, the contract in question had been let to the Pease Company, it could not properly be said that the making of it was an abuse of discretion on the sole ground that the price of the work was too high. It would require an extreme case to justify the courts in setting aside a municipal contract on such a ground, when made under a charter like that of Atlanta. With respect to agreeing on prices, securing good work, prompt service, etc., the municipal discretion must and should be allowed a wide scope; and, when exercised, the courts should be exceedingly slow and reluctant to interfere. Certainly, they should never undertake to substitute their judgment, in matters of judgment, for that of the city's governing authorities.

This court, in *Semmes v. Columbus*, 19 Ga. 471, held that "a body corporate is not answerable for an erroneous exercise of a discretion, though its consequences be injurious," and that "inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for impeaching" a contract for the sale of property belonging to a city. In *Wells v. Atlanta*, 43 Ga. 67, it was decided that, where a municipal corporation is acting within the scope of its powers, a court will not "interfere to restrain or control its action on the ground that the same is unwise or extravagant," and that, "to sustain such interference, it must appear either that the act is *ultra vires*, or fraudulent and corrupt." Again, in *Danielly v. Cabanis*, 52 Ga. 212, it was ruled that "when a town council is authorized by law to do a particular act at its discretion, the courts will not control this discretion, and inquire into the propriety, economy, and general wisdom of the undertaking, or into the details of the

manner adopted to carry the project into execution." The case of *Americus v. Eldridge*, 64 Ga. 524, is on the same line, and there are many others in which this court has made decisions of similar import. The doctrine of all these cases, *viz.* that, as a general rule, there should be no judicial interference with the exercise by municipal bodies of the discretion with which they are by law invested, is sound and well recognized; but this rule is not absolutely without exception. The whole subject was given thorough consideration in the case of *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509, in which, after stating that "under the charter of the city of Atlanta the discretion of its municipal authorities, within the sphere of their powers, is very broad, and this discretion is to be exercised according to the judgment of the corporate authorities as to the necessity or expediency of any given measure," it was held that, "where these authorities are acting within the scope of their duties, and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. In a case where it clearly appears that a threatened act on the part of the municipal authorities will result in such oppression, a court of equity may interfere to prevent the wrong." The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands, and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city which it is idle to say would not be presented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting this ordinance the mayor and general council exceeded their authority. In 1 *Spelling. Extraordinary Relief*, § 718, it is said: "Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts, they are not obliged to let the work to the lowest bidder, and cannot be enjoined for a refusal to do so, unless guilty of fraud. They may exercise an unlimited discretion so long as they are not guilty of gross abuse of discretion, and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds." It is interesting, in this connection, to notice the case of *Avery v. Job*, 25 Or. 512, 36 Pac. 293, in which was ruled that, "although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Here, then, we have most re-

spectable authority for the proposition that a municipal act which amounts to a refusal to exercise discretion, and which must result in an arbitrary waste of the public funds, "is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Is not such waste sure to occur when, out of nineteen printing concerns in Atlanta, only four are allowed to compete for the city's work, and would not a combination of these four (which could most probably be effected without much difficulty) certainly create a monopoly? If the four should combine, there would be no competition whatever. It was urged in the argument that, if such a thing should occur, the ordinance could and would be speedily repealed. To this we reply that the combination might be made without the knowledge of the municipal authorities; but, aside from this, they ought at all times to be in a position to meet such an emergency without being compelled to resort to further legislation; and, further, whether such a combination is to be anticipated or not, they have no more right to restrict competition than to defeat it altogether.

The case of *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 52 N. E. 314, is in many respects similar to the one in hand. It was there held that "a board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work, or placed upon its pay rolls." We make two pertinent extracts from the opinion of Mr. Justice Cartwright: "It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition, and to increase the cost of work. It is unquestionable that, if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule, or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the Constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision." Pages 199, 200, 177 Ill., page 316, 52 N. E., and page 720, 42 L. R. A. "There is another ground upon which complainant has an undoubted right to maintain the bill, and that 51 L. R. A.

is that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work; and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract." Pages 201, 202, 177 Ill., page 316, 52 N. E., and page 721, 42 L. R. A. In *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556, which was a case of identically the same kind as ours, except that there the city charter required the contracts to be let to the lowest bidders, it was decided that an ordinance like the one now under review was "illegal, as tending to create monopoly, and impose an additional burden on taxpayers." While, of course, the provision as to letting contracts to the lowest bidders was a matter of consequence, an examination of the opinion, which was delivered by the same justice from whom we quoted above, will leave little room for doubting that the decision would and ought to have been the same, even in the absence of such a provision.

There are, besides the foregoing, numerous other authorities which support our conclusion in the present case. We cite, as more or less in point, the following: *Beach, Monopolies*, § 125; 2 *Beach, Inj.* § 1299; *Chicago v. Rumpff*, 45 Ill. 90; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 292; *State. Van Reipen. Prosecutor. v. Jersey City*, 58 N. J. L. 282, 33 Atl. 740; *State, Oakley, Prosecutor. v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Winkler v. Summers*, 22 Abb. N. C. 80, 5 N. Y. Supp. 723. Most of the authorities cited in this opinion are also pertinent upon the proposition that in a case like the present the taxpayer has the right to invoke an injunction. Our case of *Peoples v. Byrd*, 98 Ga. 688, 25 S. E. 677, relied on by counsel for the plaintiffs in error, is in entire accord with what we now decide. There the supreme court reporter was in fact exercising a discretion. Here the corporate authorities sought to put themselves in a place where they could not do so at all, or else within very narrow limits.

Judgment affirmed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Paul J. PLANT, President, etc., of Union
257, Painters and Decorators of America,
et al.,

v.

Henry K. WOODS, President, etc., of Union
257, Painters and Decorators of America,
et al.

(176 Mass. 492.)

Members of a labor union are entitled to an injunction restraining the members of another union from which they have withdrawn from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them.

(Holmes, Ch. J., *dissents.*)

(September 5, 1900.)

PRESERVATION by the Superior Court for Hampden County after decree in favor of plaintiffs for the opinion of the Supreme Judicial Court of a suit brought to enjoin defendants from interfering with the pursuit by plaintiffs of their occupations. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. W. R. Heady and J. W. Flannery, for plaintiffs:

Intentional and wilful interference with a man's pursuing his trade or occupation in life, by direct acts that make a direct and proximate, and in its nature effective, interference with such pursuit of trade or occupation, has uniformly been held unlawful.

Allen v. Flood, 67 L. J. Q. B. N. S. 123; *Carew v. Rutherford*, 106 Mass. 9, 8 Am. Rep. 287; *Vegelahn v. Guntner*, 167 Mass. 98, 35 L. R. A. 722, 44 N. E. 1077; *Walker v. Cronin*, 107 Mass. 562; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649.

The true understanding of all continuous employment such as was enjoyed by the

NOTE.—On the question of liability for inducing breach of contract with third person, see *note* to *Boysen v. Thorn* (Cal.) 21 L. R. A. 233; also *Raycroft v. Tayntor* (Vt.) 33 L. R. A. 225; *Gare v. Condon* (Md.) 40 L. R. A. 382; and *Doremus v. Hennessy* (Ill.) 43 L. R. A. 797.

For conspiracy to coerce employers or employees, see *note* to *Casey v. Cincinnati Typographical Union*, No. 3 (C. C. §. D. O.) 12 L. R. A. 195.

For injunction against strikes, see *note* to *Longshore Printing & Pub. Co. v. Howell* (Or.) 28 L. R. A. 464.

51 L. R. A.

plaintiffs in this case, and by laboring men generally,—the day-by-day part of it being merely that their wages are measured at a certain rate per day,—is that it is a self-continuing contract until terminated by notice from the other party.

Cooke, Trade & Labor Combinations, § 8, p. 32, note 1.

The law protects a man from interference, even though he is hired merely from day to day.

There is no legal difference between maliciously, by wrongful act, causing a person to break contracts with plaintiff, and by the same act causing a person to terminate, or not to enter into, contracts with a plaintiff.

Temperton v. Russell, 62 L. J. Q. B. N. S. 412; *Allen v. Flood*, 67 L. J. Q. B. N. S. 123; *Carew v. Rutherford*, 106 Mass. 9, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 562; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934; *Dannerberg v. Ashley*, 10 Ohio C. C. 558; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96; *Cooke, Trade & Labor Combinations*, § 10, p. 48, note 3.

A conspiracy to interfere with the employment of men, to prevent their entering into employment or continuing in employment, is an unlawful conspiracy; and this is especially so if their interference is by force or intimidation; and acts in pursuance thereof are unlawful acts.

Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; *Pub. Stat. chap. 202*, § 29; *Acts 1894*, chap. 508, § 2; *Walker v. Cronin*, 107 Mass. 562; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077; *Temperton v. Russell*, 62 L. J. Q. B. N. S. 412; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890.

Such acts and threats as were found against the defendants in this case amount to force and intimidation within the meaning of the common law and of our statutes; and there need not be fear of personal, physical injury from violence; but a moral or material intimidation that works upon the mind, and would move, even against his will, an ordinary man, is sufficient.

Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96; *Carew v. Rutherford*, 106 Mass. 9, 8 Am. Rep. 287; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 98, 35 L. R. A. 722, 44 N. E. 1077; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Allen v. Flood*, 67 L. J. Q. B. N. S. 123; *Williams v. Bayley*, 35 L. J.

Ch. N. S. 717; *Rcy. v. Druitt*, 10 Cox C. C. 592; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; Record in *Book v. Railway Teamsters' Protective Union*, New Eng. Ref. Library, vol. 77, No. 1; *Lucke v. Clothing Cutters & Trimmers' Assembly*, No. 7507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505.

An unlawful conspiracy to operate by continuous unlawful acts to the injury of the plaintiff, or of his property or rights, is a nuisance which equity will enjoin.

Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 99, 35 L. R. A. 722, 44 N. E. 1077; *Longshore Printing & Pub. Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464, note, 38 Pac. 547; *Merwin*, Eq. §§ 798, 799, 838, note 5.

The supreme court has established the right and duty of equity to enjoin any private nuisance of a permanent or continuous character.

Fall River Iron Works Co. v. Old Colony & F. River R. Co. 5 Allen, 221; *Creely v. Bay State Brick Co.* 103 Mass. 514; *Page v. Young*, 106 Mass. 313; *Haskell v. New Bedford*, 108 Mass. 208; *Winslow v. Nayson*, 113 Mass. 411; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Cadigan v. Brown*, 120 Mass. 403; *Nash v. New England Mut. L. Ins. Co.* 127 Mass. 91.

Acts which would be lawful if done by one are often illegal if done in pursuance of a conspiracy.

Curew v. Rutherford, 106 Mass. 10, 8 Am. Rep. 287; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077; *Cooke, Trade & Labor Combinations*, § 4, p. 14, note 2; *Temperton v. Russell*, 62 L. J. Q. B. N. S. 412; *Doremus v. Hennessy*, 62 Ill. App. 391; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890.

The conduct of the defendants was an injury to the plaintiffs enabling and entitling them to maintain this action, even if they did not have definite contracts for definitely settled long terms of service.

Perkins v. Pendleton, 90 Ma. 166, 38 Atl. 96; *Curew v. Rutherford*, 106 Mass. 10, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 563; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 99, 35 L. R. A. 722, 44 N. E. 1077; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Temperton v. Russell*, 62 L. J. Q. B. N. S. 412; *Allen v. Flood*, 67 L. J. Q. B. N. S. 123; *Chipleay v. Atkinson*, 23 Fla. 206, 1 So. 934.

Messrs. J. B. Carroll and W. H. McClintock, for defendants:

An action will lie for injuring a man's business, or depriving him of possible contracts, whether the result is accomplished by persuasion, fraud, or force, if the harm is inflicted simply from malevolence, and without some justifiable cause, such as competition in trade.

Walker v. Cronin, 107 Mass. 555; *Mo-* 51 L. R. A.

rasse v. Brochu, 151 Mass. 567, 8 L. R. A. 524, 25 N. E. 74; *May v. Wood*, 172 Mass. 11, 51 N. E. 191.

And an action will also lie, when there is justifiable cause, for the infliction of such damages, if the means employed to secure the end are in themselves unlawful.

Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077.

But if justifiable cause for interfering with another's business does exist, damage may be inflicted by persuasion to leave another's employ, or persuasion to discharge or to refuse to hire another, by refusing to work in the same employment with another, by notification to an employer of such intention not to work, or by the refusal or withdrawal of trade or other pecuniary advantages from a third person, who shall deal with or hire another.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; *Boven v. Matheson*, 14 Allen, 499; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25.

The means adopted by the defendant association to compel the members of the plaintiffs' association to join the defendant association were lawful if they had a justifiable cause for interfering with the plaintiffs. Such justifiable cause existed.

There was the same element of competition between these two associations as would exist in the case of two rival department stores.

Competition has been defined as a conflict of temporal interests, and there certainly is a conflict of temporal interests between two organizations covering the same field, with the same object, but the one perfectly free from the control of the other.

The value of labor organization depends on the control of all possible supplies of labor under one governing body, and the introduction of each rival organization weakens in some degree the strength of what is called "organized labor."

The two rival organizations were engaged in a struggle for life, which made the means adopted justifiable.

The defendants have the right to combine among themselves for the purpose of regulating their own conduct towards persons who should employ Lafayette men; that is to say, for the purpose of refusing to work in shops where Lafayette men were employed.

Vegelahn v. Guntner, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *Allen v. Flood* [1898] A. C. 1; *Raycroft v. Tayntor*, 68 Vt. 219, 33 L. R. A. 225, 35 Atl. 53; *Snow v. Wheeler*, 113 Mass. 179.

It being lawful to combine for that purpose, it cannot be unlawful to give notice of an intention to act on that concerted purpose.

An injunction ought not to be granted in such a case as this.

Here are simply a series of six or seven separate acts, which can by no means be said

to be a continuing injury or nuisance. An injunction should not issue in such a case.

Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 19 Am. Rep. 310; *Raymond v. Russell*, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544; *Smith v. Smith*, 148 Mass. 1, 18 N. E. 595.

If anything unlawful has been done, the remedy is by separate actions of tort, brought by each member injured.

Worthington v. Waring, 157 Mass. 421, 20 L. R. A. 342, 32 N. E. 744; *Workman v. Smith*, 155 Mass. 92, 29 N. E. 198.

Hammond, J., delivered the opinion of the court:

This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette, in the state of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore, in the state of Maryland. The plaintiff union was composed of workmen who, in 1897, withdrew from the defendant union. There does not appear to be anything illegal in the object of either union, as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trades union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union. The case is before us upon a report after a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be nonunion men," and voted "to notify bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs, and each of them, to join the defendant association, peaceably, if possible, but by threat and intimidation if necessary. Accordingly, on October 7, they voted that, "if our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the manner fully set forth in the master's report. Without rehearsing the circumstances in detail, it is sufficient to say here that the general method of operations was substantially as follows: A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs

were at work, and inform the employer of the action of the defendant union with reference to the plaintiffs, and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as nonunion men, but have not otherwise represented them as men lacking in good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employees who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott; and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employees as were Lafayette men who declined to sign application blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employers' business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette union to join the Baltimore union, and as a means to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business. We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and, to carry out their purpose, have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. It matters not that this request to discharge

has not been expressly made. There can be no doubt, upon the findings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of noncompliance with the demands of the defendant union is one of the prominent features of the plan agreed upon. It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will by strong, persistent, and organized persuasion and social pressure of every description do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practised by organized labor will be made to injure him in his business, even to his ruin, if possible; and that by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself. However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally, or even answerable civilly in damages to those who suffer, still, with full knowledge of what is to be expected, they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those—whether their employer or fellow workmen—against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered. Such is the nature of the threat, and such the degree of coercion and intimidation involved in it. If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs all over the state in the same manner, and compel them to abandon their trade, 51 L. R. A.

or bow to the behests of their pursuers. It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this as in every other case of equal rights the right of each individual is to be exercised with due regard to the similar right of all others, and the right of one be said to end where that of another begins. The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle, in his book on Trades-Unions (page 12), has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right, under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition." The same rule is stated with care and discrimination by Wells, J., in *Walker v. Cronin*, 107 Mass. 555, 564: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract, or otherwise, is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing." In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful. *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 100 Mass. 1, 8 Am. Rep. 287, and cases cited therein.

The defendants contend that they have done nothing unlawful, and in support of that contention they say that a person may work for whom he pleases, and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his intention in advance, with or without stating

the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done, notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employees, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true. It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in [1898] App. Cas. 1, as follows: "An act lawful in itself is not converted by a malicious or bad motive, into an unlawful act, so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate. In so far as a right is lawful it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor,—as, where one digs upon his own land for water (*Greenleaf v. Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra v. Bourges*, 141 Mass. 7, 4 N. E. 623); but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel, and of procuring a wife to leave her husband. *Tasker v. Stanley*, 153 Mass. 148, 10 L. R. A. 468, 26 N. E. 417, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See, on this, an instructive article in 8 Harvard Law Rev. 1, where the subject is considered at some length. It is manifest that not much progress is made by such general statements as those quoted above from *Allen v. Flood*, whatever may be their meaning.

Still standing for solution is the question, Under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent? In cases somewhat akin to the one at bar this court has 51 L. R. A.

had occasion to consider the question how far acts manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury, and partly in reliance upon such coercion are justifiable. In *Bowen v. Matheson*, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship if men shipped by a nonmember were in that ship, to refuse to furnish seamen through a nonmember, to notify the public that they had combined against nonmembers and had "laid the plaintiff on the shelf," to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them, and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts so injurious to the business of the plaintiff, and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (page 503), "if their effect is to destroy the business of shipping masters who are not members of the association, it is such a result as, in the competition of business, often follows from a course of proceeding that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals. Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition. *Mogul S. S. Co. v. McGregor* [1892] A. C. 26; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1. On the other hand, it was held in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, that a conspiracy against a mechanic—who is under the necessity of employing workmen in order to carry on his business—to obtain a sum of money from him, which he is under no legal obligation to pay, by inducing his workmen to leave him, or by deterring others from entering into his employ, or by threatening to do this, so that he is induced to pay the money demanded under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is an illegal, if not criminal, conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, Ch. J., speaking for the court, says that there is no doubt that, if the parties under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him. That case bears a

close analogy to the one at bar. The acts there threatened were like those in this case, and the purpose was, in substance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons. Without now indicating to what extent workmen may combine, and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced, or their wages increased, and to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow workmen, we think this case must be governed by the principles laid down in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in *Reg. v. Druiitt*, 10 Cox. C. C. 592: "No right of property or capital was so sacred or carefully guarded by the law of the land as that of personal liberty. . . . That liberty is not liberty of the mind only; it is also a liberty of the mind and will; and the liberty of a man's mind and will to say how he should bestow himself, his means, his talents and his industry is as much a subject of the law's protection as that of his body." It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will. The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them. The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws. The law is 51 L. R. A.

guage used by this court in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, may be repeated here with emphasis, as applicable to this case: "The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and, if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both." See, in addition to the authorities above cited, *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Sherry v. Perkins*, 147 Mass. 214, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077; Stat. 1894, chap. 508, § 2; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 640; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Lucke v. Clothing Cutters & Trimmers' Assembly*, No. 7507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505. As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind, which will be likely still more to injure the plaintiffs, a bill in equity lies to enjoin the defendants. *Vegelahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 722, 44 N. E. 1077.

Some phases of the labor question have recently been discussed in the very elaborately considered case of *Allen v. Flood* [1898] A. C. 1. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained, not only by three of the nine lords who sat in the case, but also by the great majority of the common-law judges who had occasion officially to express an opinion. There must be, therefore a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause any person to discriminate against any employer or members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because, so far as respects unlawful acts, it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted. Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants.

As thus modified, in the opinion of the majority of the court, the decree should stand. Decree accordingly.

Holmes, Ch. J., dissenting:

When a question has been decided by the

court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority, and leave the remedy to the legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon *Vegeahn v. Guntner*, 107 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the House of Lords in *Allen v. Flood* [1898] App. Cas. 1. But, much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

I agree that the conduct of the defendants is actionable unless justified. *May v. Wood*, 172 Mass. 11, 14, 51 N. E. 191, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct; that is, upon the motive with which they acted. *Vegeahn v. Guntner*, 107 Mass. 92, 105, 106, 35 L. R. A. 722, 44 N. E. 1077. I agree, for instance, that, if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. *Weston v. Barnicoat*, 175 Mass. 454, 49 L. R. A. 612, 56 N. E. 619. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workingman would not contend that the courts should sanction a combination for the purpose of inflicting or threatening violence, or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts

and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests.

I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor, as a whole, secures a larger share by that means.

The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.

It is only by divesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption,—asking ourselves what is the annual product, who consumes it, and what changes would or could we make,—that we can keep in the world of realities.

But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

MICHIGAN SUPREME COURT.

Edith STRETCH

v.

Village of CASSOPOLIS, *Plff. in Err.*

(.....Mich.....)

The removal by a municipality of shade

trees from a street without giving the abutting owner, who owns the fee of the street, any notice of the public necessity for the removal, or any opportunity to transplant them or to remove them himself, constitutes an invasion of the owner's legal rights, for which the municipality is liable in damages.

NOTE.—As to ownership and control of trees in highway, see *Chase v. Oshkosh* (Wis.) 15 L. R. A. 553, and *note*; *State, v. Avis, Prosecutor, v. Vineland* (N. J. L.) 23 L. R. A. 685; *Tate v. Greensboro* (N. C.) 24 L. R. A. 671; *Dalley v. State* (Ohio) 24 L. R. A. 724; *Mount Carmel v. Shaw* (Ill.) 27 L. R. A. 580; *Bradley v. South-* 51 L. R. A.

ern New England Teleph. Co. (Conn.) 32 L. R. A. 280; *Vanderhurst v. Tholcke* (Cal.) 35 L. R. A. 267.

For trees on street as a nuisance subject to municipal control, see cases in *note* to *Hagerstown v. Witmer* (Md.) 89 L. R. A. on page 870.

(Hooker, J., dissents.)

(November 18, 1900.)

ERROR to the Circuit Court for Cass County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged illegal cutting of plaintiff's trees. *Affirmed.*

The facts are stated in the opinion.

Mr. M. L. Howell, for plaintiff in error:

A municipality has absolute control over its streets, and may devote any part of them to sidewalks, and its action is not reversible.

McArthur v. Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; *Fuller v. Grand Rapids*, 105 Mich. 529, 63 N. W. 530; *Pontiac v. Carter*, 32 Mich. 164.

The village had the right to remove the trees without notice.

Mount Carmel v. Shaw, 155 Ill. 37, 27 L. R. A. 580, 39 N. E. 584; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 267, 45 Pac. 266; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 51 N. W. 560; *Wyant v. Central Telephone Co.* (Mich.) 47 L. R. A. 497, 81 N. W. 928.

Their location with reference to the proposed sidewalk, of which plaintiff had notice, made them an obstruction to its use and a dangerous nuisance.

Hickey v. Michigan O. R. Co. 96 Mich. 498, 21 L. R. A. 729, 55 N. W. 989.

Mr. Coy W. Hendryx for defendant in error.

Montgomery, Ch. J., delivered the opinion of the court:

The sole question which this record presents is whether a village acting under the general incorporation act (Comp. Laws, chap. 87), may cut down and remove shade trees standing within the highway and which have been planted and maintained by the abutting owner, who owns to the center of the street, when such removal is without previous notice to the abutting owner to remove the trees. There is no question but that the abutting owner has the title to shade trees adjoining his premises. *Cooley, Torts*, 318, 372; *Clark v. Dasso*, 34 Mich. 86; *Rogers v. Randall*, 29 Mich. 41; *People v. Foss*, 80 Mich. 559, 8 L. R. A. 472, 45 N. W. 480.

It is equally well settled, and is conceded by the learned counsel for the plaintiff, that the municipality may, when the public necessities appear to them to call for such action, require such shade trees to be removed. The question is whether, as preliminary to their removal by the public authorities, the owner should have notice of the fact that the public necessity requires the removal of the trees, and be given the opportunity himself to transplant them or remove them. The case of *Clark v. Dasso*, 34 Mich. 86, answers this question in the following language: "It is to be remembered that the trees are the property of the adjacent owner, who cannot be lawfully deprived of any species of property in the summary mode which 51 L. R. A.

was adopted in this case. If the trees must be removed he may prefer to take them as living trees, and transplant them elsewhere, perhaps in more suitable localities in the street, and he should not be compelled to cut them down where removal is preferred." We are satisfied that this view applies with as much force in the present case as in *Clark v. Dasso*. No other view is consistent with ownership of the trees by the adjacent owner. True, this title is subservient to the public right, but the public right may well be exercised in a manner not to entail entire loss of property upon the owner. It may be true that the language quoted is *dictum*, but such has been understood to be the law for many years, and we discover nothing in the rule which imposes on the public authorities any great burden.

The case of *Wyant v. Central Telephone Co.* is not inconsistent with this holding. In that case, which may be found at 47 L. R. A. 497, 81 N. W. 928, notice to the owner would furnish no opportunity to avoid the cutting of limbs. Whatever damage a tree might sustain by such cutting could not be obviated by the owner; therefore, notice to the owner would serve no purpose. In case of the destruction of the tree an entirely different consideration obtains. The owner who has notice of the public requirements is in a position to protect himself in a large part from damage. So clearly is this a valuable right that it has been held that a duty rests on the owner to protect himself from unnecessary damage; as in *Shawnee County Comrs. v. Beekwith*, 10 Kan. 603, where in a condemnation case the owner of a hedge sought allowance for the value of it, it was held that the allowance should be limited to the value of the hedge and its decreased value by reason of the transplanting.

It is contended that the plaintiff in this case did not suffer because of the failure to give notice, because she testified that if she had had notice the trees would not have been removed. Whether the plaintiff meant by this that she would have taken steps to prevent their removal, or that she herself would not have removed them and allowed the village authorities to do so, is not quite clear, but it does appear that she was not given the opportunity to decide the question.

The removal was therefore an invasion of her legal rights, and the judgment for the damages sustained is affirmed.

Moore, Long, and Grant, JJ., concur.

Hooker, J., dissenting:

I concur in the opinion that the village is liable upon the ground that the agents of the village converted the trees to the use of the village, after they were cut, as was substantially true in *Clark v. Dasso*, 34 Mich. 86.

I am of opinion that, not only has the village authority to remove trees when necessity requires it for highway purposes, but that it does not become a trespasser by so doing, so long as it does not do unnecessary

damage to the owner, either by greater injury to the trees than is necessary, or by preventing their removal to another location by the owner, where feasible, which would be doing unnecessary injury. But I think it cannot be properly said that the right of action exists in every case where notice has not been given, whether a notice would be of use or not. If the tree could not, by any possibility, be saved, or if the owner should not care to remove it, or if it were not practicable to do so profitably, there would be no damage, and a rule which subjects a municipality to damages and costs in such a case, is, in my opinion, unjust, and at variance with *Wyant v. Central Telephone Co.* 47 L. R. A. 497, 81 N. W. 928. In that case

it was held that the defendant was not liable, although no notice was given nor opportunity afforded for the owner to cut the limbs because no unnecessary injury was done.

The same rule should apply to any other case of tree cutting, where the owner has not been subjected to damage. This question is discussed at length in an opinion by the writer in *Miller v. Detroit, Y. & A. A. R. Co.* (Mich.) 84 N. W. 49, where numerous cases sustaining the authority of municipalities to cut trees summarily are cited.

The judgment should be reversed for error in the charge relating to the measure of damage.

IOWA SUPREME COURT.

STATE of Iowa, Appt.,

v.
G. T. SCHLENKER.

(.....Iowa.....)

1. An intent to defraud is not an essential element of the offense denounced by Code, §§ 4989, 4990, which prohibit the adulteration of milk intended for sale by adding to it anything whatever.
2. A definition in a statute of terms therein used is not an invasion of the province of the courts to construe statutes.
3. The power of the legislature to prohibit the addition of water or any other substance whatever to milk that is sold is included within the police power to protect health, even when it extends to the addition of that which is harmless in itself, and which is added without intent to defraud, but merely to preserve the milk.
4. No restraint on the police power of the states is imposed by U. S. Const. Fourteenth Amendment.

(December 22, 1900.)

APPEAL by the State from an order of the District Court for Polk County arresting judgment after conviction of defendant for selling adulterated milk on the ground that the statute under which the conviction was had was unconstitutional. *Reversed.*

The facts are stated in the opinion.

Messrs. Milton Remley, Attorney General, and Charles A. Van Vleet, for appellant:

If any however small an amount of any substance or thing be added, then, under the

NOTE.—As to ordinance requiring samples of milk to be furnished for inspection, see *State v. Duquesne* (La.) 26 L. R. A. 162.

As to ordinance providing for destruction of milk which does not come up to prescribed standard, see *Deems v. Baltimore* (Md.) 26 L. R. A. 541.

As to statute requiring registration of cattle of persons selling milk, and prohibiting sale of milk from unsanitary premises, see *State v. Broadbelt* (Md.) 45 L. R. A. 433.
41 L. R. A.

provisions of the statute, the milk is adulterated, and the sale of the milk thus adulterated is in violation of § 4989.

Com. v. Gordon, 159 Mass. 8, 33 N. E. 709; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *State v. Campbell*, 64 N. H. 404, 13 Atl. 585.

If it were in the power of the general assembly to enact § 4989, then the act cannot be declared to be unconstitutional.

If the law cannot be said to be unconstitutional, then surely one violating the law cannot be heard to say that his act was harmless; that it was not injurious to public health or to public peace, nor did it defraud anyone; hence, he is not amenable to the law.

Com. v. Schaffner, 146 Mass. 512, 16 N. E. 280; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315.

Messrs. W. N. Jordan and James C. Hume, for appellee:

The trial judge was right in holding that a law which arbitrarily interferes with one's right of private property is void, and he may have been right in so interpreting the statutes under which defendant is accused as to make them conform to the fundamental law of the state.

In view of the fact that the object against which the force of § 4989 is directed is "unclean, impure, unhealthy, adulterated, unwholesome, or skimmed milk," the words of § 4990, *vis.*, "any other substance or thing," only mean "any other substance or thing" that is "unclean, impure, unhealthy, adulterated, or unwholesome."

State v. Botkin, 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185; *State v. Stoller*, 38 Iowa, 321; *Keokuk v. Scroggs*, 39 Iowa, 447; *State v. Campbell*, 76 Iowa, 122, 40 N. W. 100.

Where a statute is susceptible of two constructions, one of which, if adopted, will render it constitutional, and the other will ren-

der it unconstitutional, the former construction should always be adopted.

Santo v. State, 2 Iowa, 165, 63 Am. Dec. 497; *State ex rel. Weir v. Davis County Judge*, 2 Iowa, 280; *Duncombe v. Prindle*, 12 Iowa, 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221.

A statute forbidding the sale, without deceit or fraud, of a harmless and wholesome article of food, is void: (a) Because it is a violation of an absolute right of the people; (b) because it is a violation of § 9, art. 1, of the Constitution of Iowa, which forbids the deprivation of anyone of his property without due process of law; and (c) because it is a violation of art. 14 of the Amendments of the Constitution of the United States, which restrains every state from depriving any person of his property without due process of law.

There is, as it were, back of the Constitution, an unwritten constitution which guarantees and well protects all the absolute rights of the people.

Hanson v. Vernon, 27 Iowa, 28, 73, 1 Am. Rep. 215.

The right of private property is the free use, enjoyment, and disposal of all of one's lawful acquisitions, without any control or diminution, save only by the law of the land.

1 Bl. Com. 138.

The words "the law of the land" convey the same meaning as the words "due process of law."

2 Inst. 50; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Mason v. Messenger*, 17 Iowa, 261; *Foule v. Mann*, 53 Iowa, 42, 3 N. W. 814; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

The law of our land recognizes the right of the legislature to control the use and disposal of one's lawful acquisitions in certain cases. This right is based upon the maxim, *Sic utere tuo ut alienum non laedas*, and is designated as the police power of the state.

4 Bl. Com. 162; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

The state, by virtue of its police power, may enact all such laws as may be necessary or proper to protect its citizens in their persons, health, and property, and to guard them against frauds, impositions and oppressions.

Council Bluffs v. Kansas City, St. J. & C. B. R. Co. 45 Iowa, 338, 24 Am. Rep. 773.

There are certain well-recognized limitations upon it, and, so far as it relates to the statutory regulations of the sale of food and drink, it is confined strictly to enactments: First, for the preservation of the morals and health of the people, and, second, to enactments for their protection against frauds, impositions, and oppressions; and a law which does not come within one or the other of these branches of the power is unconstitutional and void.

Cooley, Const. Lim. chap. 16; Council Bluffs v. Kansas City, St. J. & C. B. R. Co. 51 L. R. A.

45 Iowa, 338, 24 Am. Rep. 773; *State v. Snow*, 81 Iowa, 642, 11 L. R. A. 355, 47 N. W. 777; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

A state cannot, under the guise of a police regulation, prohibit the manufacture or sale of articles of food which are harmless and wholesome.

People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Dorsey v. State*, 38 Tex. Crim. Rep. 527, 40 L. R. A. 201, 44 S. W. 514; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

Where the article is not injurious to health, a legislature cannot even require that it be marked in a distasteful or repulsive manner, for that would practically amount to a prohibition of its manufacture and sale.

Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of the facts of which judicial notice may be taken, then the act must fall; otherwise it should stand.

People v. Smith, 108 Mich. 527, 32 L. R. A. 853, 66 N. W. 382; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Section 4990 of the Code of Iowa, being an act deciding and declaring the character and admissibility of evidence, is void.

Cooley, Const. Lim. 368, 369; Wantlan v. White, 19 Ind. 470; *Adams v. Beale*, 19 Iowa, 61; *McCready v. Seaton*, 29 Iowa, 356, 4 Am. Rep. 214.

Deemer, J., delivered the opinion of the court:

The statute under which the information was filed reads as follows: "If any person shall sell . . . any adulterated . . . milk . . . he shall be fined," etc. Section 4989. Section 4990 reads, "For the purpose of this chapter the addition of water or any other substance or thing, to whole milk or skimmed milk or partially skimmed milk, is hereby declared an adulteration," etc. There is no question that defendant sold milk to various persons into which he had put and mixed boracic acid. Some of them were notified of the adulteration, but others were not. He testifies that he dissolved 5 pounds of the acid in 20 gallons of water, and added 1 pint of the solution to 10 gallons of milk; that he used it as a preservative, and told quite a number of his customers that he was using the solution for the purpose indicated; that he never attempted to deceive any of his customers regarding the use of the solution; and that its use was necessary "to keep the milk from souring." He also introduced experts

to show that the quantity of boracic acid used tended to prevent decomposition, and would have no deleterious effect on the consumers. For the purpose of the case, we must assume that the quantity of acid used by the defendant in the milk sold by him had no deleterious effect, but tended to prevent decomposition and the development of germs. The experts also testified, however, that the addition of an excessive amount of boracic acid would have a deleterious effect, in that it would retard the formation of gastric juice in the stomach. The learned district judge filed an opinion in which he held, in effect, that the statute, construed literally, was unconstitutional, and that the evident intent of the legislature was to prohibit sales of anything that would operate as a fraud upon the buyer or prove deleterious to his health, and that, as the defendant was guilty of no fraud and the adulteration was harmless, he had not violated the law. These propositions are insisted upon by the appellee, and further contention is made that if the statute is not so construed it is unconstitutional, for various reasons, that will be referred to during the course of the opinion. It seems to us that the construction placed on the statute by the trial court is a strained and unnatural one. The language of the enactment is plain, and in view of previous legislation there is no doubt that the act should have a literal interpretation. That the legislature so intended is not open to serious debate. So construed, are the acts in question constitutional?

Section 4990 is said to be void because it invades the judicial province, in that it is not permissible for the legislature to make certain evidence conclusive of a question that may be submitted to judicial determination. No doubt, the legislature cannot indirectly dispose of a cause by prescribing conclusive rules of evidence, and it has no power to direct the judiciary in the interpretation of existing statutes. *Groesbeck v. Seeley*, 13 Mich. 329; *Johns v. State*, 55 Md. 362; *Reiser v. William Tell Sav. Fund Assn.* 39 Pa. 137; *Salter v. Tobias*, 3 Paige, 338. But it does have power to prescribe legal definitions of its own language, and, when an act passed by it embodies a definition, it is binding on the courts. *Smith v. State*, 28 Ind. 321; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440; *Herold v. State*, 21 Neb. 50, 31 N. W. 258; *Clay v. Central R. & Bkg. Co.* 84 Ga. 345, 10 S. E. 967; *People ex rel. Mutual L. Ins. Co. v. New York City & County Supers.* 16 N. Y. 424. Even declaratory statutes are entitled to respectful consideration by the courts, although not always binding. *Cooley*, St. Crimes, 2d ed. § 91; *People ex rel. Mutual L. Ins. Co. v. New York City & County Supers.* 16 N. Y. 424; *Lambertson v. Hogan*, 2 Pa. St. 25. The definition given by the legislature in § 4990 of the Code as to the term "adulteration" is valid and binding. Such legislation does not trench on the powers of the judiciary, and is not invalid for the reason suggested.

51 L. R. A.

But it is said that the legislature had no power to forbid the sale, without deceit or fraud, of a harmless and wholesome article of food. This may be true, as a general proposition; but it is also true that in virtue of the police power it may pass such laws as are, or may reasonably appear to be, necessary for the health, comfort, and safety of the people. No clear and comprehensive definition of the police power has ever been given, and it is doubtful if one can be framed, that will be accurate and cover every conceivable case that may arise. It is much easier to determine whether the particular case comes within the scope of the power, than to give a definition that will be applicable to all cases. In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, it is said: The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety. The power belongs to the several states, and not to the Federal government, save in exceptional cases; and, so long as the legislature does not pass the limits prescribed by the Federal or state Constitutions, courts have no authority to interfere on the ground that the acts in question violate natural principles of right and justice. Ordinarily the legislature determines when the public welfare and safety demand its exercise; and, as a general rule, courts have nothing to do with the policy, wisdom, or necessity of the enactment. Of course, the state cannot, by arbitrarily assuming that a commodity is injurious to the health or comfort of the people, impair individual rights guaranteed by the Constitution. The police power of the state, like every other, is subject to the Constitution, and cannot be used as a cloak under which to disregard constitutional rights or restrictions. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. The question is, of necessity, primarily with the legislature, and its decision should not be lightly disregarded by the courts. Courts will not interfere, as a rule, unless there is a plain excess or usurpation of power, and in case of doubt it should be solved in favor of the power of the legislature to make the enactment. It was an indictable offense at common law to mix unwholesome ingredients, such as alum in bread, or to mix unwholesome substances in anything intended for the food of man. There is an ancient statute (Stat. 51 Hen. III.) prohibiting the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew. 4 Bl. Com. 162. In *Rea v. Dixon*, 3 Maule & S. 11, defendant was indicted for furnishing bread not fit for food. It appeared that the loaves were strongly impregnated with alum, and that large pieces of crude alum were found in them. Defendant's motion for a new trial, filed after a verdict of guilty, was overruled; the court saying that "alum being

perilous to health, in the form used, it is immaterial that if used in certain quantities it was not noxious, but wholesome." Statutes enacted to secure the sale of pure food and to prevent adulteration are quite common in this country, and have ever been referred to the police power. See English sale of food and drugs act of 1875 (chap. 63); Tenn. Laws 1859, 1860, chap. 81, § 4; Mass. Rev. Stat. chap. 131, § 1. They are enacted to prevent fraud and to conserve the public health, and as such are a valid exercise of the police power. *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *Powell v. Pennsylvania*, 127 U. S. 679, 32 L. ed. 254, 8 Sup. Ct. Rep. 992, 1257; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

That the sale of milk to which water and boracic acid have been added may amount to a fraud upon the purchaser is evident. He has the right to assume that the milk he buys is unadulterated, and that it will go through the natural process of oxidation and decomposition. He may wish to use sour milk for culinary purposes, and has the right to assume that nothing has been added to prevent chemical change. Counsel for appellee responds to this thought by saying that defendant notified all persons to whom he sold that boracic acid had been added, and that no one of the witnesses for the state was deceived. The record does not bear them out in this contention, but, even if it did, we would have no help therefrom in solving the constitutional question involved. It may be conceded that the milk sold by defendant was not harmful to the health of those who used it; but it is certainly dangerous to the public to permit milkmen and those dealing in milk to adulterate it in such manner as to change its constituent properties. The statute does not deprive the defendant of his property, but it does impose upon him the duty of so using it that no injury shall result to others most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but these rights are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable regulations as the legislature, under the Constitution, may deem necessary and expedient. In the *Schaffner Case*, from Massachusetts, and the *Campbell Case*, from New Hampshire, it is expressly held to be immaterial whether the foreign matter is or is not injurious to health. The court in the latter case said that, "if the legislature has power to fix a standard, it must judge whether or not milk below that standard is unwholesome;" 51 L. R. A.

and in the former it was held that the addition of pure water to milk was an adulteration punishable under the statute. In *Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709, it is expressly held that the addition of boracic acid to cream is an offense under the statute of the state of Massachusetts. See also *Com. v. Wetherbee*, 153 Mass. 159, 26 N. E. 414. In *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711, the exact question made by defendant in this case was decided, the court using the following language: "It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore the legislature has no power to make the sale of milk and water when mixed a penal offense, unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practised with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency." It is not enough to show that defendant did not intend to defraud, or that the milk he sold was wholesome. If that were true, almost any law intended to protect the public health and safety might be overthrown. It is enough that adulteration such as prescribed by the statute may defraud or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices, and that it ought to be prohibited. To defeat the act prohibiting such conduct, it is not enough to show that in the particular case the article sold was innocuous. Criminal intent is not an essential element of the offense described in the statute, and need not be shown in order to justify a conviction. *Com. v. Smith*, 103 Mass. 444; *Com. v. Farren*, 9 Allen, 489; *Com. v. Nichols*, 10 Allen, 199; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Smith*, 10 R. I. 258. If the statute required knowledge or intent, of course these matters should be shown. These propositions are a sufficient answer to the opinion of the trial court, holding that an intent to defraud is necessary.

Appellee further contends that the statute in question is in violation of the 14th Amendment to the Federal Constitution. Such contention is not sound, for it is fundamental that this amendment does not impose any restraints on the exercise of the police power of the state for the protection of the safety, health, or morals of the community. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6;

Re Rahrer, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245. The conclusion of the learned trial judge was made to depend almost wholly on the facts developed by the evidence. If the jury had found the milk as adulterated, unwholesome, we have no doubt that the trial court would have sustained the convictions. That the constitutionality of a statute ought not to be made to depend on the finding of a jury on the facts of a case is manifest. If the plain provisions of the Constitution have been violated, or if the act cannot be said to be a proper exercise of the police power, in view of the facts of which judicial notice may be taken, then the duty of declaring the act invalid is clear. But, in the absence of such finding, the act should stand. Ordinarily it cannot, we think, be a question of fact for a jury. See *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Smith*, 108 Mich. 527, 32 L. R. A. 853, 66 N. W. 382. *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, is relied on by appellee. That case involved the right to sell oleomargarine, and not the question of adulteration. That it is not in conflict with anything we have announced clearly appears from the *Cipperly Case*, in 101 N. Y. 634, 4 N. E. 107. See also *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741, 8 N. E. 736. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, involved the commerce clause of the Federal Constitution; and it was held that the legislature could not, under the guise of the police power, absolutely prohibit the sale of articles which are the sub-

jects of interstate commerce. It does not overrule *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, or *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 154; and as those cases sustain our holding, we may well rest thereon.

Lastly, it is said that § 4990 of the Code is void because the subject is not expressed in the title. The act is found in the Code of 1897. Whether or not it existed prior to that time is immaterial to our present inquiry. Some claim is made that the title of the act adopting the Code, and particularly that part of it under consideration, is insufficient. Our attention has not been called to any defects in the enactment of the Code, either as a whole, or by titles and chapters; and in the absence of such a showing, and of the most cogent arguments in support of the claim, we are not justified in holding that either the Code or any section or chapter thereof is void because of the constitutional provision defining what shall be embraced in the title of an act. The title to the original act was sufficiently specific. *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; *State v. Snow*, 81 Iowa, 642, 11 L. R. A. 355, 47 N. W. 777; *Christie v. Life Indemnity & Invest. Co.* 82 Iowa, 360, 48 N. W. 94.

We have covered all points made in argument, and reach the conclusion that the trial court was in error in his conclusions of law; and we therefore reverse the same, to the end that the proper rule may be established for such cases.

Reversed.

ILLINOIS SUPREME COURT.

John Charles BARCLAY, *Plff. in Err.*,
v.

Grace Leslie BARCLAY.

(184 Ill. 375.)

1. The commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt within the constitutional provision against imprisonment for debt.
2. A decree for alimony being a penalty imposed for a failure to perform a duty, and always subject to modification by the court according to the varying circumstances of the parties, the obligation imposed thereby is not a provable debt in bankruptcy proceedings.

(*Boggs, J., dissents.*)

(February 19, 1900.)

NOTE.—On the question of alimony as provable debt in bankruptcy proceedings, see *Noyes v. Hubbard* (Vt.) 15 L. R. A. 394.
51 L. R. A.

ERROR to the Circuit Court for Cook County to review a judgment in favor of plaintiff in a proceeding to compel the payment of alimony. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thornton & Chancellor for plaintiff in error.

Mr. James Maher, for defendant in error:

Alimony is not a debt, nor any imprisonment for nonpayment an imprisonment for debt.

Wightman v. Wightman, 45 Ill. 167.

The liability to pay alimony does not exist solely by means of the marriage relation, but the public at large have an interest, and a vital one, in seeing that the payment of alimony is enforced, so that the families of husbands in such cases may not be a burden upon the public for their support; and public policy demands that such decrees shall be enforced.

Noyes v. Hubbard, 64 Vt. 302, 15 L. R. A. 394, 23 Atl. 727.

Phillips, J., delivered the opinion of the court:

On June 27, 1899, the defendant in error, upon a decree awarded to her for the payment of alimony in her suit for separate maintenance, on a petition, which was duly verified, showing that the sum of \$532 was due her, after personal service of notice of the application therefor, obtained a rule on the plaintiff in error, her husband, to show cause why he should not be attached for contempt of court for disobedience of the order of court requiring him to pay the alimony. To this rule the plaintiff in error filed his answer in the nature of a plea in abatement, duly verified, averring that on the 5th day of July, 1899, he had filed his petition in the bankruptcy court, in and by which he avers that he had exhibited and scheduled this indebtedness in favor of the defendant in error, and asked to be discharged therefrom. On hearing, the circuit court adjudged the plaintiff in error guilty of a contempt of court for failure to pay the sum of money accruing to defendant in error as her alimony, and found the sum then due to be \$532, and, to compel the plaintiff to pay this amount, ordered that an attachment should forthwith issue against his person. The plaintiff in error brings the record to this court, and insists, first, that the proceedings should have been stayed in the circuit court until the adjudication on the bankruptcy petition; and further insists that this court should take jurisdiction of this case because it requires a construction of § 12 of article 2 of the Constitution, which is as follows: "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud;" and insists that an imprisonment for contempt was a violation of that provision. It has been frequently held that the commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt, from which he can claim exemption under the provisions of a constitution prohibiting imprisonment for debt. *Wightman v. Wightman*, 45 Ill. 167; *Carlton v. Carlton*, 44 Ga. 216; *Menzie v. Anderson*, 65 Ind. 239; *Allen v. Allen*, 100 Mass. 373. The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. As heretofore shown, it may be enforced by imprisonment for contempt without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be

paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court. *Noyes v. Hubbard*, 64 Vt. 302, 15 L. R. A. 394, 23 Atl. 727. While there has been some doubt expressed as to whether past-due alimony is a provable debt under the bankrupt acts of 1867 and of 1841, yet on principle it would seem that it is not a provable debt, not only for the reason that an action will not ordinarily lie to enforce a decree for alimony, but because the peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties; and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority, and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such change in conditions and as to such original right of the parties. It was held in 1878, by the United States court for the southern district of New York, that a claim for alimony, whether accruing before or subsequent to the proceedings in bankruptcy, was not a provable debt, and that proceedings to enforce its payment cannot properly be stayed by the bankruptcy court. *Re Lachemeyer*, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7, 966. Under the bankrupt act of 1898 an opinion was handed down on September 15, 1899, by Kirkpatrick, J., of the United States district court for the district of New Jersey, in the case of *Re Van Orden*, 1 N. B. N. 475, 96 Fed. Rep. 86, holding that a decree for alimony and costs is a provable debt in bankruptcy proceedings, and that the provisions of the statute authorize the debtor's discharge from liability under such decree. We do not concur with the reasoning of the court in that case, and adhere to what we have heretofore said with reference to the question. We hold there was no error committed by the circuit court in refusing to grant a stay of proceedings until the petition in bankruptcy could be heard, nor was there error in awarding an attachment against the person of the plaintiff in error.

The decree of the Circuit Court of Cook County is affirmed.

Boggs, J., dissenting:

I concur, excepting so far as the opinion may be construed to hold that alimony which has accrued and become due and payable under a decree against the husband does not constitute a provable claim against the assignee in bankruptcy of the estate of the husband.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

PRESS PUBLISHING COMPANY, *Piff. in*
Err.,
v.

Harriet MONROE.

419 C. C. A. 429, 38 U. S. App. 410, 73 Fed. Rep. 196.)

1. A newspaper publication of an ode written for the World's Columbian Exposition, made before the delivery of the ode at the Exposition or its publication elsewhere, and without the consent of the author or of the Exposition committee for which it was written, is a violation of the rights of the author which makes the newspaper liable for damages.
2. The common-law right of an author to his unpublished manuscript is not abrogated by the copyright acts of Congress.
3. An author's reservation of "copyright" in an ode written for the World's

Columbian Exposition, subject to the concession that in addition to the delivery of the ode at the Exposition the Exposition company shall have the right to publish it in the final history thereof, and to furnish copies to the newspaper press and for free distribution, is not invalid, although it accompanies an acknowledgment of the receipt of money "in full payment for ode composed by me."

4. Wanton and reckless indifference to the rights of others, equivalent to an intentional violation of them, may constitute a ground of exemplary damages.
5. Actual damages are not necessary to authorize exemplary damages in case of wanton and reckless indifference to the rights of others by a wrongdoer.
6. The practice of the court as to permitting a paper put in evidence during the examination of a witness to be read by counsel or witness is not reviewable on appeal.

(March 12, 1896.)

NOTE.—Common-law rights of authors and others in intellectual productions.

- I. General theories.
- II. Prerogative publications.
- III. Parties.
 - a. Originators.
 - b. Compilers.
 - c. Annotators and commentators.
 - d. Successors.
 - e. Masters and servants.
- IV. Works.
 - a. In general.
 - b. Immoral, libelous, or irreligious works.
 - c. Letters.
- V. Rights.
 - a. Before publication.
 - b. After publication.
 - c. What constitutes publication.
 1. General principles.
 2. What is a publication.
 3. What is not a publication.
- VI. Infringements.
 - a. Names or designations.
 - b. Abridgments.
 - c. Translations.
 - d. Reproductions.
 - e. Originals.
 1. Author's own obtained surreptitiously.
 2. Independent creations.
 3. Combinations.
- VII. Remedies.
- VIII. Liabilities.
 - a. Creditors.
 - b. Taxation.

It is not within the purview of this note to comment, save historically or incidentally, upon the rights of authors, artists, or composers as defined or affected by copyright statutes; its scope is limited to considering their rights at law independent of any express legislation.

I. General theories.

There are two theories of ownership in mental creations radically opposed to each other, and their respective advocates have, from the beginning, contended, and still contend, for the supremacy of either, and, though one of these has generally prevailed in the law, it has not done so without compromise in favor of the other, and has not ceased to be challenged as unsound upon reason and principle.

The one theory is that intellectual creations are property like unto other species of property, and belong by right of the highest possible title to their creator, his heirs and assigns forever; that, whether published or unpublished, and to the end of time, they are to be secured to their producers and their successors in interest, to the same extent as other kinds of property; and that the public has no more right or justification to take away or impair the originator's property in his mental progeny, either in law or morals, than it has to deprive him of any other possession. This is the view taken by many of the most eminent jurists in England and America, among them Lord Mansfield and Sir William Blackstone; and it is almost unanimously adopted by the modern text-book writers upon the subject, and it is supported by a mass of precedents and wealth of learning, and in some instances at least by severe criticism of the knowledge and motives of those who do not subscribe to it. It is so general and familiar that, inasmuch as it has failed to prevail, there is no need of citations to sustain or illustrate it.

The other theory, which, in the courts and legislatures at least, has been generally accepted, is that the producer of a work of the intellect has no natural property in it, and has and enjoys only such rights in respect thereof as the public chooses to confer. Under this theory a writing, a work of art, a musical composition, may be said to be a contribution to the common stock of knowledge and enjoyment of mankind, a labor for the benefit of civilization, which the public should reward, of course, even generously, but which is the heritage of the race. Even Lord Mansfield, the great exponent of the opposing theory, is not wholly free from an inclination toward this view, as, for instance, where he says: The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial,—the one that men of ability who have employed their time for the service of the community may not be deprived of their just merits and the reward of their ingenuity and labor; the other that the world may not be deprived of improvements, nor the progress of the arts be retarded. *Sayre v. Moore* (1785) 1 East, 361, note.

As this latter theory prevails in the case and statute law to-day, both in England and in the United States, a brief notice of what its

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for \$5,000 in favor of plaintiff in an action for unlawfully publishing in the World newspaper a poem written by plaintiff to be delivered on the occasion of the opening of the Columbian Exposition, in Chicago. *Affirmed.*

Before *Peckham*, Circuit Justice, and *Wallace* and *Lacombe*, Circuit Judges.

The facts are stated in the opinion.

Mr. John M. Bowers, with *Mr. G. Will-lett Van Nest* for plaintiff in error.

Messrs. Henry S. Monroe and *George H. Yeaman*, for defendant in error:

The plaintiff was entitled to recover punitive or exemplary damages in this case.

The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep.

261; *Press Pub. Co. v. McDonald*, 26 L. R. A. 531, 11 C. C. A. 155, 26 U. S. App. 167, 63 Fed. Rep. 238; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 609, 30 L. ed. 1146, 1148, 7 Sup. Ct. Rep. 1286; *Day v. Woodworth*, 13 How. 363, 371, 14 L. ed. 181, 185; *Milcaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 492, 23 L. ed. 374, 375; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 521, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Barry v. Edmunds*, 116 U. S. 550, 562, 563, 29 L. ed. 729, 733, 6 Sup. Ct. Rep. 501.

Punitive or exemplary damages have been sustained where no actual damages were proved.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 110, 37 L. ed. 102, 13 Sup. Ct. Rep. 261; *Brown v. Evans*, 8 Sawy. 488, 17 Fed. Rep. 912; *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 91, 14 U. S. App. 173, 55-

exponents have said concerning it will not be out of place.

And first it may be said that all individual ownership of property, according to Grotius (*de Jure Belli ac Pacis*, lib. II. c. 2, 3) and Puffendorf (*de Jure Naturæ et Gentium*, lib. IV. c. 4, 6), originates by the tacit consent of society that its first occupant or maker should have it exclusively; and although eminent writers (*Locke*, *Civil Gov.* chap. 5; and 2 *Bl. Com.* chap. 1) hold such consent unnecessary, if this contention is sound then the right to enjoy mental products rests on the social compact.

In all the early English cases, prior to the first copyright statute (8 Anne, chap. 19, 1710), the bills of complaint contain as an essential averment the statement that the complainant had, at the time of the commission of the piracy, on hand for sale copies of the pirated work sufficient to supply the public with all it required at a reasonable price.

From the introduction of printing into England about 1471, until the abolition of the Star Chamber in 1640, the King claimed as a prerogative right a monopoly of printing the Bible, church liturgies, ecclesiastical calendars, the acts of Parliament, reports of cases, etc., and granted such rights to various patentees. Whether the royal claims to prerogative publications were based on a property right in the monarch, as Lord Mansfield thought and made one of the grounds of his decision in the great case of *Millar v. Taylor*, 4 Burr. 2303, *infra*, or whether, as Justice Yates, who dissented therein, thought, it was a naked prerogative founded on reasons of state and church polity, was, and ever since has been, an open question. And when, five years later, the great case of *Donaldson v. Beckett*, 2 Bro. P. C. 129, *infra*, was decided in the House of Lords, Lord Camden, in moving the judgment of reversal, said: If there be anything in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. Why did we enter into society at all, but to enlighten one another's minds for the common welfare of the species. And when, more than half a century later, Parliament debated Talfourd's bill, which ultimately became the Victorian copyright act of 1842, Lord Macaulay characterized the principles of copyright as "a tax on readers for the purpose of giving a bounty to writers." And a dozen years or more later, when the House of Lords was again called upon to pass on the question in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 3 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615, Baron Pollock said: 51 L. R. A.

Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct.

In the United States the theory of the "author's right" never gained a foothold in legislation or the decisions. This will be fully brought out in the citations below, when the rights after publication come to be considered. A few typical references, however, may be made here.

In speaking of the constitutional power of Congress to secure for a limited time the exclusive right to authors and inventors in their respective productions (U. S. Const. art. 1, § 8), Story says: It was beneficial to all parties that the national government should possess this power; to authors and inventors because otherwise they would have been subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy, the value of their rights; to the public as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint. Authors would have little inducement to prepare elaborate works for the public if their publication was to be at a large expense and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright. Story, Const. § 1152.

And though the distinction has been well made between inventions and literary work, namely,—that the inventor merely anticipates that sooner or later his invention is bound to be produced anyway, and therefore his monopoly is well limited; while a literary production is *sui generis*; if the author does not put it forth it will never be born of another, hence it is protected before publication at least, while the invention is not (*Cooley*, *Torta*, 352 *et seq.*),—yet the theory under consideration now is well illustrated by the remarks of the court in a patent cause, to wit: The limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public was another, and doubtless the primary, object in granting and securing that monopoly. *Kendall v. Winsor*, 21 How. 328, 16 L. ed. 167.

And finally, the whole doctrine is summed up by a modern jurist as follows: The public are interested in the development and promulga-

Fed. Rep. 241; *Brown v. Memphis & C. R. Co.* 7 Fed. Rep. 63; *Morning Journal Asso. v. Rutherford*, 16 L. R. A. 803, 2 C. C. A. 354, 1 U. S. App. 296, 51 Fed. Rep. 515; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 213, 16 L. ed. 76; *Wood's Mayne*, Damages, 61, note p.

There are two kinds of copyright, one common-law and one statutory.

Millar v. Taylor, 3 Burr. 2306.

The receipt did not deprive Miss Monroe of her rights in the ode or bar her recovery in this suit.

Drone, Copyright, 343.

Copyright is said to mean the right which an author of an unpublished literary composition has at common law to the piece of paper on which it is written, and to the copies of it which he chooses to make. If he lends or intrusts a copy to another, that

person cannot multiply copies of it, or make any other use of it, except by the consent of the author.

Jefferys v. Boosey, 4 H. L. Cas. 919; *Shortt*, Copyright, 48; *Prince Albert v. Strange*, 2 De G. & S. 693.

An author has, at common law, a property in his manuscript, and may obtain redress against anyone who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication.

Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076; *Clemens v. Belford*, 11 Biss. 459, 14 Fed. Rep. 728; *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784.

The common-law property in literary productions exists in full force, without statutory copyright.

Palmer v. DeWitt, 47 N. Y. 532, 7 Am.

tion of all new and wholesome ideas, and in new combinations and illustrations of old ones; the most efficient mode of promulgating them is that afforded by the press. Without publication and some exclusive right thereto the products of authors would prove comparatively profitless. The public, then, for the addition to its general stock of knowledge, and the author in consideration of the pecuniary profit derivable therefrom, are jointly interested in the publication of new works. Then, after remarks about the United States Constitution and statutes, he proceeds: These statutes were not regarded as regulations of existing common-law rights, but the "exclusive right to their respective writings for limited times" was thereby created and conferred upon authors as a compensation for their contributions to the promotion of general knowledge. The impracticability of fixing any specific price for their respective contributions was avoided by leaving the sum to be graduated by the ad valorem favor which the public should mete out to the author by way of demand for his production. *Carter v. Bailey* (1874) 64 Me. 458, 18 Am. Rep. 278, *Virgin*, J.

II. Prerogative publications.

From the introduction in England of printing, the Crown claimed as part of its prerogative the right to designate who should print, how many presses and workmen should be employed, and a complete monopoly of the printing of certain works, at least, if not all. These works were the Scriptures, liturgies, and divine-service books, the church calendars, the statutes and law reports. The ground of this right has been much disputed. The advocates of "authors' rights," so called, have ever insisted that there was a property right in the King quite analogous to private-property right in the author. In support of this it is urged, first, that, as there were no certain authors in which the property in these prerogative publications could vest, and as the principle of property right required an owner to be assigned to all property capable of ownership, and vested all property that had no other owner in the King, therefore the King owned these publications as he owned many other species of property. Again, it was said that the King's ownership beyond this was his by right of purchase. That Henry VI., at the instance of the Archbishop of Canterbury, and at his private expense of 1,500 marks, brought printing to England and established the first press at Oxford; but this contention has since been abandoned as not in accord with the facts. It was also said that the King was at the ex-

pense of translating the Bible, and that the judges were paid officers of the Crown, and their recorded judgments belonged to their royal master. The opposing view was that, forasmuch as printing involved widespread dissemination of ideas among the people, unrestricted liberty of the press would be dangerous to the public, the peace and welfare of the realm was affected, heresy could be widespread, and the gravest reasons of state and church united to uphold a naked prerogative.

The general considerations are summed up by Bacon (Abridgment, *Prerogative* F. 5), and the earlier cases are to be read in the light thereof.

The conclusions of the textbook writers upon this point are thus stated:

At the same time it must be admitted that with the idea of property was also advanced the claim of naked prerogative resting upon reasons of state; and it is not very easy to distinguish upon the earlier authorities what the precise grounds were on which courts intended to rest the title to various prerogative copies. *Curtis*, Copyright, pp. 39, 40.

It is plain that the primary and chief object of all the decrees, ordinances, and acts promulgated by the Star Chamber or by Parliament prior to the act of Anne in 1710 was the regulation of the press and the suppression of all writings obnoxious to the government or the church. *Drone*, Copyright, 58.

Sometimes, however, another principle came into play. A royal grant of monopoly to buy, sell, work, use, or make any commodity was, not only void at common law, but whosoever procured it was liable to fine and imprisonment (*vide* Bacon's Abr. title *Monopoly*), and freedom of trade and labor was regarded of such importance to the public that one could not by his own act totally debar himself of the privilege of either (*Merchant Adventurers Co. v. Rebow*, 8 Mod. 128; *Darcy v. Allin*, Noy, 182). This principle was held generally not to apply to patents for inventions and licenses to print and publish, but it had always more or less influence in respect of the latter class of grants.

One of the earliest, if not the first, reported cases upon this point was decided about 1602. In 1558 (30 Ellis. Jun. 13) a royal patent for the exclusive making and vending of playing cards was granted to one Ralph Bowes for twelve years, followed by another ten years later to one Darcy of the same privilege for twelve years beginning with the termination of the first patent. Darcy complained of the making of 80 gross of playing cards and the vending of some of them by one Allin, who in

Rep. 480; *Brown v. Evans*, 8 Sawy. 488, 17 Fed. Rep. 912; *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 91, 14 U. S. App. 173, 55 Fed. Rep. 241; *Brown v. Memphis & O. R. Co.* 7 Fed. Rep. 63; *Morning Journal Asso. v. Rutherford*, 16 L. R. A. 803, 2 C. C. A. 354, 1 U. S. App. 296, 51 Fed. Rep. 515; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 213, 16 L. ed. 76; *Wood's Mayne*, Damages, 61, note p.

Lacombe, Circuit Judge, delivered the opinion of the court:

At the time when preparations were being made for the opening ceremonies of the World's Fair, or Columbian Exposition, in Chicago, plaintiff, a resident of that city, who was engaged in the literary profession, had published poems and prose writings, and had an excellent reputation as an au-

thoress, was invited by the committee on ceremonies to write and deliver a poem at the dedicatory exercises. That invitation was given March, 1891. The dedicatory exercises were had on October 21, 1892, in the presence of a vast concourse of people. They included the delivery of addresses by orators of well-known ability. No effort was spared to make them effective, and they were, by reason of the event which they commemorated, of exceptional interest to the country at large. For the public utterances of orator or poet who had been selected to speak on that day and in that place, the occasion was unique. The plaintiff accepted the invitation, and after many months of careful work produced an ode of some 400 lines. After it had been shown to the committee on ceremonies, and suggestions made as to changes, she revised it, reducing its length

defense pleaded his trade and the custom of it in the city of London to be free from time immemorial, and on demurrer to this defense it was held good that the patent, being a monopoly grant and in restraint of trade, was void. *Darcy v. Allin*, Noy, 173, F. Moore, 673, 675, Fuller, J.

More than half a century later (18 Car. II. 1607) a case reached decision in the House of Lords. The controversy arose over the right to print Rolle's Abridgment, claimed by Col. Atkins, in the right of his wife, daughter of John More, patentee of James I. In the 15th year of his reign of the right to print law books, and disputed by the Stationer's Company under its charters of 1556 and 1558. The injunction got by the patentees against the company was confirmed, and it was declared that a copyright was a thing acknowledged at common law, and that the King had this right and had granted it to the patentees. *Stationer's & P. Co. v. Patentees*, Carter, 89.

It was in this case, it is said (Bacon's Abr. *Prerogative* F. 5, p. 142), that Col. Atkins invented the fiction that printing was a flower of the Crown acquired by Henry VI. by purchase, the first printer in England having been brought to Oxford by Archbishop Bouchier, at the King's expense. *Basket v. Cambridge University*, 1 W. Bl. 113, 2 Burr. 661, 2 Ld. Kenyon, 397.

Four or five years later (22 Car. II. 1671-2) we meet the first reported case of conflict between the right to publish derived from the author and that emanating from the Crown. The plaintiff purchased from the executors of Justice Croke the third part of his reports, and the defendant, having a royal grant to print law books, published them without other authority. The purchaser brought suit and demurred to the plea of the King's patent offered in defense, contending that as he was the purchaser from the executors of the author, he was the exclusive owner of the copy by the common law. The common pleas sustained the demurrer, and so held, but was reversed in the House of Lords, which held the King's patent controlled. The grounds stated were that law books were prerogative publications, and royal grants had always been allowed; that printing was a new art, and, being within memory, prescription did not arise, that it was a concern of state and a matter of public care, and, as the judges were created by the King, their work was his, and, as he alone could make proclamations, so he alone could publish them. *Roper v. Streeter*, cited in *Skinner*, 234.

In 1677-8 (29 Car. II.) a controversy arose 51 L. R. A.

over the unauthorized publication of an almanac, and the royal patent was sustained. In that case it was contended by the court that printing was a new invention, therefore every man could not by the common law have a liberty of printing law books, and this was a stronger case than that of law books. Since the art became common what was always inclosed for state reasons remained so. Printing always had been under the care of the government, and it was to be presumed that former ways of publishing were, too. Then, there being no particular author of an almanac, by the rules of English law the King had property in the copy. *Stationer's Co. v. Seymour*, 1 Mod. 256.

In 1682 an application was made in chancery for an injunction to stop the sale of English Bibles printed beyond the seas. It was urged that chancery was a court of state, and because great mischief might arise from public sales they should be prohibited on grounds of policy, also to quiet the King's patentees in their possession. The Lord Keeper directed, however, that the legal right be first established in an action at law when the application might be renewed. *Anonymous*, 1 Vern. 120.

When the Stationer's Company next came into chancery its application for an injunction against the vending of books imported from Holland was granted. It is not clear from the report just what the imported books were, but the case appears to have been a renewal of the last-cited application. The court said: If the words of the statute imported a general liberty for all sorts of books, the defendants might insist to import any seditious or heretical books, which by law they cannot do; so that the liberty of importing books must be restrained to such as are not contrary to the King's prerogative and the public weal. *Stationer's Co. v. Lee* (1682) 2 Show. 258.

In 1684 an attempt was made by the King's printer to restrain Oxford University from printing Bibles. Several royal patents were involved, and the parties were relegated to an action at law. The Lord Keeper thought the university right was limited to printing for its own use, or at least to such a small number additional as would recoup its expenses. *Hills v. Oxford University*, 1 Vern. 275.

A similar question came before King's bench in the next year (1 Jac. II.) over the right to print a calendar, and the court inclined to hold with the defendant, who justified under the university patent, but ordered a reargument because the *Seymour Case*, 1 Mod. 256, *supra*,

to about 375 lines, and delivering the final revised version to the committee on September 20, 1892. Fifty-six lines of the ode were lyrical songs, intended to be sung. The original version of the ode was shown to a Mr. Chadwick, who wrote the music for these songs, and the 56 lines were published with the music so composed, in order to properly rehearse the chorus. Except of these 56 lines, there had, down to this time, been no publication of the ode by the plaintiff or by anyone else. The copies which were given to the members of the committee on ceremonies, and to a so-called "literary committee," were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a publication, and

could not prejudice the owner's common-law rights. *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,802, 5 McLean, 32, Fed. Cas. No. 1,076.

On September 23, 1892, plaintiff met the acting chairman of the committee on ceremonies, who informed her that the poem was satisfactory, and the matter arranged, and paid her \$1,000, whereupon she signed the following receipt:

Received, Chicago, the 23rd day of September, 1892, from the World's Columbian Exposition, one thousand dollars (\$1,000) in full payment for ode composed by me.

It is understood and agreed that said Exposition company shall have the right to furnish copies for publication to the newspaper press of the world, and copies for free disposition, if desired, and also may publish

was a hard case the other way. *Stationer's Co. v. Parker* (1885) *Skin*. 233.

In 1686 (1 & 2 Jac. II.) the Earl of Yarmouth, under a patent from Charles II. of the sole right to print legal blanks, undertook to prevent a member of the Stationer's Company from publishing blank bonds. The jury found a special verdict that the Stationer's Company, had constantly printed such bonds for forty years before the patent, and the court, though holding that the King had a prerogative to grant to a particular person a sole right of printing, yet held that the case at bar was an exception, that bonds were of public use, unlike almanacs showing the feasts and fasts of the church, which were public in their nature. *Yarmouth v. Darrel*, 8 Mod. 75.

The right to print acts of Parliament came into controversy about 1753 between the King's printer, whose office originated in the first year of Edward VI. (1547) and who claimed, under Queen Anne's patent of 1714, the exclusive right, and Cambridge University, claiming under patents 26 Henry VIII. and 3 Car. 1. The court held the rights were concurrent, and in a letter to the reporter Foster, J., says that the university holds as trustee for the public benefit for the advancement of literature, and not to be transferred upon lucrative views to other hands. In his argument for the university, Solicitor General Yorke says that the story that Archbishop Bourchier brought printing to Oxford at the expense of Henry VI. was proved false by Dr. Middleton in his dissertation on printing; that the royal prerogative did not exist by purchase; that no license was necessary at common law, and Caxton had none; and that there is only one instance of prohibition of printing prior to Henry VIII.'s grant to Cambridge in 1533, and that is referred to in Fox's Book of Martyrs, 290, and plainly founded on the statute, 2 Henry IV. chap. 15, against heresy. *Baskett v. Cambridge University*, 1 W. Bl. 113, 2 Burr. 661, 2 Lord Kenyon, 397.

In 1755 the Lord Chancellor enjoined the publication of a copy of the Sessions paper. *Manley v. Owen*, cited in 4 Burr. 2329.

In 1781 Baskett's patent having passed to Eyre & Strahan, and a form of prayer ordered by George III. to be read in all the churches having been published in violation of their privilege, they recovered an account of profits from the unauthorized publisher. It being held that books of divine service were prerogative publications founded on public convenience, supported by long usage and acknowledged by the unanimous opinion of judges in former *81 L. R. A.*

cases involving the moot point. *Eyre v. Carnan*, 8 Bacon, Abr. 144, Skinner, C. B.

And in 1802 an injunction issued against booksellers who had imported prerogative publications from Scotland printed by the Scottish King's printer and sold in London without privilege of the King's printer in England; it being expressly held that the Bible, Testament, and Book of Common Prayer belonged exclusively to the Crown, and the right of publishing them was to be exercised only under royal patents. *Oxford & Cambridge Universities v. Richardson*, 6 Ves. Jr. 689.

There are some analogous cases in the United States that may appropriately be referred to at this point. These are those where the government, state, national, or municipal, has a property right in an intellectual work either from the nature of it, as in the familiar case of statutes and law reports, or from the relation of master and servant between it and the producer, or by direct gift or purchase. For instance, it is said in our first great copyright case: It may be proper to remark that the court are unanimously of the opinion that no reporter has, or can have, any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right. *Wheaton v. Peters* (1834) 8 Pet. 591, 8 L. ed. 1055. *M'Lean, J.*

So, too, official letters of public officers belong to the government to publish or withhold as the public interests require (*Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901); and a letter sent to a city in response to an address to a distinguished man is corporate property (*New York v. Lent*, 51 Barb. 19); and the sketches of an artist who went with a government expedition as a regular member of the ship's company on wages, with the prior understanding between him and the commandant that his drawings should belong to the government, these being afterwards embodied in the official report, has no proprietary interest in his sketches, and cannot maintain an action against one who republishes them. *Heine v. Appleton* (1857) 4 Blatchf. 125, Fed. Cas. No. 6,324. But in that case it appeared that the artist had aided in getting up the work he complained of and had been paid for his services without making any claim of copyright.

The property right in a map made by a state employee from materials collected by him while in the state service and at public expense is in the state, and he will be restrained from publishing it for his own benefit. *Com. v. Dealliver* (1858) 3 Phila. 81.

When an artist is commissioned by the gov-

same in the official history of the dedicatory ceremonies; and, subject to the concession herein made, the author expressly reserves her copyright therein. Harriet Monroe.

The first question to be determined—and it is the important question in the case—is, What property rights to the ode remained to the plaintiff after September 23, 1892? The evidence indicates that the receipt quoted above expressed, item by item, the conditions of the contract between Miss Monroe and the committee, which was not otherwise reduced to writing. The defendant contends that by the first clause of this receipt plaintiff transferred to the committee her entire common-law right of property in the manuscript; that the residue of the receipt is a nullity; that it cannot be construed as impairing in any way the full rights of own-

ership given by the first clause; that the second paragraph was intended only as a reservation of the right to take out a copyright under the United States statute, and was powerless to secure even that, since publication without the statutory copyright notice is authorized, and, the poem being once thus published, all right to restrain future piracy would be lost. We are unable to accept this construction. The whole instrument is to be construed together, and manifestly it contemplates something short of a complete transfer of all right to the committee. A reservation by the author, "subject to the concession herein made, . . . of her copyright in the poem," imports a reservation of common-law as well as of statutory copyright, and it must be made clear, either upon the face of the instrument itself or otherwise by competent proof, that the

ernment to design, execute, and put in place a work of art in a public building, if his contract fails clearly and explicitly to reserve him the copyright, although the government officials in charge of the construction and decoration of the building assent to his copyrighting the design in his own name, and he does so, and puts notice thereof on the completed work, he cannot maintain suit against one who publishes a photograph of his work taken by the consent of those in charge of the building it adorns. *Dielman v. White* (1900) 102 Fed. Rep. 892, Lowell, J.

III. Parties.

Although it is not within the present purpose to enumerate all those in whose behalf rights to mental products have been asserted or enforced, it will probably aid the reader to call attention to the parties involved in cases arising upon common-law rights. These include, in brief: (a) Originators in the full sense of the word; (b) compilers or arrangers of *data* common to everybody; (c) annotators and commentators; (d) successors in interests, both by devolution and express or implied conveyances, from absolute deeds to mere licenses, and for the entire work or a part of it, as well as for limitless and limited use of it both as to time and territory; (e) masters and servants.

a. Originators.

Apart from prerogative publications, if there are any property rights in mental productions, common consent awards their ownership to those who create them. The producer of an intellectual work is at the head of the list of those who may be or become its owners. In Milton's great parliamentary plea for unlicensed printing in 1644, he expressly excepted and conceded the author's right to his own productions. Mr. Shortt (*Law of Literature*, 48) has it thus: Every new and innocent product of mental labor which has been embodied in writing or some other material form [is] the exclusive property of its author, the law securing it to him as such, and restraining every other person from infringing his right. Drone on Copyright, 102, says: The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights. There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it. He has a right to exclude all persons from its enjoyment, and when he chooses to do so any use of the property without his consent is a violation of his rights. And every statute enacted in respect 51 L. R. A.

of copyright both in Great Britain and the United States has recognized the originator of an intellectual work as the primary owner thereof.

b. Compilers.

He who merely gathers and arranges in some concrete form materials that are open and accessible to all who have the mind to work with like diligence is as much the owner of the result of his labors as if his work was a creation rather than a construction. These include, among many, the makers of ocean charts (*Sayre v. Moore*, 1 East, 361, note; *Blunt v. Patten*, 2 Palne, 393, Fed. Cas. No. 1,579); calendars or civil lists (*Matthewson v. Stockdale*, 12 Ves. Jr. 273); gazetteers (*Lewis v. Fularton*, 2 Beav. 6, 3 Jur. 669); abstracts of title (*Banker v. Caldwell*, 3 Minn. 94, Gil. 46; *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544; *Perry v. Big Rapids*, 67 Mich. 146, 34 N. W. 530; *Leon Loan & Abstract Co. v. Leon Bd. of Equalization*, 86 Iowa, 127, 17 L. R. A. 190, 53 N. W. 94; *Booth & H. Abstract Co. v. Phelps*, 8 Wash. 549, 23 L. R. A. 864, 36 Pac. 489); stock quotations and market reports (*Kiernan v. Manhattan Quotation Teleg. Co.* 50 How. Pr. 194; *Gold & Stock Teleg. Co. v. Todd*, 17 Hun. 548; *Exchange Teleg. Co. v. Gregory* [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83); directories and guide books (*Kelly v. Morris*, L. R. 1 Eq. 697, 35 L. J. Ch. N. S. 423, 14 L. T. N. S. 222, 14 Week. Rep. 496); and mercantile credit ratings. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* 165 N. Y. 251, 41 L. R. A. 846, 49 N. E. 872.

And there are found among cases arising under the statutes other instances of the foregoing classes, and other works of similar character, such as catalogues, tabulations, statistics, concordances, etc.

c. Annotators and commentators.

Whoso by his own investigation and labor annotates or makes a commentary upon the literary product of another is considered the owner of his notes and comments, and treated in the law accordingly. The following cases sufficiently illustrate this proposition: *Forrester v. Waller*, cited in 4 Burr. 2331, which involved a lawyer's notes in manuscript; *Tonson v. Walker*, 3 Swanst. 672, concerning *Paradise Lost* and Dr. Newton's notes to the poem; *Brooke v. Clarke*, 1 Barn. & Ald. 396; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Little v. Hall*, 18 How. 165, 15 L. ed. 328; *Paige v. Banks*, 13 Wall. 608, 20 L. ed. 709; *Myers v. Callaghan*, 10 Blas. 139, 5 Fed. Rep. 726; *Banks v. Man-*

word "copyright" was used in some more restricted sense. To the committee was given, not only the right to have the poem delivered on the occasion of the dedicatory ceremonies, but also the right to publish it in the official history thereof, and the right to furnish copies for publication to the newspaper press of the world, and the right to furnish copies for free distribution. This was all the committee needed for its purposes, and, having secured all it needed, there is nothing surprising in its leaving all other rights to the author. When the committee chose to avail of its concession, and publish the poem, that act would terminate the common-law copyright, but until publication that right survived, and by the terms of the agreement was not conveyed to the committee, but reserved to the author. Any unauthorized publication would be a tres-

pass upon that right of property, and right of action therefor would still be in the author.

The contention of the plaintiff in error that the passage by Congress of the copyright statutes has abrogated the common-law right of an author to his unpublished manuscript is unsupported by authority. These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication. "That an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted. . . . The argument

chester, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36;—all respecting reports of case law; and *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, which concerned notes and commentary on *Wheaton's International Law*.

d. Successors.

The right of property includes the right to transfer the subject of it, or any interest in it, by gift, grant, or devise. And if the fruits of mental effort are regarded as property, like all other possessions they descend to the legatees, the executors and administrators of their creators, they pass by sale or gift to their transferees, the use of them, limited or unlimited, goes to their licensees, and logically the power of the state is bound to protect forever the successive owners in the exclusive use and enjoyment thereof.

Title may pass by parol assignment (*Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, *supra*; *Black v. Henry G. Allen Co.* 9 L. R. A. 483, 42 Fed. Rep. 618); and by implication, as from an absolute unconditional sale of an uncopyrighted, unpublished picture by artist to purchaser (*Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784) or as necessarily included in a formal assignment of a secured copyright for a term allowed by an existing statute which is afterwards amended so as to lengthen the term of protection. *Paige v. Banks*, 13 Wall. 608, 20 L. ed. 709.

Logically, too, intellectual products, like other property, are subject to taxation and sale for nonpayment of taxes, and may be seized and sold on execution to satisfy debts of record. All other works of man perish sooner or later, but the productions of intellectual genius are immortal, therefore a source of revenue to the owner and the state so long as society shall endure. But the present state of the law is not the logical outcome of either of the theories mentioned at the outset, but somewhat of a compromise with both. In general it may be said that the cases recognize the title of the successors in interest of the creator of an intellectual product accruing to the claimant by descent or inheritance, as personal representative, as assignee, donee, or licensee, expressly or impliedly, and with limited or unlimited rights. The many cases wherein the claimant under various forms of title asserted rights in the courts so far as they involved questions of common law within the scope of this note are elsewhere cited herein. So far as mere questions of title are concerned the cases involving them have not been considered.

51 L. R. A.

e. Masters and servants.

There are a few cases involving the reciprocal rights of master and servant in works of the mind produced in the course of the employment by direction and at the expense of the master or the respective rights of superior and subordinate working under a common employment, but these are generally to be determined by the contractual rights and obligations. Such cases as have come under consideration in the preparation of this note, and involve this relation, are *Storace v. Longman*, 2 Campb. 27, note, where Lord Kenyon, in 1788, said that it was no defense to a complaint by the composer of a song written for and sung by his sister in an opera, that all compositions of such character were the property of the opera house, and not of the composer, because the statute vested the right in the author and private regulations could not interfere with public right; the cases of *Heine v. Appleton* (1857) 4 Blatchf. 125, Fed. Cas. No. 6,324, and *Com. v. Desilver* (1858) 3 Phila. 31, *supra*; and the recent case of *Peters v. Borst* (1889) 24 Abb. N. C. 1, 9 N. Y. Supp. 789, where Justice Williams of the New York supreme court held that a professor at a university was entitled to the possession of scientific manuscripts started and planned by him, in part executed by himself and partly by an assistant under his direction, and finally completed by the assistant alone, as against such assistant, in replevin. But it has also been held that to constitute one an author under the United States copyright acts the work must be the output of his own brain, even if arranged from materials furnished him by others, he cannot have a copyright in the materials just as they come from others though made expressly for him and on his order and employment. *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640.

Finally it may be said that there is a class of mental labor so slight and trivial in its nature that it merges in some complete work, lost to its originator and passing without effect to enhance the work of another. Such are written additions to, alterations or adaptations of, a manuscript play. They belong to the owner of the play, not to him who makes them. *Keene v. Wheatley* (1860) 4 Phila. 157, *Cadwalader, J.*

IV. Works.

a. In general.

The various copyright statutes in Great Britain and in the United States, beginning with the English act of 1710 (8 Anne, chap. 19),

that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted, . . . [at least until] he shall have sold it publicly." *Wheaton v. Peters*, 8 Pet. 657, 658, 8 L. ed. 1079. And that common-law right may be enforced in the Federal courts whenever diversity of citizenship gives those courts jurisdiction of the parties, irrespective of whatever additional means of redress are provided by § 9 of the act of Congress of February 3, 1831, 4 Stat. at L. 436, 438, chap. 16, now U. S. Rev. Stat. § 4967. See *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082, 5 McLean, 32, Fed. Cas. No. 1,076; *Keene v. Wheatley*, 9 Am. L. Reg. 33, Fed. Cas. No. 7,644; *Palmer v. DeWitt*, 47 N. Y. 532, 7 Am. Rep. 480. The various assignments of error, therefore, which cover both the refusal of

the court to direct a verdict in favor of defendant and also so much of the charge as instructed the jury that plaintiff had property rights which would be trespassed upon by an unauthorized publication of her ode, are unsound.

On September 23d—the day when the money was paid and the receipt signed—the *New York World*, a newspaper published by defendant, received a telegram from one Fay, its agent in Chicago, saying that a copy of the ode could be obtained for \$150, and asking whether it should be paid, and the ode procured. On the next day the managing editor of the *World* directed its purchase, and ordered it sent that afternoon and night to the *World* by telegraph. While the ode was in transit, a message was received from the Associated Press to the effect that it was understood that a copy of

recognize copyright in books and other literary writings (and a book was early held, 1809, to include a song on a single sheet. *Clementi v. Golding*, 2 Campb. 25), prints, etchings and engravings, sculptures, dramatic compositions, lectures, music, paintings, drawings, photographs, maps, charts, designs, models, and other works of art, learning, imagination, or fancy. The cases involving one or more of these productions are collated throughout this note, and elsewhere discussed when they involve questions of common law.

There are two kinds of intellectual productions not within the statutes. One class is without the pale of legal protection either by statute or at common law. The other class finds protection by the common law, full and ample, and is controlled by principles peculiar to its kind.

b. Immoral, libelous, or irreligious works.

The first class of works includes all that are libelous or of immoral tendency, and did in former times include also such as were heretical or contrary to the Scriptures. Probably the last-alluded-to cases would not be followed in modern times. Typical cases of this class were *Walcot v. Walker* (1802) 7 Ves. Jr. 1; *Lawrence v. Smith* (1822) Jac. 471,—where the chancellor refused to continue an injunction against pirating certain lectures on physiology, zoölogy, and the natural history of man because they contained doctrines contrary to the Scriptures, and denied the immortality of the soul; and *Stockdale v. Onwhyn* (1826) 5 Barn. & C. 173, 7 Dowl. & R. 625, 2 Craig & P. 163. The cases in this class need not be discussed.

c. Letters.

The second class of mental products without the statutes is letters, business, familiar, and literary. Not that there is anything to prevent these being copyrighted the same as other writings, but this usually is not done, and the statutes do not enumerate them specifically among works within their terms.

There is a dual right of property in all letters: A qualified one in the writer to publish when and as he chooses, or withhold from publication altogether and to prevent publication without his consent; and the recipient's right of physical possession, use, and enjoyment, and transfer, without power to publish except by consent of the author or for self vindication or justification. All the cases are in accord on these propositions.

The right of the author to prevent the unau-
51 L. R. A.

thorized publication of his unpublished letters is a property right according to the weight of authority. All the English and American cases rest the writer's claim to relief on the ground of property in his manuscripts, and because of this doctrine some cases limited relief against the unauthorized publication of letters to those which were possessed of literary value, and refused it where only private business or familiar letters were involved. Some jurists and writers, recognizing the need of preventing the publication of private letters, have sought to find a basis for doing so upon the ground of guarding the feelings from wounds, preventing mischief and breaches of confidence, and promoting peace. See 2 Story, Eq. Jur. §§ 946-948, cited *supra*; Browne's American Notes in *Macklin v. Richardson*, 7 English Ruling Cases, 77; Bell, *Law of Scotland*, § 1356, referring to the Scotch cases. But the cases afford no support to this doctrine, and although the later ones especially give relief against the unauthorized publication of all sorts of letters whether they have a literary quality or not, it is apparently on the ground of the writer's property in them, whether that be of little or great value.

The earliest English reported case, *Pope v. Curl*, 2 Atk. 342, was decided in 1741 concerning an English reprint of letters of Swift, Pope, and others from a pirated Irish edition. The Lord Chancellor, on motion to dissolve the injunction after issue joined said the letters were within the intention of the statute of Anne the same as any other book, and were not a gift to the receiver, but only passed a special property and no license to publish without the writer's consent.

In 1774 the widow of Lord Chesterfield's natural son was restrained, at the instance of the writer's executors, from publishing the celebrated "Letters," although she showed that he had declined to take them back on her offer to return them. It was considered that this fell short of consent to publish, and that the letters might be regarded as a system of education, hence a literary production. *Thompson v. Stanhope*, 2 Amb. 737.

This case was followed in 1809 by *Granard v. Dunkin*, 1 Ball. & B. 207, when publication of private letters was restrained. In that case defendant had married a relative of the plaintiff's testator, and been permitted to occupy her Dublin house, in which she left, on going into the country, many books, papers, and letters from divers correspondents, including the plaintiff. She died while away, and her will named plaintiff executrix and residuary legatee. Defendant having refused to give up

the ode had gotten out somehow, and that its publication was forbidden, on the ground that it was copyrighted. Fay was thereupon communicated with, and replied that the copy which he had did not have any copyrighting words upon it, and that there was no indication upon it that it was copyrighted. Thereupon, and on September 24th, the following dispatch was sent to Fay in Chicago:

We will take our chances on it. Interview Miss Monroe to-morrow, and get a good talk with her about ode and literature generally. Explain to her that the World could not miss an opportunity to give the public such a grand poem, and tell her how much better to have the World treat it as it will to-morrow, making it the great feature of the day, than to have it peddled around among the little papers. The World.

the books, papers, and letters, and threatened to publish the latter, the suit was brought. It was contended that letters, being property, vested as assets in the executrix, who was alone entitled to profit from the publication, and that the case of the Chesterfield letters was not so strong as the one at bar, because here defendant had no shadow of title.

In *Perceval v. Phipps*, 2 Ves. & B. 19, a preliminary injunction was dissolved after joinder of issue with a plea of justification that publication was necessary to disprove the charge that defendant circulated false news. It is not quite clear that the dissolution went upon this ground, although the court (Sir Thomas Plummer) said the original injunction was perhaps proper enough, but the answer had changed the situation. He conceded that the recipient of a letter was not authorized to publish it without consent of the writer, but criticized the complaint as being a naked bill to prevent the publication of private letters, not stating the nature, subject, or occasion for them, or that they were intended to be sold as a literary work for profit or of any value to the plaintiff. And he added that in such a case it was not necessary to determine the general question how far a court of equity will interfere to protect the interest of the author of private letters, and that every familiar letter was not protected as copyright.

In 1818 Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 402, holding that the writer had the exclusive right to publish and to restrain publication by others without his consent, and the recipient a right of possession, rested relief on the property right, and not upon any consideration for wounded feelings. He doubted there being any property in familiar letters, but felt constrained by the decisions of Lord Hardwicke in *Pope v. Curl*, 2 Atk. 342, and Lord Apsley in *Thompson v. Stanhope*, 2 Amb. 737, and he thought *Perceval v. Phipps*, 2 Ves. & B. 19, went on the ground that Lady Perceval had once authorized publication. And in harmony with the above-stated doctrines, are *Palin v. Gathercole* (1844) 1 Colly. Ch. Cas. 565; *Oliver v. Oliver* (1861) 11 C. B. N. S. 139, 81 L. J. C. P. N. S. 4, 8 Jur. N. S. 512, 5 L. T. N. S. 287, 10 Week. Rep. 18; *Re Wheatcroft* (1877) L. R. 6 Ch. Div. 97, 46 L. J. Ch. N. S. 669, 26 Week. Rep. 69.

But, notwithstanding the writer's objections, the recipient may be compelled to produce letters in court, certainly whenever suit to prevent publication has not been brought. *Hop-51 L. R. A.*

The ode was printed in full in the issue of the paper of Sunday, September 25, with comments upon it, a sketch of Miss Monroe, and what purported to be a portrait of her. Fay was not put on the witness stand, nor was any evidence offered to show how the copy which he bought had been obtained. The court instructed the jury that if they found "it was obtained and sold to the defendant against the mind and will and without the authority and consent of both the Exposition company and Miss Monroe, the act of publication was a wrongful violation of her rights," and that "upon that issue the plaintiff had the burden of proof." The jury were further instructed that in actions of trespass to personal property, or in actions for injury to personal property, when the circumstances showed gross or wanton or malicious disregard by the defendant of the rights of the plaintiff, the

kinson v. Burghley (1867) L. R. 2 Ch. 447, 36 L. J. Ch. N. S. 504.

In deciding adversely to a solicitor, who sought in 1863 to enjoin the publication of a letter he had written on the business of a company and apparently in its behalf although he swore he wrote it in his private capacity, the master of the rolls said: I accede to the views of the plaintiff that a person has a property in letters written by him, and that this right cannot be violated by the person who receives them, but this, however, is subject to many exceptions and qualifications. *Howard v. Gunn*, 32 Beav. 462.

And in a rather notable case of recent times between the present Lord Lytton and the executrix of his mother to prevent the publication of Bulwer's letters, an injunction was granted upon the same doctrines, *ibid supra*, notwithstanding a plea that publication was necessary to vindicate the memory of Lady Lytton, as the court held no such purpose could be subserved by such publication. *Lytton v. Devey*, 54 L. J. Ch. N. S. 298, 52 L. T. N. S. 121.

And a stenographer who had surreptitiously retained notes of his employer's letters, which it was proposed to publish and use as evidence in criminal prosecution or parliamentary inquiry at the instance of the writers, was restrained by perpetual injunction from their publication. *Laidlaw v. Lear*, 30 Ont. Rep. 26.

The same principles are recognized and applied in the American cases. There is the same uncertainty of touch respecting familiar letters, the same groping after means to justify the prevention of publicity.

Says Story (2 Eq. Jur. §§ 946-948): A question has been made and a doubt suggested, how far protection ought to be given to restrain the publication of mere private letters on business, or on family concerns, or on matters of personal friendship, and not strictly falling within the line of literary composition. It would be a sad reproach to English and American jurisprudence if courts of equity could not interpose in such cases. Fortunately for public, as well as for private, peace and morals, the learned doubts on this subject have been overruled, and it is now held that there is no distinction between private letters of one nature and private letters of another.

The earliest American case appears to be one in Louisiana in 1811, where Judge Martin enjoined the multiplication of copies of a private letter on the ground of violation of the author's exclusive right, and held the letter to be an object of property. *Denis v. Leclerc*, 1 Mart.

jury would have a right to give exemplary damages in excess of any actual loss which was suffered. The testimony in the case warranted the jury in finding that the defendant had reason to know that the poem had not theretofore been published; that it was the wish and intention, both of the Exposition committee, and of the plaintiff, to withhold it from publication until, in the language of the circuit judge, "it should be presented to the audience with all the advantages which the enthusiasm of the occasion could give, and unmarred by criticism or comment, either polite or impolite." The managing editor testified that he knew the ode belonged to the World's Fair, and that he made no inquiry of the World's Fair committee as to whether he had any right to buy it or not; that as to the question whether an editor of a newspaper has the right

to publish a literary work unless the owner consents to it, he left that matter to be settled by the lawyers; and added: "Under some circumstances, I believe that I have the right, as an editor, to publish the manuscript of a person without that person's consent." This is a restatement of the proposition so frequently advanced, when newspapers happen to be defendants, that the personal or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may, in the opinion of the editor, promote the entertainment of the purchasers of his paper. Testimony such as this was abundantly sufficient to warrant the jury in finding that the publication of the plaintiff's ode in the World newspaper was the result of "that wanton and reckless indifference to the rights of

(La.) 297. In that case, too, the recipient was punished for disobedience because by public advertisement he gave notice to all curious ones to go to the clerk's office and read a copy of the letter attached to his answer, or call at his office to inspect a copy there posted up. The defendant was evidently a victim of indiscreet advice of counsel grounded upon the idea which later (1818) found expression through Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 402, *supra*, who said a common injunction against publication did not run against reading aloud or showing the letter to friends.

Judge Martin's opinion in *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712, is quite a learned one. He cites a long passage from Cicero to show that his decision accords with ancient Roman law, and says it is good French law as well (citing 1 *Procédure du Châtelet*, 225, and *Denisart*), and adds that no change was made when the Spaniards came to America, nor by American law since that time.

In *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901, decided in 1841, the ruling is: The author of any letter, literary, familiar, or business composition, possesses the sole and exclusive copyright therein, and no person, neither the addressee nor another, has any right or authority to publish the same, on his own account or for his own benefit, except the addressee upon some justifiable occasion, such as production in court, or for his own vindication or defense. And it is said: Unless . . . there be a most unequivocal dedication of private letters and papers by the author, either to the public or to some private person, . . . the author has a property therein, and that the copyright thereof exclusively belongs to him.

The next year, however, Vice-Chancellor McCoun squarely held in New York that the publication of letters of no value as literature would not be restrained by injunction. That chancery interfered only to protect property rights, and not to prevent injury to the feelings. *Wetmore v. Scovell* (1842) 3 Edw. Ch. 515. And six years later (1848) the decision was followed and approved by Chancellor Walworth of the same state in *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178.

But it is safe to say that these decisions are no longer good law, although apparently accepted as such by at least one modern writer. 2 *High, Inf.* § 1012.

Another (note to *Hoyt v. Mackenzie* (N. Y.) 49 Am. Dec. 181) states the modern rule truly by saying that the weight of authority and better reason is against Chancellor Walworth; that the correct doctrine is that letters belong 51 L. R. A.

to the author for the purpose of exclusive publication, whether of much or little value.

The decisions just referred to were expressly disapproved as unsound when the question involved next came before the New York courts in 1855. After an extended examination and elaborate reasoning Duer, J., decided that a court of equity had power to restrain by injunction the publication of letters against the will of the writer, whether of literary value or not, and whether private and familiar or business correspondence; by the recipient when not necessary to vindicate or justify his actions; by a stranger in any case; but not upon the ground of mischief or injury to feelings or betrayal of confidence, but wholly on the ground of a right of property of the author therein. *Woolsey v. Judd*, 4 Duer, 379.

And in 1867, Robertson, J., in a Kentucky case says: The ancient common law recognized the exclusive right of the author of a literary manuscript to publish it for his own profit. That venerable Code being silent as to private letters, it was long a debatable and controverted question whether the same principles applied to them. But as such manuscript may possess literary merits worthy of publication, and the author should have the right to decide for himself whether publication would be useful to the public and profitable to himself, and as the letter, whether literary or not, is a transcript of his own mind, the modern common law seems not to be identical with the ancient, and applies the same doctrines to private letters. *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509. In that case upon the question of the property right in letters, it was held that a surviving husband, who was also administrator of his deceased wife, was not entitled to the possession of letters received by his wife during her maidenhood and married life as against her daughter to whom she gave them in her last illness, but was entitled to prevent the publication of such of them as he himself had written; the court holding that the recipient of letters owned them without the right to publish save for vindication, but by the writer's consent; and that the writer only had an exclusive right to publish. These correlative rights of property are now established by abundant authority, fortified by principle and analogy.

Further light is thrown on the question of the property right in letters in *Eyre v. Higbee* (1861) 35 Barb. 502, where it was held that the title to letters passed to the administrator of the recipient, but that these were not assets of the estate subject to sale; therefore his grantee could not recover them from the donee

others which is equivalent to an intentional violation of them." *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374. In view of the testimony of the principal witness for the defendant, it seems to have escaped on this occasion with a light verdict.

Plaintiff in error contends that the court erred in instructing the jury that it might award exemplary damages. That in certain classes of cases juries are authorized to give punitive or exemplary damages to punish a wrongdoer, and to deter others from the commission of a like wrong is well-settled law in the Federal courts and in the courts of this state. *Day v. Woodworth*, 13 How. 370, 14 L. ed. 184; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Voltz v. Blackmar*, 64 N. Y. 440. In such cases exemplary damages may be given in addition to what may be proved to be the

actual money loss of the plaintiff. It is contended, however, that when no actual damages are proved, exemplary damages should not be allowed. In support of this proposition three cases are cited from the Texas Reports, but the law of that state is peculiar on the subject of exemplary damages (*Sedgw. Damages*, § 359, and cases there cited), and its decisions inapplicable where a different law prevails. Of the other cases cited on the brief, *Graham v. Fulford*, 73 Ill. 596, was an action on a special statute. *Kuhn v. Chicago, M. & St. P. R. Co.* 74 Iowa, 141, 37 N. W. 116; *Stacy v. Portland Pub. Co.* 68 Me. 287; and *Mawell v. Kennedy*, 50 Wis. 649, 7 N. W. 657,—sustain the contention of the plaintiff in error. They are, however, plainly at variance with the theory upon which exemplary damages are awarded in the Federal courts, namely,

of the recipient's widow who had from her husband's death, with the tacit assent of his heir for forty years, kept possession of them. The subject of controversy was letters written by George Washington, which had grown to be very valuable.

Again, in 1808 the property right of the recipient in the physical possession of a letter was enforced in the case of *New York v. Lent*, 51 Barb. 19. In that case a controversy arose over a letter of Washington written in 1784 to the city authorities in response to a municipal address, and which somehow got into the possession of A. In 1834, and remained there until 1868, when his executrix sold it at auction and defendant purchased it for a large sum, and it was awarded to the city, notwithstanding the great lapse of time.

But it was held lately that, forasmuch as letters may not be published without the consent of the writers, a contract to sell and deliver a quantity of them sent as testimonials to the value of proprietary articles after a purchase from the recipient was void. *Rice v. Williams* (1887) 32 Fed. Rep. 437.

The same year the doctrine that the recipient of a private letter might, notwithstanding the objection of the writer, publish it by way of vindication or defense against charges by the writer, was applied in the case of *Widdemer v. Hubbard*, 19 Phila. 263, where the court refused to restrain the publication of a letter from a husband to his wife retracting charges of infidelity he had made against her and afterwards renewed. But the court also based its denial of an injunction upon the ground that the husband, having expressly authorized other persons than his wife to read the letter, had thereby made such a public dedication of it as lost him the right to object; so the case is not as conclusive as might be wished.

V. Rights.

a. Before publication.

It is settled law, universally accepted without question both in England and the United States, that there is at common law an absolute property in an unpublished intellectual creation which none can take from the producer without his consent. He and his grantees alone at pleasure may keep it from the public for all time, may prevent its use or enjoyment by others, may publish it when, how, and where they choose.

An author may keep his production by him indefinitely, and though others may see it or hear it or become familiar with it, they are 51 L. R. A.

not at liberty to publish it without his consent. *Cooley, Torts*, 354.

Copyright before publication is the more ancient. It is the exclusive privilege of first publishing any original material production of intellectual labor. Its basis is property, and it depends entirely on the common law. *Morgan, Law of Literature*, 386.

Whether the ideas unpublished take the shape of written manuscripts of literary, dramatic, or musical compositions, or whether they are designs for works of ornament or utility planned by the mind of an artist, they are equally inviolable while they remain unpublished, and the author possesses an absolute right to publish them or not as he thinks fit, and, if he does not desire to publish them, to hinder their publication, either in whole or in part, by anyone else. *Short, Law of Literature*, 48.

It is well settled that the author of an unpublished manuscript has, independent of any question of copyright, an exclusive property therein until he dedicates it to the public. *Note to Hoyt v. Mackenzie* (N. Y.) 49 Am. Dec. 181.

Unpublished compositions are property at common law, and publication of them without his assent is an invasion of the owner's right. They include works intended for publication, though a gift or sale of the manuscripts may have been made; works intended for publication of a special sort,—dramas, etc.; and letters issued, but not to be published. *Bell, Law of Scotland*, § 1356.

The cases illustrate various phases of the doctrine. The British cases will be examined first.

The earliest case occurred in 1732 upon a bill filed by the son and devisee, of a conveyancer against his father's former clerk to prevent the threatened publication of his father's draughts of precedents. *Sir Joseph Jekyll granted an injunction. Webb v. Rose*, cited in 4 Burr. 2330.

And the next one arose in 1741. In that case the plaintiff, a lawyer, loaned his manuscript notes to a friend whose clerk made a copy of them, and the publication was enjoined at the author's suit. *Forrester v. Waller*, cited in 4 Burr. 2331.

In 1758 the representatives of Edward, Earl of Clarendon, obtained an injunction against the printing, publishing, and vending of his "History of the Reign of Charles II. from the Restoration to 1667," although the manuscript had been given by the noble author to the father of the vendor to copy and use as he thought

as something additional to, and in no wise dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions "where the wrong done to the plaintiff is incapable of being measured by a money standard." *Day v. Woodworth*, 13 How. 370, 14 L. ed. 184; *Wilson v. Vaughan*, 23 Fed. Rep. 229. There is room for argument against the allowance of exemplary damages at all as anomalous and illogical. Some courts have held that it is unfair to allow the plaintiff to recover, not only all the loss he has actually sustained, but also the fine which society imposes on the offender to protect its peculiar interests. But if it be once conceded that such additional damages may be assessed against the wrongdoer, and, when assessed, may be taken by the plaintiff,—and such is the settled law of the Federal courts,—there is

neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant.

Several passages in the charge dealing with the question of exemplary damages were excepted to, and are set out in the assignment of errors; but, since no argument in support of such exceptions is found in the brief, and none was made on the hearing, no discussion of them need be had in this opinion. They seem to be without merit.

Plaintiff in error cites authorities as to nonliability of a corporation for exemplary damages except under special circumstances. Presumably this is in support of his request

fit; but it was held that this did not authorize the donee to multiply copies. In a note to this case the reporter says that it established what was admitted in the later case of *Southey v. Sherwood*, 2 Meriv. 435, that an author has a property in an unpublished work independent of the statute. *Queensberry v. Shebbeare*, 2 Eden, 329.

The statute of Anne, says Chief Justice Abbott, writing in 1819, gave to authors a copyright in works, not only composed and printed, but composed and not printed, and I think that it was not the intention of the legislature (in 54 Geo. III. chap. 156) either to abridge authors of any of their former rights, or impose upon them as a condition precedent that they should not sell their compositions in manuscripts before they were printed. *White v. Geroch*, 2 Barn. & Ald. 298, 1 Chitty, 24. (There will be occasion to refer to this case again when the question, What is a publication? comes up.)

In 1820 a druggist's clerk, who had embarked in business on his own account, was restrained, at the suit of his former employer, from making use of, or communicating, the formulae of certain veterinary remedies he had copied from the latter's manuscript books. *Yovatt v. Winyard*, 1 Jac. & W. 394.

In 1823 it was held that a recipe for a proprietary medicine kept in manuscript and assigned to trustees for the benefit of the owner's daughter for life of her and her husband to be sold at their decease for the benefit of their children was property, and could be followed to, and made to be accounted for by, one who had purchased it from the eldest son, to whom the daughter communicated it after she had destroyed the manuscript. *Green v. Folgham*, 1 Sim. & Stu. 398, 1 L. J. Ch. 208.

In 1848 an injunction was procured in behalf of the Prince Consort to prevent the public exhibition of prints of some etching made by the Queen and himself for private entertainment, and surreptitiously held out by some workmen employed on the press work. Sir Fancielot Shadwell, V. C., in deciding the case, said: Upon the principle, therefore, of protecting property, it is that the common law in cases not aided or prejudiced by statute shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. And again, he says: The decision of the House of Lords in *Donaldson v. Beckett*, 2 Bro. P. C. 129, *infra*, was not inconsistent with the answer of the majority of the judges to the first question put to them in that case, namely, whether at common law an author of any book had the

sole right of first printing and publishing the same for sale, which was answered in the affirmative, and is generally or universally agreed to be correct. *Prince Albert v. Strange*, 2 De G. & S. 652, 13 Jur. 507.

In a later case it was said: It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue, notwithstanding some kind of communications to others: the case of private letters, etc. *Lord Halsbury, L. C.*, in *Caird v. Sims*, L. R. 12 App. Cas. 326, 57 L. J. P. C. N. S. 2, 57 L. T. N. S. 634, 36 Week. Rep. 199.

In the same case Lord Watson said: The author of a lecture or any other original composition retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. And even Lord Fitz Gerald, who dissented in that case, agreed with his opponents upon the point now under consideration. He said: It was not contested that, by the common law of Scotland, as well as by the common law of England, every author has a right of property in his conceptions so long as they remain unpublished, and that a private lecturer may impose an express condition on persons allowed to hear his lecture, that they shall not publish what they hear, and that such a condition may also be lawfully implied from the circumstances. In such cases the common law protects the author's right of property, and forbids the infringement.

Later it was ruled that information furnished to subscribers for their private use of stock transactions by means of letter-press sheets and printed stock ticker tapes were unpublished manuscripts to be protected accordingly. *Exchange Telegraph Co. v. Gregory* [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83.

Turning to the United States, one finds early recognition of the doctrine just enunciated.

The New York statute of 1786 to promote literature (2 N. Y. Laws [Jones & Var. ed. of 1789] 320) contained a provision that naught in it should affect, prejudice, or confirm any person's rights at common law to print or publish any book or pamphlet in cases not mentioned in the act.

The American cases from the beginning have uniformly and consistently recognized and guarded the common-law right of the owner in his unpublished mental concepts. This is plain from all the citations.

Though the case is no longer an authority—

to charge, "Malice cannot be imputed to an incorporation for the acts of its agent unless it has advised or ratified the same," which request was refused. The court, however, charged that "a corporation cannot be made liable for exemplary damages for the acts of its employees unless it has itself directed the acts or ratified them." This was certainly all the defendant was entitled to on that branch of the case. The court stated to the jury, and error is assigned to such statement, that "Mr. Chamberlain [the managing editor] was asked, and replied in the negative, if he had ever been blamed or found fault with for his conduct; and he was also asked if his conduct had been ratified by the managers of the corporation, to which he replied that it had been, so far as he knew." This was an accurate statement of the evidence. The court in no way in-

dicated what weight should be given to it, but left it to the jury to consider as proof, which the plaintiff claimed showed a ratification. In this there was no error. Approval of the conduct of the particular editor who had directed the publication tended to prove ratification of his acts.

Exception was taken to the statement in the charge that the copy of the ode was obtained by defendant against the mind and will of the author. The evidence abundantly warranted such a statement. Exception was also taken to the statement that "the Columbian Exposition committee desired to keep this ode secret until the day of its delivery." This exception is frivolous. The court merely rehearsed the testimony of the officers of the committee on that point, and added that upon that evidence and the other proofs in the case it was contended by

upon the point it decided, Chancellor Walworth was quite correct in 1848 in saying, in *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178, *supra*: By the principles of the common law the author of a book or other literary production, whether in the shape of letters or otherwise, has a right of property therein, at least until it has been published with his assent.

In another case, *McLean, J.*, in 1852, speaking of an author, says: He had a right to his manuscript, which the statute protects, and the property in which would be protected at common law. *Pulte v. Derby*, 5 McLean, 328, Fed. Cas. No. 11,465.

He had put it in another case just before (1849) in this wise: We have to say whether the writer has a right of property in his own manuscript. That he has such a property in his own literary labor until he shall relinquish it by contract or by some unequivocal act would seem to be clear. *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076.

And later the same jurist again expressed himself on this point: At common law an author has a right to his unpublished manuscript the same as to any other property he may possess, and this statute (Copyright Act of February 3, 1831, § 9) gives him a remedy to protect this right. *Little v. Hall*, 18 How. 165, 15 L. ed. 328.

Other jurists and courts have declared the same doctrines to be good law.

The plaintiff's books were not published, and while he remained the owner of the manuscript his property in it was exclusive as against the world. None of the cases referred to dispute this doctrine, but, on the contrary, most of them make the distinction in favor of the exclusive right of any person in the manuscript of his own works, not the material simply, but the thoughts and ideas, so long as they remain unpublished. *Banker v. Caldwell* (1859) 3 Minn. 94, Gil. 46, Flandrau, J.

As Shipman, J., (1862) in his opinion says: The object of this statute is apparent at a glance. It is to secure to the author of a copyrighted play the sole right to its performance in any public place after it is printed. While it is in manuscript he needs no protection. Manuscripts are protected by the common law as well as by the act. *Boucicault v. Fox*, 5 Blatchf. 87-97, Fed. Cas. No. 1,691.

An art or method of brewing which improves the keeping properties of beer, and which, though patentable, the discoverer or originator elects to keep secret, will be protected from publication by one who learned it under restrictive

conditions from the author's instructions. *Hammer v. Barnes*, 26 How. Pr. 174.

In *Boucicault v. Wood* (1867) 2 Biss. 34, Fed. Cas. No. 1,693, Drummond, J., said with reference to a foreign author: There having been no publication in this country of these two plays (*The Octoroon* and the *Colleen Bawn*) by him or under his authority, he is entitled by the common law, independent of the statute, to the property in them existing in manuscript. He may authorize their performance by others, or dispose of his property in them. This is his common-law right.

The author of any literary or dramatic work is the sole proprietor of the manuscript and its contents and of copies of the same independently of legislation, so long as he does not publish it or part with the right of property. This is called a common-law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assignee in a proper case, just as it will the owner of any other species of property. *Crowe v. Alken* (1870) 2 Biss. 215, Fed. Cas. No. 3,441, Drummond, J. This case held that although by the public performance in England of an unpublished manuscript play a dramatic author loses his right to copyright it under the United States statutes, he still retains his common-law rights, and may stand on them in the United States until he prints or publishes or dedicates the work to the public in some other way.

In the leading case in New York, *Allen, J.*, writing for the court of appeals, exhaustively reviews the law down to that time (1872), and states the general doctrine over and over again with emphasis: The rights of authors in respect to their unpublished works have been so frequently and elaborately considered and carefully adjudicated by the courts of this country and of England, and are now so well understood and established, that there is but little to do in passing on the merits presented by the record before us, save to apply to rules clearly deducible from adjudged cases of conceded authority. And again: The common-law rights of authors as now recognized existed before the passage of copyright laws, and have not been taken away or impaired by these laws. Also: The right of literary property is as sacred as that to any other species of property. The courts of the state are open to an alien friend pursuing his property and seeking to recover it from a wrongdoer; and there is nothing in any positive law or in the policy of the government which would close the door against the same alien friend seeking protection for the fruits of

the plaintiff that the ode was obtained surreptitiously, and without intent of the Exposition company, leaving it to the jury to determine that question.

We are at a loss to understand from the record upon what theory the defendant supports its claim that there was harmful error in admitting in evidence any part of Exhibit 4 (a copy of the Sunday World of September 25, 1892) except the ode. When this paper was offered, defendant objected that there appeared in it the ode, and also some comments on the ode, and a picture of Miss Monroe, which defendant contended were irrelevant. No Exhibit 4 is presented here.

The record states that the plaintiff, then on the witness stand, "read the first column of the article down to and including the words, 'This is set to music, and ends with the line, 'And love shall be supreme,'" and then continued reading to and including the words, 'The ode is published for the first time exclusively in the World to-day,' and then read the ode as published in the World." The only exhibit we find in the record answering to this description, in that it contains the lines quoted, comments on the ode, the ode itself in full, and a portrait of Miss Monroe, is a document marked "Defendant's Exhibit No. 1," which was, without objection, read

his mental labor by restraining its publication against his wishes. The protection afforded by the common law to literary labor is very slight at the best, but, such as it is, it is accorded to alien friend and citizen alike, and both are regarded with equal favor. And finally: The rights the plaintiff has in the drama (the American rights to Robinson's play) exist at common law independent of any statute either of the state or the United States. The protection he seeks is of a right of property which is well established and recognized wherever the common law prevails, and not a franchise or privilege conferred by statute. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

In the same year another eminent jurist said: Undoubtedly the author of a book, or of an unpublished manuscript, or of any work of art, has at common law and independently of any statute a property in his work until he publishes it or it is published by his consent and allowance, and that quality exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript; he may withhold it or he may communicate it, and communicating it he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. *Parton v. Prang* (1872) 3 Cliff. 537, Fed. Cas. No. 10,784, Clifford, J.

The decision of the English case of *Exchange Telegraph Co. v. Gregory* [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, *supra*, has been followed by two cases in New York to the same effect: *Kiernan v. Manhattan Quotation Telegraph Co.* (1878) 50 How. Pr. 194; *Gold & Stock Telegraph Co. v. Todd* (1879) 17 Hun, 548.

Another judge (1878) referring to the early policy of the common law to protect authors in enjoying the pecuniary benefit, and of the change wrought by the statute so far as rights subsequent to publication are concerned, says: But it only deprived the author of his exclusive right after publication. Before publication it has continued to be maintained the same as it was first assured, and the law still continues to maintain and protect the right of the author to his unpublished manuscript or composition as it formerly did, independently of the statutes concerning copyrights. *French v. Maguire*, 55 How. Pr. 471, Daniels, J.

In another case a distinguished judge, in the course of an opinion where he elaborately examined the law in respect to our subject, thus expressed himself: That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public has never been disputed. *Tompkins v. Halleck* (1892) 133 Mass. 32, 43 Am. Rep. 480, Devens, J.

The doctrine has been also put this way: The owner of a dramatic or musical composition may, like the owner of any other kind of property, 51 L. R. A.

do with his own as he pleases: he may retain it for his own use and benefit, or he may give it to the public out and out, or he may make a limited and partial dedication of it; and when his act of dedication is of such a character as to show unmistakably that he does not intend to abandon all right, but simply to give the public the right to have a limited use of his property, or to use it in a particular way and to reserve to himself whatever is not plainly given, the public acquire the right to use the property to the extent of his dedication, but nothing more, and any use of it in excess of the extent dedicated, is a violation of his reserved rights. *Aronson v. Baker* (1887) 43 N. J. Eq. 385, 12 Atl. 177, Van Fleet, V. C.

The American purchasers of a manuscript opera are entitled to protection against its unauthorized production in the United States, where it has never been published or dedicated to the public anywhere by their consent, although the composer, after conveying to them the American rights, published the piano score in Europe. *Goldmark v. Kreling* (1888) 35 Fed. Rep. 661.

The law protecting the rights of authors in their compositions, literary and musical, where they have not been dedicated to the public nor published with the author's consent, is well established. *Ibid.*, Sawyer, J.

In a late case, where protection was accorded to secret unpublished patterns, the device of an inventor of an unpatented pump abandoned to the public made of metals of different degrees of expansibility under the influence of heat and cold so that it was impossible to reproduce the patterns from the completed pump, *Vann, J.*, writing for the court (1889), says: It is conceded by appellant that, independent of copyright or letters patent, an inventor or author has by the common law an exclusive property in his invention or composition until by publication it becomes the property of the general public. The concession seems to be well founded, and to be sustained by authority. *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12.

So, too, a secret code of prices or cost marks devised by a trader for the guidance of salesmen in selling its wares, betrayed to a customer who copied the symbols into the trader's catalogue, has been protected from use, disclosure, and publication by the principles of the common law. *Simmons Hardware Co. v. Waibel* (1891) 1 S. D. 488, 11 L. R. A. 267, 47 N. W. 814.

And an actor who, in plaintiff's employment, memorized one of the parts of an original dramatization of a new translation of a foreign novel, will be prevented from incorporating the lines thus acquired, and from introducing the "business" used in connection therewith in a rival performance of an independent dramatization of a different translation of the same novel. *Fleron v. Lackaye* (1891) 14 N. Y. Supp. 292.

in evidence by defendant's counsel, and marked, during the direct examination of defendant's managing editor. Whether a paper put in evidence during the examination of a witness shall be read by counsel or by witness is a matter of practice in the court below, which will not be reviewed on appeal. In allowing plaintiff thus to read the article in the *World* and her own copy of the ode, the trial judge committed no error. The conversations with Fay, the Chicago representative of the *World*, who interviewed plaintiff on the morning of the day of publication under instructions from defendant, were proper as tending to show knowledge on the part of defendant's agent

that the poem had not been published by author or committee, and was to be withheld from publication until the day of dedication.

There are many other assignments of error; some to the admission of evidence, others to parts of the charge, or to refusals to charge defendant's requests. We have examined them all, but find in them no ground for reversal. Since they have not been discussed either in the brief of counsel or upon the oral argument, it is unnecessary to give them any fuller discussion here.

The judgment of the Circuit Court is affirmed.

A lecturer has a right at common law, "quite distinct." It is said, from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and incidentally to prevent fraud upon purchasers. That such right exists is too well settled upon reason and authority to require demonstration. *Drummond v. Altemus* (1894) 60 Fed. Rep. 338, Dallas, J.

The intellectual conceptions of an author are his absolute property. He may hold them captive in his brain, or he may release them and express them by outward signs. In the latter case the common law protects him against duplication or publication by any other parties without his consent. *Werckmeister v. Springer Lithographing Co.* (1894) 63 Fed. Rep. 808, Townsend, J.

It is conceded that an author, at common law, owns his literary production, but may sell it or lose his property in it by publication. *Ockenholdt v. Frohman* (1895) 60 Ill. App. 300, Gary, P. J.

There is but one discordant note in all the harmonious chorus. In setting aside a verdict of \$10,000 on the ground that a case of literary piracy had not been made out on the facts, *Seaman, J.* (1899), said: "The existence of a dramatic or stage right at common law upon which the plaintiff's cause of action must rest is controverted by the English precedents cited, and support is found in American authorities as well, for the further contention that there is no inherent property right in ideas, sentiments, or creations of the imagination expressed by an author apart either from the manuscript in which they are contained, or the concrete form which he has given them and the language in which he has clothed them. *Stowe v. Thomas*, 2 Wall. Jr. 547, Fed. Cas. No. 13,514, *infra*."

"On the other hand, American decisions have in notable instances upheld dramatic rights not resting on the copyright statutes, but as literary property at common law." *Maxwell v. Goodwin*, 93 Fed. Rep. 665. But even in that case the judge concludes that the weight and trend of the decisions in the United States is in favor of the common-law right.

The English precedents and American authorities referred to by the learned judge as denying the existence of a common-law right in dramatic compositions, etc., are not cited in the report of the case, and unless the court was misled by the numerous cases which have held the common-law right lost by publication, or such English cases as held that the early copyright statutes did not extend to stage rights in plays, it is difficult, since no others have been discovered, to account for the view expressed.

Furthermore, it will be seen, on reviewing the cases which hold that the common-law right after publication has merged in and been superseded by the statutes of copyright, that there 51 L. R. A.

is a consensus of opinion supporting the proposition stated at the head of this subdivision.

b. After publication.

Whether property in an intellectual creation after it had been given out to the general public ever existed at common law or not, there is now no question but that it no longer survives an unrestricted, unlimited publication.

Whatever rights an author or artist has at the present day are conserved by statute only, and if not so protected are forever gone.

Some writers strenuously maintain that there is no doubt but what the author of a literary composition at least, had, by the common law, anterior to all statutes, a right of property in perpetuity in his writings published and unpublished which the courts uniformly recognized and upheld. They insist, too, that the decisions to the effect that copyright statutes originally created such rights in intellectual productions, or at least superseded such as existed, if any, are unsound. Others are almost equally positive upon the other side. The question is academic, but the development of the law will perhaps be better understood if these conflicting views are briefly noticed.

Mr. Curtis in his very able work on copyright (p. 19) says: Although no legislative protection existed before the reign of Queen Anne, there was a protection founded in an acknowledged common-law right and the practice of printers and booksellers, which may be traced as far back as the reign of Queen Elizabeth. And again (Id. p. 20, note): There is very little reason to doubt that the right of authors was practically acknowledged as a common-law right in the reign of Elizabeth. Elsewhere he says that for fifty-seven years after the statute of Anne the perpetual copyright in published works was assumed to always exist, and the practice was to grant injunctions on the common-law right after the statutory time limit had expired. And it is true that there are several reported cases, which are referred to *infra*, where this was done.

Another writer, referring to the star chamber decrees and parliamentary ordinances prior to the statute of Anne as being primarily regulations of censorship, says: Most, if not all, of them contained clauses recognizing property in books, and providing for its protection. What the extent of this protection was or what was the exact status of literary property, cannot be precisely determined. *Drone, Copyright*, 58.

Elsewhere he says: At common law the ownership of literary property is not lost by any publication of the work. The rights and remedies are the same after as before publication. When these rights are lost by publication it is not by force of the common law, but

by operation of the statute as it has been judicially construed. *Id.* 116.

On the other hand, in the debate over Talfour's bill which ended in the enactment of the Victorian copyright act of 1842, Sir Edward Sugden declared that there was no common-law right in the author beyond the manuscript when it was written, or whilst it remained in his own possession.

And in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 3 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615, *infra*, Baron Pollock asserted that copyright was wholly the creature of the municipal law, and had no existence by the common law of England.

Mr. Schouler, in his treatise on the Law of Personal Property, vol. 2, § 28, says: Everyone has a natural dominion over his own ideas to impart them to others or confine them to himself; but this natural right is not found sufficient of itself to exclude others in society from making use of such fruits of the brain as are once communicated, and hence the protection is essential for the promotion of science and the arts which legislation now accords in the nature of a monopoly grant to the originator of something new and useful for addition to the world's stock of knowledge. The modern law of patents and copyrights in England and America rests upon statutes, and it is doubtful whether authors and inventors can be said to have had any valuable privileges at the common-law, or to enjoy at this day the exclusive benefit of their brain products otherwise than through legislative enactment.

Published works are protected by statute solely. *Bell, Law of Scotland*, § 1356.

Whether there now is, or ever has been, copyright at common law in a work when it has once been published, is still the subject of controversy. *Monkswell, Copyright Reform*, May, 1898, 23 *Law Mag. & Rev.* 4th Series, 195.

If the common-law theory in respect to these subjects (patents and copyrights) be correct, that there is no natural right to the exclusive manufacture of one's own inventions and intellectual productions, then the grant of an exclusive right to manufacture is a monopoly, etc. *Tiedeman, State & Federal Control of Persons and Property in United States*, vol. 1, p. 573, § 129.

Still, as in the case of inventions, no monopoly in publication is secured except by compliance with the statute. *Cooley, Torts*, 354.

In considering the power of Congress to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries (U. S. Const. art. 1, § 8), Story says: The power did not exist under the Confederation, and its utility does not seem to have been questioned. The copyright of authors in their works had, before the (American) Revolution, been decided in Great Britain to be a common-law right, and it was regulated and limited under statutes passed by Parliament upon that subject. It was doubtless to this knowledge of the common law and statutable rights of authors and inventors that we are to attribute this constitutional provision. *Story, Const.* §§ 1151, 1152.

The copyright recognized in the act of Congress as meriting protection is that form of property which an author has by the common law in his manuscript. But in the United States the author of a published work can have no exclusive property in it except under some act of Congress. *Ordroneaux, Const. Legislation*, 486.

The dispute cannot be settled, but there is one circumstance bearing upon it which has been generally ignored by the disputants. The 51 L. R. A.

generally accepted date of the introduction of printing in England is 1471, and it was two hundred and thirty-nine years afterwards, in 1710, before the first copyright statute, the celebrated 8 Anne, chap. 19, was enacted. During the entire intervening period, nearly two and a half centuries, there is not reported or cited a single case, unless *Roper v. Streeter* cited in *Skinner*, 284, in 1671, can be regarded as an exception, of any kind involving an author's right in his published work. And *Roper v. Streeter* involved a prerogative publication, and the King's patentee, a stranger to the author, prevailed. True, *Willea, J.*, says in *Millar v. Taylor*, 4 Burr. 2303, that the star chamber records have all been lost or destroyed, but these could hardly have involved the common-law rights of authors in works not the King's by prerogative. Either literary piracy was altogether unknown, or was not considered to be actionable, or else cases where it did occur were not regarded as important or novel enough to warrant reporting. It cannot be said that there was no literature. The period embraced the very golden age of English literature, the age of Shakespeare and of Milton. It can hardly be said that there was no temptation to literary piracy, since during that period *Walton's Angler* ran through five editions beginning in 1653 and ending with *Cotton's* in 1676. It is not easy to think the cases were considered commonplace. The art of printing was not only novel, but one of the greatest advances the race has ever made. One is almost forced to conclude that literary piracy was not considered actionable.

The statute of Anne, which gave protection for a term of twenty-one years, had been enacted twenty-five years before the first English case relating to copyright is met with.

In 1735, Sir Joseph Jekyll, M. R., granted an injunction against the publication of an unauthorized edition of "The Whole Duty of Man," first published in 1657, and his decision is said to have been acquiesced in. *Eyre v. Walker*, cited in 4 Burr. 2325.

In the same year Lord Talbot enjoined the publishing of Pope's and Swift's "Miscellanies," some of which had been first published in 1701, 1702, and 1708. *Motte v. Falkner*, cited in 4 Burr. 2325.

And the next year, 1736, Jekyll, M. R., restrained the publication of Nelson's "Festivals and Fasts" first printed in 1703 in the lifetime of the author, who died in 1714. *Waltheof v. Walker*, cited in 4 Burr. 2325.

These cases are all cited by Mr. Justice Willea in the great case of *Millar v. Taylor*, 4 Burr. 2303, *infra*, as authorities for the decision. The cases not being reported, it is not possible to determine upon what ground they went. There is some basis for supposing the last case to have been one of prerogative publication.

In 1748 a case arose in Scotland wherein London booksellers sought to recover of Edinburgh publishers for printing and vending books owned by them without their consent. Damages were claimed on the ground that by the statute a property was given to authors of the books published by them, a sufficient foundation because every proprietor is entitled to separation and damages at common law against those who encroach upon his property. But the court held that no action lay because the requirement of the statute respecting registration at Stationer's Hall had not been complied with, nor in case it had did any action lie for damages. The statute was held, in accordance with the modern view, to have superseded all other remedies. *Midwinter v. Hamilton*, 10 Mor. Dict. of Dec. 8295. The case went to the

House of Lords for review, but was there disposed of on a technicality.

A case, *sub nom.* *Midwinter v. Kincaid*, 1 Paton, Sc. App. Cas. 488, probably the same, accords with the ruling. It was there held the action was improperly brought by demanding at the same time a discovery and account of profits and the penalties given by the act as well. It was also said that there was a misjoinder of plaintiffs as they had distinct rights in separate works. Lord Eichel said: It was written from London that it was the opinion of the house (or seemed to be) that a suit, if properly brought, lies for profits within the term granted by the statute, but not after that term.

In 1752 an injunction issued against the publication of an unauthorized edition of "Paradise Lost" including Fenton's "Life of Milton" and notes of all former editions, but it also included notes by Dr. Newton which were plainly protected by the statute of Anne.

This is another case cited by Justice Willes, 4 Burr. 2325, in his opinion in *Millar v. Taylor*, 4 Burr. 2303, but Justice Yates, dissenting in that case says the injunction rests on Newton's notes. *Tonson v. Walker*, 3 Swanst. 672.

In 1760 a case over the right to publish "The Spectator" arose. The plaintiff claimed in the right of Addison and Steele. His contention was that, independent of the statute, there was an exclusive right in an author and he assigns in his works in perpetuity, and that the statute of 8 Anne was passed merely as additional sanction by imposing penalties for infringing that right. Yates, afterwards the dissident in *Millar v. Taylor*, 4 Burr. 2303, *infra*, is said to have been counsel in that case, and to have maintained the contrary. The court inclined toward the view that the plaintiff had a perpetual right by the common law, but discovered that the action was a collusive one between the parties, and dismissed it upon that ground. *Tonson v. Collins*, 1 W. Bl. 301.

In 1769 the King's bench was called upon to decide a controversy over the right to publish Thomson's "Seasons" and according to the headnote the case is the "first determination" in that court "of the old and oft litigated question of literary property." This is the celebrated case of *Millar v. Taylor*, 4 Burr. 2303, the foundation case of the whole claim to literary property in perpetuity after publication. The case was twice elaborately argued by the then leaders of the English bar, the first time by Dunning for the plaintiff and Thurlow for the defendant, and the second time by Blackstone for the plaintiff and Murphy for the defendant, before a court composed of Lord Mansfield and Willes, Aston, and Yates, JJ. It was contended in plaintiff's behalf that a property remained in authors after publication, and that they and their assigns have the sole right to multiply copies at pleasure for sale; and in defendant's behalf, that there was no property right after publication, no author's right at common law at all. The only rights there were were those given by the statute, and, as the time limited by that had expired, these were gone in the case at bar. It was insisted that whatever rights existed in publications anterior to the statute, of Anne were printers' rights, not authors', and that all the royal grants were to printers only; that publication was a dedication to the public, and a purchaser of a published book was at liberty to make any use he pleased of it; that the sole right of multiplying copies was a monopoly, and all monopolies were contrary to the common law.

The work in question was first published in 1727 and bought by the plaintiff two years later. The plaintiff was a member of the Sta-

tioner's Company, had registered as required by its by-laws to secure the exclusive right to print, and the period of protection given by the statute of Anne had fully expired when the alleged piracy was committed. The author, too, was a native British subject, had printed for himself only, and assigned to the plaintiff direct, so there was no question of noncompliance with any technical requirement, none of foreign books or abandonment to the public, and as there was a verdict found that plaintiff had printed enough copies to supply the demand, and had them for sale at a reasonable price, there were none of the obnoxious features of monopoly. In short the questions presented for decision were clean cut: (1) Whether the copy of a book or literary composition belongs to the author by the common law; (2) whether the statute of 8 Anne had taken that common-law right away. The decision was a sweeping triumph for the author's right, by a majority of three to one, Mansfield, Willes, and Aston against Yates.

The opinions of Justice Willes and Lord Mansfield in this case constitute the armory from which advocates of the author's right, so-called, have drawn all their argumentative weapons ever since. Every member of the court stated his views and conclusions at length, and Justice Willes very elaborately. The latter jurist, commenting on the paucity of cases in point, remarked that few bills against pirates of books are ever brought to a hearing. If the defendant acquiesce in the injunction, it is seldom worth plaintiff's while to proceed for an account, the sale being stopped. That from 1709 until that time not more than two or three such cases had been heard, and that the question of common-law right could not arise till twenty-one years from the 10th of April, 1710 (the date of passage of the statute of Anne), for old copies, consequently the soonest it could come up was after the 10th of April, 1731. Concerning prerogative publications, he puts the argument thus: But if the copy necessarily becomes open as a gift to the public by the printing and publication, it must likewise be so as to Crown copies, the contrary of which is now settled. I cannot distinguish between the King and an author. I disclaim any idea that the King has the least control over the press but what arises from his property in his copy. And he concludes: I am of opinion that there is a common-law right of an author to his copy; that it was not taken away by the act of 8 Queen Anne; and that judgment ought to be for the plaintiff. In concurring, Lord Mansfield thus expressed himself: The whole, then, must finally resolve in this question, whether it is agreeable to natural principles, moral justice, and fitness to allow him (the author) copy after publication as well as before. The general consent of this kingdom for ages is on the affirmative side. The legislative authority has taken it for granted, and imposed penalties to protect it for a time. He says that the single opinion of Milton, given after consideration, is worth more than inferences from gathering acorns or seizing vacant land; and that judicial opinions of eminent lawyers on granting injunctions in cases after publication not within the statute of Anne and not contradicted by books or judgments are of greater weight than theory and speculation. Justice Yates, in dissenting, points out that the cases of *Webb v. Rose*, cited in 4 Burr. 2330; *Pope v. Curl*, 2 Atk. 342; *Forrester v. Waller*, cited in 4 Burr. 2331; and *Queensberry v. Shebbeare*, 2 Eden, 329, *supra*,—all involved publications that were surreptitious against the will of the owner before he had consented to the publication of them, and therefore not precedent. Most

certainly, he says, the sole proprietor of any copy may determine whether he will print it or not. If a person takes it to the press without his consent he is certainly a trespasser, though he came to it by legal means as by loan or devolution. Ideas are free; but while the author confines them to his study they are like birds in a cage which none but he can have a right to let fly, for till he thinks proper to emancipate them they are under his own dominion.

But the question was not settled by this decision. As already seen, the views of the Scottish courts were directly contrary (*Midwinter v. Hamilton*, 10 Mor. Dict. of Dec. 8295, *supra*), and were adhered to when next the question came before them as it did in 1773.

Donaldson, having reprinted and published in Scotland an edition of Stackhouse's History of the Bible, Hinton of London, who laid claim to the property of that work, not under the statute of Anne, but in virtue of a supposed common-law right, brought suit for damages, but the court, after a full discussion of the question, being of opinion that such right did not exist in authors or publishers at common law, assailed from the action. *Hinton v. Donaldson*, 10 Mor. Dict. of Dec. 8807.

It is said that in the argument of counsel before the House of Lords in the later case of *Jefferys v. Boosey*, 4 H. L. Cas. 815, 3 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615, that in this case, which preceded *Donaldson v. Beckett*, 2 Bro. P. C. 129, *infra*, in England, twelve of the judges held there was no copyright at common law, and only one, Lord Monboddo, took the opposite view.

In 1774 the House of Lords distinctly overruled the doctrine of *Millar v. Taylor*, 4 Burr. 2303, *supra*, and declared the law to be, that property rights in literary productions after they are once published do not exist at common law since the enactment of copyright statutes, but depend upon such statutes alone,—a view that has prevailed ever since. Thomson's "Seasons" was again the publication involved, and Lord Apsley, afterwards Earl Bathurst, following, though doubtfully, the decision in *Millar v. Taylor*, 4 Burr. 2303, *supra*, granted an injunction *pro forma* with the understanding that the case would be reviewed in the House of Lords. Five questions were submitted to the opinions of the judges by the Lords, and there was a division upon all of them: 1. Whether, at common law, an author of any book or composition had the sole right of first printing and publishing the same for sale. Yes, eight to three. 2. If he had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author? No, seven to four. 3. If an action would have lain at common law if it taken away by the statute (8 Anne, chap. 19), and is an author by such statute precluded from every remedy except on the foundation of such statute and on the terms and conditions prescribed thereby? Yes, six to five. 4. Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law? Yes, seven to four. 5. Whether this right is in any way impeached, restrained, or taken away by the statute of Anne? Yes, six to five. Lord Mansfield sat as a peer at the time, but expressed no opinion and did not vote. It has been assumed that he adhered to the views he had expressed in *Millar v. Taylor*, and pointed out that in case he did, the vote on questions 3 and 5 would have been a tie. Many expressed opinions in the case, 51 L. R. A.

but that of Chief Justice de Grey of the common pleas, which was adopted *en bloc* by Lord Camden in moving the judgment of reversal, need alone be referred to here. That jurist, admitting that an author had the sole right at common law to dispose of his unpublished manuscript, and could maintain trover, trespass, or case against any invader of that right, maintained that there was no common-law right after publication, and that none was ever claimed from the introduction of printing until after the restoration, nor even then except only as to prerogative publications. He insisted that the common law must have remained unchanged from the time printing was introduced down to the then present, and that no traces of the asserted claim appeared until after Charles II. late in the 17th century, and concerning Crown copies only. That the by-laws and regulations of the Stationer's Company, a private body, could not change or affect the law, although that organization could enforce its own rules by fine or expulsion upon its own membership, and doubtless at first included all London booksellers. He contended that the star chamber decrees could not be regarded as in any sense expressions of the common law, and he declared: that, of the seventeen causes for injunction,—the whole number,—that since the statute of Anne had come before chancery eight were founded on the statute itself, two or three were on the question of fair abridgment, and all the rest were *ex parte* on bill and affidavit, the defendant not being heard. The vote of the Lords for reversal was twenty-two to eleven. *Donaldson v. Beckett*, 2 Bro. P. C. 120-138.

There is said to be a fuller report with all the opinions and speeches condensed, in 17 Hansard's Parliamentary History, 953.

This decision was immediately followed (1775) by an act of Parliament (15 Geo. III. chap. 54) conferring upon Oxford and Cambridge universities, four Scotch universities, and the colleges of Eton, Westminster, and Winchester the right to hold their copyrights in perpetuity upon trust that the profits be applied as a fund for the advancement of learning and other beneficial purposes of education. There still remained for a long time some uncertainty as to the extent of the application of the last-cited case.

In 1798 it was held that the author's common-law rights in his literary work continued under the statute of Anne as before, but, instead of perpetually, only for the time limited in the act; and therefore were protected, notwithstanding the work had not been registered at Stationer's Hall, or the author's name printed on the first published copies, as required by the statute; only in the absence of compliance with these requirements there could be no enforcement of the forfeitures and penalties provided by the act. *Beckford v. Hood*, 7 Durn. & E. 349.

The same question arose in Scotland soon afterwards, and the court in the first instance held, according to the modern view, that failure to enter at Stationer's Hall the title of the work as required by the statute barred a recovery against the pirate, as the only remedies were those given by the statute, and its requirements must be observed; but on appeal the House of Lords adopted the view taken in the last-cited case, declaring, at the suggestion of Lord Eldon, Chancellor, that those to whom the sole liberty of printing books is given by the statute of Anne for the term or terms therein mentioned have thereby a vested right entitling them to maintain a suit for damages in case of a violation of it, and to prevent such violation by interdict for the statutory term, although no entry be made at Stationer's Hall.

before publication. *Cadell v. Robertson* (1811) 5 Paton, Sc. App. Cas. 493.

It was near the middle of the nineteenth century before another case involving a common-law right in intellectual productions came again before the English courts. The assignee of Auber in 1845 invoked the aid of the courts against a pirating publisher of the opera of *Fra Diavolo*, and was defeated. The holding in that case was that the assignee of a foreign author, whose work was written and published abroad, could not prosecute for literary piracy, since the foreigner had, neither by common law nor under the then statutes (8 Anne 19, and 54 Geo. III. 136), any copyright in England. *Chappell v. Purday*, 14 Mees. & W. 301, 14 L. J. Exch. N. S. 258.

The doctrine of this case was formally adopted by the House of Lords in 1854 in one of the great cases on this topic. The controversy was over the rights in Bellini's "*La Sonnambula*," and on the trial before Baron Rolfe in 1850 it appeared that the opera was composed in 1831, the composer being then a non-resident alien friend, and it was assigned the same year to another nonresident alien friend, who in turn assigned the English rights to the plaintiff, a native resident, who published it the same year and duly registered it at Stationer's Hall and renewed the registration in 1844. A verdict was directed for the defendant at the trial, which was reversed and a new trial ordered in 1851 by the judges of the exchequer chamber, and a writ of error taken to the House of Lords. While the case went upon the ground that a nonresident foreigner could not have a copyright under English law, and hence could not assign it to a native, the discussion ranged over the whole subject of common-law rights, and the famous case of *Donaldson v. Beckett*, 2 Bro. P. C. 129-138, underwent critical examination; and since the case is not held to have conclusively settled the questions involved in it (*vide*, *Reade v. Conquest*, 9 C. B. N. S. 755, 30 L. J. C. P. N. S. 269, 7 Jur. N. S. 265, 3 L. T. N. S. 888, 9 Week. Rep. 434, *infra*), a somewhat extended consideration of it may be indulged. An interesting question was put by the Lord Chancellor to Sir F. Kelly, who was arguing as counsel for the author's right, and is taken with the answer illuminating. Q. Is there an instance of property of this sort being claimed before the statute of Anne? A. All the cases from the earliest times show that there existed in the author of any work, and in the purchaser from the author, an absolute right of property. And in support of this statement he cites *Roper v. Streater*, cited in *Skinner*, 234, *supra*, a case where the author's right was made to yield to that of the King's patentee upon a prerogative publication; *Stationer's Co. v. Seymour*, 1 Mod. 258, *supra*, an almanac, held a prerogative publication with no certain author; and *Queensberry v. Shebbeare*, 2 Eden, 329, *supra*, involving an unpublished manuscript history, about which there never has been any dispute, and the late case of *Prince Albert v. Strange* (1848) 2 De G. & S. 652, 13 Jur. 507, the royal etchings case. Of the judges, six, namely Williams, Erle, Crompton, Wightman, Maule, and Coleridge, were for affirmance, but several of them declined to express any opinion as to whether by the common law the author's right survived publication, and four, namely Alderson, Parke, Pollock, and Jervis, were for reversal, and all the law lords, the Lord Chancellor, and Lords Brougham and St. Leonards concurred, and the judgment of the exchequer was reversed and that of the trial court affirmed. Erle and Coleridge, JJ., expressed themselves in favor of the author's perpetual right. Baron Parke and JJ. Pollock 51 L. R. A.

and Jervis, the Lords Brougham and St. Leonards, denied the existence of any perpetual right at common law, and the remainder were of the opinion that if such right had existed before the statute the latter had taken it away. Some of the expressions of the judges and law lords upon the points discussed thus far, are of interest: About the rights of an author at common law before publication all are agreed. Erle, J., thought they continued after publication as well. With respect to the right before publication it does in fact exist by the common law of England. The weight of authority is in its favor. It has scarcely been disputed. As to whether by the common law copyright after publication exists has been much questioned and high authority may be cited on both sides. I do not decide. Maule, J. It is not necessary to consider the question as to the rights of an author against parties having illegally or surreptitiously taken or used his manuscripts or copies. Such rights must not be confounded with the copyright now under discussion, the creation of, or limited by, the statute. Lord Crompton. Whatever the difficulties may have been originally, I had supposed that it had been considered as now settled that either copyright was originally created or at all events is now entirely regulated by, and in this country depends on, the statute of Anne. Baron Alderson. Lord Brougham declared that the judges who had supported the common-law right of authors after publication relied on speculative and enthusiastic views rather than cold legal reasoning. That the statute of Anne plainly indicated that in the legislative view there was no common-law copyright. As to the right of the author at common law before publication, that was unquestioned and had never, when accurately defined, been denied. Lord St. Leonards asserted that no common-law right exists after publication, and there is no difference in this respect between author and inventor. All agreed that publication abroad made a work public in England; that an alien friend resident in England had, until publication, the rights of a native; and a majority that a non-resident alien friend had no English copyright at common law or by statute, and could transfer none. So far as the English courts were concerned, the long contest was ended, the defeat of the advocates of a perpetual property after publication in mental products was complete. *Jefferys v. Boosey*, 4 H. L. Cas. 815, 3 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615.

In 1861 Charles Reade, the novelist, complained of an infringement of his copyrighted novel "*Never too Late to Mend*," in that it had been dramatized and represented on the stage, and in his behalf it was contended, on demurrer to the second count in his declaration that an author had a common-law right in his novel as regards its public representation in dramatic form, which was not impaired by the publication of the copyrighted book, but the demurrer was sustained, the court ruling that the statutes (3 & 4 Wm. IV. chap. 15, protecting plays, and 5 & 6 Vict. chap. 45, protecting books) did not apply to a play made from a copyrighted book. *Reade v. Conquest*, 9 C. B. N. S. 755, 30 L. J. C. P. N. S. 269, 7 Jur. N. S. 265, 3 L. T. N. S. 888, 9 Week. Rep. 434.

When later the same case came up after a trial on the merits a recovery of the plaintiff on a verdict subject to the opinion of the court was sustained because it then appeared that the dramatist of the novel, "*Never too Late to Mend*," had, though unwittingly, infringed the plaintiff's copyrighted play of "*Gold*," upon which the novel was founded. Williams, J., in delivering the opinion of the court in this case,

took occasion to say that the weight of authority in Lord Mansfield's time was that there existed anterior to the statute of Anne, at common law, a copyright in published books, more extensive and durable than the rights under the statute, but the doctrine had found less favor in modern times; that the continued existence of such common-law right was distinctly denied in *Donaldson v. Beckett*, 2 Bro. P. C. 129-138. He added that if the question was still an open one it could not be doubted but that much might be said in favor of the common-law right, running at least during the statutory term, by reading the majority opinions in *Millar v. Taylor*, 4 Burr. 2303, and the minority opinion of *Earle, J.*, in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 5 C. L. Rep. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 815, but it was the opinion of a large majority of the judges and law lords in that case that the time had passed when the question was open to discussion, and that it must now be considered to be settled that copyright in a published work exists only by statute. *Reade v. Conquest*, 11 C. B. N. S. 478, 5 L. T. N. S. 677, 81 L. J. C. P. N. S. 153, 8 Jur. N. S. 764.

This decision is noteworthy from the fact that *Erie, Ch. J.*, who took the other view in *Jefferys v. Boosey*, was a member of the court and concurred in it.

The case of *Jefferys v. Boosey* was distinguished, however, and incidentally somewhat criticised, in 1868, in a controversy between rival publishers of the work of an American author, who sent her manuscript to one of them for publication, and upon his advice went to Montreal for a temporary residence while an English copyright was secured. In that case it was held that the 5 & 6 Vict. act includes an alien friend residing in British dominions, and he is entitled to a copyright when he first publishes in England. It was said that, so far as *Jefferys v. Boosey* is an authority the other way, it depended on earlier statutes that have been materially modified by later acts. *Lords Cairns* and *Westbury* criticised *Jefferys v. Boosey*; *Lord Chelmsford* distinguished it on the ground of the author's temporary residence in Montreal in the case at bar; *Lord Cranworth* took the same view; and *Lord Colonsay* admitted as much and concurred in the result. *Routledge v. Low* (1868) L. R. 3 H. L. 100, 37 L. J. Ch. N. S. 454, 18 L. T. N. S. 874, 16 Week. Rep. 1081.

In 1869 *Malins, V. C.*, held that under the English statutes a newspaper had a property right in articles contributed to and published by it, and it was not necessary for its protection that it be registered at Stationer's Hall, but he refused an injunction in the particular case because the tabulated statement complained of was merely made up of common materials open to everybody. *Cox v. Land & Water-Journal Co.* L. R. 9 Eq. 823, 39 L. J. Ch. N. S. 152.

In 1891 a joint action by an artist and the buyer of his picture, complaining of an unauthorized reproduction, failed because the requirements of the statutes as to registration had not been observed, it being held that registration in the artist's name was unavailing because his copyright passed to the purchaser of the picture when he sold it, and that the purchaser, not having registered, had no action. There was a final holding that the statute of copyright must, to protect a published work, be complied with in every respect. There, too, the copyright passed simply by implication with the ownership of the work, *Fry, J.*, saying: It seems to me extremely improbable that the picture should pass and the copyright remain in the vender. That is a possible, but an unnatural,

dissociation of two kinds which I think we ought not to infer, and ought not to think probable. *London Printing & Pub. Alliance Co. v. Cox* [1891] 8 Ch. 291.

In the United States the decisions from the start have consistently held that after publication the only rights of an author in his production were those secured by copyright statutes.

The first great copyright case reached the United States Supreme Court in 1834, and the decision therein has been the basis of all cases since. It followed *Donaldson v. Beckett*, 2 Bro. P. C. 129-138, in holding that the common-law rights of authors did not survive publication, but were superseded if they ever existed by the copyright statute of 1790, which, in substance, was like to that of 8 Anne. And it went further, and declared that the English common law did not exist in the United States, nationally considered, nor in its entirety in any of the states, but only in part so far as recognized and adopted in some of the states, and these, even, were not agreed upon the particular parts therein in force; therefore, whatever the common-law rules in England in a given case were, they did not apply and govern any case in the United States unless they had been affirmatively recognized or adopted by the state in which the controversy arose. It seems, however, that this doctrine is now an exploded one. The recent decision of the Supreme Court of the United States in the case of *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. —, Adv. S. 561, 21 Sup. Ct. Rep. 561, establishes the doctrine that the common law extends even to interstate commerce which is outside the range of any state law. The case arose in Pennsylvania over the right to publish *Wheaton's* reports of the decisions from 1816 to 1827 of the United States Supreme Court, some of the technical requirements of the copyright statutes appearing not to have been literally complied with. Briefly stated the contentions of the parties were as follows: It was urged on behalf of the plaintiff: 1. That an author had perpetual property in his work by the common law. 2. That this common-law right was not affected by the provisions of the United States Constitution, and stress was laid on the use of the word "secure" instead of "vest" or "grant" in that regard in the instrument; and the states retained concurrently jurisdiction over questions of common-law copyright. 3. That if the statute intends to take away the common-law rights of authors it is beyond the power of Congress. 4. That the common-law author's copyright exists in Pennsylvania; hence an author may have a remedy on it in the United States courts therein when diverse citizenship confers the necessary jurisdiction. That the American colonists brought with them as their birth-right and inheritance the common law of England, and it prevailed as regarded copyright in Pennsylvania because that state had enacted no copyright statute and the English act, 8 Anne, chap. 19, was not passed until after Pennsylvania was settled. 5. That law reports were proper subjects of copyright protection; the only question in England being whether they were not by prerogative right the monopoly of the Crown. The defendants answered: That a copyright statute was exclusively within the power of Congress; that it superseded the author's common-law rights beyond the first publication of his work if he ever had any; and that its requirements must be strictly observed or protection was lost. The defendants' contention prevailed, both in the court below which dismissed the bill, and in the Supreme Court on appeal in the case under notice. The court

divided, Chief Justice Marshall, and Judges Story and M'Lean concurring in the decision, and Thompson and Baldwin, JJ., dissenting. Johnson, J., was prevented by illness from sitting throughout the term, and Duvall, J., for some time after its commencement. The prevailing opinion was delivered by M'Lean, J., and in the course of it he examined the English precedent cases, including *Millar v. Taylor*, 4 Burr. 2303, and *Donaldson v. Beckett*, 2 Bro. P. C. 129-138, and commented on the statute of Anne, and concluded that since that statute it seemed to be well settled in England that the literary property of an author in his works could only be asserted under the statute; and that in spite of the great case of *Millar v. Taylor*, the asserted common-law right before the statute after publication was a question not free from doubt in England. He conceded the author's common-law right in his manuscript before publication, but said that was a very different right from that which asserts a perpetual and exclusive property in the future publication of the work after the author shall have published it to the world. To the incontrovertible argument that a literary man was as much entitled to the product of his labor as another he answered that he realized on this when he transferred his manuscript or in the sale of his works when first published. Taking up the question whether or not, assuming the claimed rights of authors exist in England by the common law, the same rights to the same extent exist in this country, he concludes that they do not, at least so far as Pennsylvania is concerned, since that state was settled before any judicial investigation of the subject of literary property came to be made in England, and long before the doubtful common-law right asserted found champions there. Then, proceeding to an examination of the United States Constitution and acts of Congress respecting copyright he comes to the conclusion that the right intended to be "secured" was the well-recognized, undisputed author's right in his unpublished manuscript work of first publication, that the power of Congress was exclusive, that protection to literary property after publication was created by the statute and depended wholly upon its terms; hence, the plaintiff's rights, if sustainable at all, must be sustained under the acts of Congress, and finally he concludes that unless it can be established on the facts in the case at bar that every requirement of the statute has been met, the action cannot be maintained. In dissenting, Thompson, J., begins by assuming, as proposition not to be questioned, that in England prior to the statute of Anne the right of an author to the benefit and profit of his work is recognized by the common law. No case, he says, has been cited on the argument, and none has fallen under my observation, at all throwing in doubt this general proposition. He reviews the cases, and concludes they are in conformity. Then, by citations from Coke, Mansfield, Kent, and others to the effect that common law is simply a general code of common right and justice founded on the principles of right and wrong, he esteems the author's copyright established in sound reason and abstract morality. The argument of Yates, J., in *Millar v. Taylor*, 4 Burr. 2303, is taken up and criticised point by point, and the statute of Anne is asserted never to have been in force in Pennsylvania. He concludes thus far that, from this view of the law as it stands in England, it is very clear that, previous to the statute of Anne, the perpetual common-law right of authors was undisputed. That after that statute in the case of *Millar v. Taylor*, 4 Burr. 2303, it was held that this common-law right remained unaffected by the statute which 51 L. R. A.

only gave a cumulative remedy. That the subsequent case of *Donaldson v. Beckett*, 2 Bro. P. C. 129-138, limited the right to the times mentioned in the statute. But that for all violations of the right during that time all the common-law remedies continued, although no entry at Stationer's Hall had been made, such entry being necessary only for the purposes of subjecting the party violating the right to the penalties given by the act. He did not deem it necessary to decide whether there was any common law of the United States, but merely whether or not the English common law prevailed in Pennsylvania; and he concluded, after extended examination, that it did, and as it obtained there as early as 1682, the statute of Anne never had force there. Turning then to the acts of Congress respecting copyright, he concludes that these did not abrogate the common-law rights, and finally holds that the American act, like the statute of Anne, merely provides for additional penalties, and that the action at bar was well founded because the time limited by the statute had not expired, and the common-law remedies continue during the term of the statute, regardless of a compliance with all its technical requirements. *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

The dissenting opinion of Justice Thompson in the case just cited is much relied on by the advocates of author's rights for the arguments to sustain their position (*vide* Drone, Copyright, *supra*, 44), yet that jurist accepted his defeat gracefully. In one of the very next copyright cases that arose, some time within the succeeding six years, he begins his opinion in these words: Copyright was formerly considered to be founded on common law, but it can now only be viewed as a part of our statute law; and judgment went for the defendant on the ground that the work infringed was not within the protection of the statute. *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872.

Thenceforth there is no dissent from the opinion that the common-law rights of the intellectual producer do not survive the publication of the product. In 1853 Justice Grier writing in the case arising over an unauthorized German translation of "Uncle Tom's Cabin" states it substantially thus: Before publication an author, who may be said to be the creator of the ideas in his books and the combination of words to represent them, has the exclusive possession of his creature. His dominion is perfect, but when he has given his thoughts, etc., to the world he can no longer have an exclusive possession of them. His conceptions have become the common property of his readers, who cannot be deprived of the use of them nor of their right to communicate them to another clothed in their own language by lecture or by treatise. By the publication of Mrs. Stowe's book the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. All that now remains is the copyright in her book. *Stowe v. Thomas*, 2 Wa. Jr. 547, Fed. Cas. No. 13,514.

In 1867, upon complaint of a dramatist over the piracy of several plays of his, some published and some unpublished, he recovered with respect of the unpublished ones, but failed as to the others. The court said: The published plays he has given to the public, and his only protection is the statute. *Boucicault v. Wood*, 2 Biss. 34, Fed. Cas. No. 1,693, *Drummond*, J.

The author of a literary work has a right to the first publication of it. This exclusive right is confined to the first publication. When once

published it is dedicated to the public, and the author has not at common law any exclusive right to multiply copies of it or to control the subsequent issues of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of statute. *Palmer v. De Witt* (1872) 47 N. Y. 532, 7 Am. Rep. 480, Allen, J.

Independently of legislation the sole proprietorship of a manuscript is in the author and he assigns until he publishes it; but an unqualified publication such as is made by printing and offering copies for sale dedicates the contents to the public unless the sole right and liberty of printing, reprinting, publishing, and vending the same is secured to the author or proprietor by copyright. *Parton v. Prang* (1872) 3 Cliff. 537, Fed. Cas. No. 10,784.

The manuscript and the author's right are still within the protection of the law. The common-law rights of authors as they existed at common law are now recognized. The author has the exclusive right to the first publication of his work, but no exclusive right to multiply copies or control subsequent issues. This latter right is the creation of the statute of the United States. *Boucicault v. Hart* (1875) 13 Blatchf. 47, Fed. Cas. No. 1,892, Hunt, J.

The doctrine that an author has a right of property in his ideas, and is entitled to demand for them the same perpetual protection which the law accords to the proprietor of personal property, generally finds no recognition either in the common law or in the statutes of any civilized country. If he publishes he ceases to have any exclusive claim to the ideas or sentiments expressed, considered apart from the language or the outward semblance in which they are conveyed. *Carter v. Bailey* (1874) 64 Me. 458, 18 Am. Rep. 273, Virgin, J.

It was very early the policy of the common law to protect authors in the enjoyment of the pecuniary benefits of their literary productions, and these probably extended so far as to include the unlimited right of publication and sale. Since then it has been protected after publication only under the laws providing an exclusive copyright. *French v. Maguire* (1878) 55 How. Pr. 471.

By the common law an author's property in his manuscript continues only so long as it is not made the subject of publication and sale. When it is embodied in the usual manner in a book for general sale, and sold indiscriminately to all desiring to acquire it, the author's exclusive right of property is gone, and all other persons after that are at liberty to publish and sell the book. The only manner in which this result can be prevented is by the author or publisher availing himself of the rights secured by the copyright laws of the United States. *Potter v. McPherson* (1880) 21 Hun, 559, Daniels, J.

It is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much of it as he has so published and the use which others may make of it is at an end. *Carte v. Ford* (1883) 15 Fed. Rep. 439, Morris, J.

If they (literary works) are published without protection by copyright, they become public property, and may be republished by anyone who chooses to do so. *Clemens v. Belford* (1883) 11 Biss. 459, 14 Fed. Rep. 728, Blodgett, J.

No authority exists for obtaining a copyright beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law, but as it exists

in the United States it depends wholly on the legislation of Congress. *Banks v. Manchester* (1888) 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36, Blatchford, J.

The right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action are only those prescribed by Congress. *Thompson v. Hubbard* (1889) 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710, Blatchford, J.

The intellectual conceptions of an author are his absolute property; but if he sets them free by unrestricted publication he abandons his property in them to the public. *Werckmeister v. Springer Lithographing Co.* (1894) 63 Fed. Rep. 808, Townsend, J.

It (the book owner), of course, cannot have at the same time the benefit of the copyright statute and also retain its common-law right. No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right. *Jeweler's Mercantile Agency v. Jewelers' Weekly Pub. Co.* (1898) 155 N. Y. 251, 41 L. R. A. 846, 49 N. E. 872, Parker, Ch. J.

While the propriety of these decisions (*Dondaldson v. Beckett*, 2 Bro. P. C. 129, and *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055) has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, while a right did exist at common law it has been superseded by statute. *Holmes v. Hurst* (1899) 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606, Brown, J.

In *Kipling v. Fenno*, 106 Fed. Rep. 692, the proposition was advanced that an author whose mental productions, prose, verse, and title, have been given to the world by publication without copyright, so that anyone is free to reprint and sell the whole or any part of them, may nevertheless regulate the manner in which such reprinted matter may be grouped and entitled, and may restrain any application of the title he selected, otherwise than as he used or uses it; but the court declined to adopt the proposition on motion for preliminary injunction, and although reserving it for final hearing, added that it would seem as if the relief obtainable by authors against unauthorized publication of their works must be found in copyright statutes, which, when availed of, were an abundant protection.

c. What constitutes publication.

1. General principles.

There are numerous cases in which this question was involved, but no general principle can be deduced from them to answer it when it arises in the future. Each case depended upon facts and circumstances peculiar to itself to find the answer.

In a note to the report of *Palmer v. DeWitt* (N. Y.) 7 Am. Rep. 488, Mr. Thompson, the accomplished editor of the *Albany Law Journal*, said: The question, what constitutes a publication has not been satisfactorily answered—most cases turning on the construction of copyright laws.

In so far as the question turns upon a statute it is without the scope of this note. Some little help is afforded by the textbooks and jurists.

In cases of literary treatises in manuscript the author (cannot) justly be deemed to intend to part with (his) ownership by depositing them (with) or allowing a third person to take and hold a copy of them. Such acts must be deemed

strictly limited in point of right use and effect to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purpose of profit or publication to which the receiver may choose to devote them. 2 Story, Eq. Jur. § 943.

To constitute a publication it is necessary that the work shall be exposed for sale or offered gratuitously to the general public so that any person may have an opportunity of enjoying that for which the copyright is intended to be secured. Copinger, Copyrights, 8d ed. p. 119.

The distinction is in the limit of circulation. If limited to friends and acquaintances it would not be a publication, but if general and not so limited it would be. *Id.* p. 117.

The determination of various courts that, under some circumstances, the delivery of lectures or the representation of plays to such of the public as may attend does not constitute publication, must be regarded as rather of an incidental character, arising undoubtedly to some extent from tenderness for authors, and not establishing any general rule. *Ladd v. Oxnard* (1896) 75 Fed. Rep. 729, Putnam, J.

2. What is a publication.

The following line of cases holding that the facts established a publication, abandonment, or dedication to the public are not open to criticism upon that score.

The making by a draughtsman of several copies of a manuscript unprinted map, one of which he placed in a public office for the use of the officials and open for consultation by the general public, and a few others of which he sold to private concerns, is such a publication or dedication as terminates the common-law rights therein. *Rees v. Peltzer* (1874) 75 Ill. 475.

The issue to a number of booksellers and private persons of copies of a book for examination, where in one instance a bill was rendered for it and the price paid, is such a publication as will defeat a copyright taken out more than ten days subsequently. *Gottschberger v. Aldine Book Pub. Co.* (1887) 33 Fed. Rep. 381, Colt, J.

The issue of a book of mercantile credit ratings, and its delivery for a money consideration to subscribers as a loan, not a sale, when no limit is placed on the extent or number of persons to whom the book might be distributed, although each subscriber is bound to keep it for his exclusive use, and to keep it from the public generally, constitutes a publication of it. *Ladd v. Oxnard* (1896) 75 Fed. Rep. 729.

And, to the same effect, *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* (1898) 155 N. Y. 241, 41 L. R. A. 846, 49 N. E. 872, Reversing 84 Hun, 12, 32 N. Y. Supp. 41, where, however, it appeared that the plaintiff had taken some steps to secure a copyright under the statute, but had never perfected it.

The gratuitous distributions of a printed pamphlet to hotels, business houses, and private residences is such an antecedent publication as will render void a subsequently obtained copyright not secured within the time limit after publication named in the statute. *D'Ole v. Kansas City Star Co.* (1899) 94 Fed. Rep. 840.

The right of an author to copyright in his book as an entirety is lost by publishing it at first in serial form in a magazine. *Holmes v. Hurst* (1899) 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606.

The next case is more doubtful.

The purchaser from a foreign dramatist of his original manuscript play in German and English with exclusive American rights therein coupled with a contract whereby the author

covenanted not to allow the drama to be published, but to keep it in manuscript himself for the protection of the American's common-law and copy rights, loses the benefit and protection of his rights at common law when, with the playwright's consent in violation of his contract, the play is published in German abroad, and thenceforth any and every one has the right to produce the drama, either on the stage or in print, in either language. *Daly v. Walrath* (1899) 40 App. Div. 220, 57 N. Y. Supp. 1125, Bartlett, J.

The case is in conflict with *Goldmark v. Kreling*, 35 Fed. Rep. 861, *supra*, wherein the United States circuit court northern district California held the contrary in 1888. In both cases the American rights had been sold with the original manuscript of the work before any publication in Europe was made. In one case proof was not clear that the author had consented to the publication abroad, but the court assumed that he had; in the other he consented in violation of his express covenant not to do so. The California case seems to have gone upon the principle that the transfer of the American rights was a grant, hence, no subsequent act of the grantor could impair the grantee's rights. The New York case, on the other hand, must have proceeded on the theory that the sale of the American rights was a mere license, and, subject to such license, the title remained in the author; so that when his common-law rights were lost his licensee's went with them. In that case the American purchaser would be confined to an action against his vendor for a breach of the latter's covenant. The report of the New York case does not show that the California decision was cited by counsel or considered by the court. Whether such a transfer is a grant, a partial assignment, or merely a license, is an open question.

The following case, too, must be considered somewhat doubtful (*vide* *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, *infra*, decided in 1859).

Public exhibitions of a painting in Europe for two months in one public gallery, and during the following summer in another, without any notice of copyright, amounts to publishing the picture within the meaning of the United States copyright laws. *Pierce & B. Mfg. Co. v. Werckmeister* (1896) 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. Rep. 54, reversing 63 Fed. Rep. 445, Colt and Nelson, JJ., concurring, Webb, J., dissenting.

In 1860, Cadwalader, J., in deciding a case before him where the question of publication was involved, stated a general principle correctly when he said substantially that a publication, literary or dramatic, might be limited or general. It was general when the communication of it was not restricted both as to persons to whom, and the purpose for which, it was made. When general it was dedicated to the public for such unlimited uses, including all modes of publishing or republishing, that it might be the means, directly or secondarily, of enabling any person to make. But the weight of authority is contrary to his further statement, that a performance at a theater to which the general public is admitted is a general publication; and he was on very uncertain ground in escaping from the force of this statement by saying that one who pirates may, notwithstanding, be prosecuted if he did not get the means of piracy from such public performance. *Keene v. Wheatley*, 4 Phila. 157.

A New York case in 1867 is decidedly against the weight of authority in holding that there is no implied understanding that an auditor admitted to a public performance of a play shall not make use of all he can remember in any way he chooses, and, when there is no ex-

press understanding to that effect, hundreds of public performances for many years generally throughout England and the United States to audiences indiscriminately gathered from the general public by different sets of performers, it amounts to a public dedication or abandonment, and the common-law rights in the unpublished manuscript play are gone so far as preventing production of a memorized version is concerned. *Keene v. Clarke*, 5 Robt. 38.

This was in effect the decision in *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426, afterwards expressly overruled by *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, *infra*.

In *Keene v. Clarke*, 5 Robt. 38, *Robertson and Barbour, JJ.*, the former writing, concurred in reversing the court below and ordering a new trial, and *Monell, J.*, dissented. The result may be justified upon the ground that there were some evidences that the plaintiff's play had been performed several times publicly without her permission or prosecution. Of course acquiescence in repeated piracies is abandonment. In the course of his opinion *Robertson* says that *Macklin v. Richardson*, 2 Amb. 694, *infra*, is a solitary case, holding that one who remembers a play he has witnessed can be restrained from printing it, and that it rests on *Millar v. Taylor*, 4 Burr. 2303, pending which it was held in abeyance, and it fell with that case when it was overruled by *Donaldson v. Beckett*, 2 Bro. P. C. 129.

Nevertheless *Macklin v. Richardson* has been generally followed in England and the United States.

We come now to the "*Iolanthe Case*," decided in Baltimore in 1883. It was there held, *Morris, J.*, writing, that after a publication of the libretto, full vocal score for each voice, with pianoforte accompaniment and a pianoforte arrangement of the overture, only the orchestration being kept in manuscript, there was such a publication or dedication of an opera to the public that the composer or owner of it could not prevent a public performance of it given without his consent, where a new and independent orchestra score had been made up by a skilled musician from the published materials. And, so holding, disapproved and refused to follow *Thomas v. Lennon*, 14 Fed. Rep. 849, *infra*. *Carte v. Ford*, 15 Fed. Rep. 439.

Comment on this case will be reserved until the *contra* decisions come to be considered.

3. What is not a publication.

In the following cases the facts were held not to establish a publication, dedication, or abandonment to the public so as to deprive the owner of his common-law rights in his manuscript work.

The British cases will be considered first.

The earliest is a well-known case in 1770 where the author of the farce "*Love à la Mode*," which had several times been performed by his permission, successfully prevented its publication in a magazine. In sustaining the author's claims the court said: It has been argued to be a publication by being acted, and therefore the printing is no injury; but this is a mistake, for, besides the advantage from performance the author has another means of profit, that of printing and publishing, and should be protected like any other author. *Macklin v. Richardson*, 2 Amb. 694.

There was originally no protection to a dramatic author who had kept his drama unpublished in manuscript, but had publicly represented it on the stage, against an unauthorized performance of it by one who had memorized it from the public representation. But this was so only because the statute did not extend

so far at first, and the rule is otherwise now. *Coleman v. Wathen* (1793) 5 Durn. & E. 136.

Allen, J., notices this condition in *Palmer v. DeWitt*, 47 N. Y. 532, 542, 7 Am. Rep. 480, 487.

In 1824 Lord Eldon, in enjoining the *London Lancet* from publishing a surgeon's lectures delivered orally from notes not reduced to a completed manuscript, at St. Bartholomew's hospital, held that it was not within the right of listeners, though they were paying pupils, to take down such lectures and publish them for profit, or dispose of them to others. *Abernethy v. Hutchinson*, 1 Hall & T. 28, 3 L. J. Ch. 209.

The picture, "*The Death of Chatterton*," was exhibited in 1856 by the artist at the Royal Academy, and the same year by his permission a wood engraving of it was published in a magazine. Then he sold the picture, and it was again exhibited by the purchaser at the Royal Academy and in Manchester in 1857, and afterwards the purchaser sold the copyright to the plaintiff to produce engravings, and gave him leave to exhibit the picture to obtain subscribers, and yet it was held that there had not been a publication, and the common-law rights were intact and operative, as the English statutes of the time did not cover paintings. *Turner v. Robinson* (1859) 10 Ir. Ch. Rep. 121.

In 1884 a case arose on a suit for an injunction against the publication of a lecture, delivered by the author from his unpublished manuscript at a workingman's college to an audience admitted by ticket only issued gratuitously, and taken down in shorthand by an auditor, an expert stenographer, who printed it verbatim in the stenographic characters in a book teaching his system of stenography. The injunction was granted, following *Abernethy v. Hutchinson*, 1 Hall & T. 28, 3 L. J. Ch. 209, which was slightly distinguished. *Kay, J.*, put the judgment on the ground that there was an implied contract that any notes the audience might take—and they were at liberty to do so to any extent for their own use or to refresh their memory,—should not be published for profit. *Nicols v. Pitman* (1884) 1 L. R. 28 Ch. Div. 374, 53 L. J. Ch. N. S. 552, 50 L. T. N. S. 254, 32 Week. Rep. 631, 48 J. P. 549.

The House of Lords in 1887 held that the oral delivery of lectures by a university professor to his class for the customary tuition fees is not a publication thereof so as to entitle anyone to print and publish them without his consent. *Caird v. Sime*, 57 L. T. N. S. 634, 36 Week. Rep. 190, L. R. 12 App. Cas. 326, 57 L. J. P. C. N. S. 2.

Lord Watson said: The only question which we have to decide is whether the oral delivery of the appellant's lectures to the students attending his class is in law equivalent to communication to the public.

Information of stock transactions and market reports furnished on sheets of letterpress and by printed tapes running from stock tickers operated by telegraph to subscribers only for their personal use, is not published by private manuscript. *Exchange Teleg. Co. v. Gregory* [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83.

An owner of copyrighted books illustrated with cuts of carriages from drawings made by himself, carrying on a business of furnishing copies of such illustrations to carriage dealers for advertising purposes, and sometimes supplying them with the electro plates of blocks to print from themselves, is entitled to restrain a stranger in possession of such electro plates from making prints therefrom, though by permission of a dealer who had been supplied with them without restrictions. *Cooper v. Stephens* [1895] 1 Ch. 597, 64 L. J. Ch. N. S. 403.

And the American cases of no publication are the following:

A chart of an ocean shoal is not dedicated to the public by making a copy of it for a United States officer for the use of the navy department, and to preserve its information among the public archives. *Blunt v. Patten*, 2 *Paine*, 392, *Fed. Cas. No.* 1,579.

An author does not lose his common-law rights in an unpublished manuscript drama merely by filing a copy of the title page as a preliminary to the obtaining of a copyright. *Jones v. Thorne* (1843) 1 *N. Y. Legal Obs.* 408.

The use for several years by the author of his own unpublished manuscript system of book-keeping as a manual for instructing his pupils, the latter having the privilege of studying and copying parts of the manuscript under his direction, and being at liberty, too, to copy the entire manuscript for their own instruction, is not a publication or abandonment so as to deprive the author of his common-law rights. *Bartlette v. Crittenden* (1847) 4 *McLean*, 300, *Fed. Cas. No.* 1,082 (1849) 5 *McLean*, 32, *Fed. Cas. No.* 1,076.

The seizure and taking from his possession of an author's unpublished manuscript by a sheriff on execution, where the author regains it without any sale having been made, is not an abandonment or dedication to the public, and does not affect the owner's common-law rights. *Banker v. Caldwell*, 3 *Minn.* 94, *Gil.* 46.

Whether a previous publication would have precluded the author from taking out a copyright I have no occasion now to consider, because acting or representing is not a publication. It has been so decided in England both upon the question of infringement and upon the question of dedication to the public. And our statute (1856, chap. 169) assumes the doctrine that representation is not publication. *Roberts v. Myers*, 23 *Month. L. Rep.* 396, *Sprague, J.*, 1860.

The reading of a manuscript lecture, or performance of a manuscript play, in public by the author does not confer upon the hearer any title to the manuscript, or to the unauthorized use of a copy which may surreptitiously or accidentally pass into his hands. *Boucicault v. Fox* (1862) 5 *Blatchf.* 87, *Fed. Cas. No.* 1,691, *Shipman, J.* In that case the play was written to order, and presented in public by the author and his wife for hire under an agreement to permit and act in its performance at that theater as long as it should run; yet it was held to be no publication.

Instructing those who choose to pay to acquire it in a secret art or process of brewing, aiming to improve the keeping qualities of beer, the method not being published, although patentable, is not abandoning or dedicating it to the public. *Hammer v. Barnes* (1863) 26 *How. Pr.* 174.

The public performances of a play never printed, but kept in manuscript, one set in England for the author's benefit and under his special license, and others in the United States under his special assignment, do not amount to publication or an abandonment to the public. And this is so notwithstanding the English courts construe their statute of 5 & 6 *Vict. chap.* 45, § 20, as making it a publication of a play when it is publicly represented. *Crowe v. Aiken*, 2 *Biss.* 215, *Fed. Cas. No.* 3,441.

In 1870, the New York supreme court at special term (*Cardozo, J.*) held, on demurrer to a complaint and a motion to dissolve an injunction on affidavits, that defendant was not entitled to publish and sell photographs of an oil painting because the artist had granted the right to reproduce it in engravings, chromo-lithographs, and photographs, or in any other

manner not a replica in oils, to another who had published a chromo-lithograph and a photograph of it. *Oeriel v. Wood*, 40 *How. Pr.* 10.

Lectures and plays are not, by their public delivery or performance in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. It does not give the hearer any title to the manuscript or a copy of it, or a right to the use of a copy. The manuscript and right of the author therein are still within the protection of the law the same as if they had never been communicated to the public in any form. *Palmer v. DeWitt* (1872) 47 *N. Y.* 532, 7 *Am. Rep.* 480, *Allen, J.* And in the same opinion it is further said: The permission to act a play at a public theater does not amount to an abandonment by the author of his title to, or to a dedication of, it to the public.

A dramatic author who has not printed but has permitted and procured his play to be performed in public for his own benefit in a specially selected theater, has neither published nor abandoned it to the public. His right to retain and use his play in this situation is a common-law right, but one which the United States courts have not jurisdiction to enforce against a citizen of the same state. *Boucicault v. Hart* (1875) 13 *Blatchf.* 47, *Fed. Cas. No.* 1,692.

Transmitting words and ideas by telegraph does not differ in principle from transmitting them by written manuscript. Telegrams are like letters; hence, furnishing news quotations by stock tickers to limited and special subscribers for their private and personal use only is not a publication thereof, nor a dedication or abandonment to the public. *Kiernan v. Manhattan Quotation Teleg. Co.* (1876) 50 *How. Pr.* 194, *Van Brunt, J.*

Reading, exhibiting, or performing an unpublished manuscript work will permit the observer or hearer to appropriate for himself so much as his memory may be capable of retaining, but will not allow him to appropriate and use the entire composition with its incidental stage accompaniments. That right still remains in the author. *French v. Maguire* (1878) 55 *How. Pr.* 471, *Daniels, J.*

The production of an opera by the author and composer's licensee on the stage, never printed but kept always in manuscript, only sufficient copies thereof being made as were requisite for proper rehearsal and performance, is not a publication, and gives no right to print. *Gilbert v. Bacher* (1880) 9 *W. N. C.* 14.

The owner of an unprinted manuscript drama for which he has no statutory copyright, who has exhibited or performed it before the general public for money, is entitled to restrain its unauthorized representation by another who has acquired his copy by memorization from attendance at the author's performances without artificial aid and without fraud. *Tompkins v. Halleck*, 133 *Mass.* 82, 43 *Am. Rep.* 480.

This case is especially noteworthy, since *Devens, J.*, writing (1882), critically examines all the earlier cases on the topic, and deliberately holds *Keene v. Kimball*, 16 *Gray*, 545, 77 *Am. Dec.* 426, unsound.

The law is now too well settled to require the citation of authorities, that the playing of a dramatic composition is not such a publication as makes the composition public property. *Aronson v. Fleckenstein* (1886) 28 *Fed. Rep.* 75, *Blodgett, J.*

The abandonment of a pump to the public is not a dedication of the patterns from which it is made when these cannot be reproduced from the pump itself. *Tabor v. Hoffman*, 118 *N. Y.* 30, 23 *N. E.* 12.

The printing of a limited number of copies of an opera for the private use of the performers in learning their parts is not such a publication as will terminate the author's common-law rights. *French v. Krelling*, 63 Fed. Rep. 621.

The sale of a painting by the artist, and of the original study or sketch from which it was made, with express reservation of the copyright, the exhibiting of the picture in a salon (the public not being permitted to copy it), and the publication in the salon catalogue of a crayon sketch of it, do not altogether amount to an abandonment or dedication to the public, nor end the artist's common-law rights. *Werckmeister v. Springer Lithographing Co.* (1894) 63 Fed. Rep. 808.

The fact that a lecturer permitted a newspaper to print abridged reports of eight out of a course of twelve lectures is not such an abandonment to the public as will justify a publisher in issuing, against the will of the author, a garbled edition of these eight as the entire course of lectures. *Drummond v. Altamus* (1894) 60 Fed. Rep. 338.

An original essay in the form of a report of a committee of an incorporated professional society, read at a public meeting of the body at which nonmembers were present (though not by invitation to the general public and with no proof that they were not exhibitors and payers of admission fees) delivered in manuscript to the officers of the society for publication by it in its proceedings, does not constitute a publication or dedication to the public, and while it remains in manuscript the corporation may prevent the publication of excerpts from it without its consent. *New Jersey State Dental Soc. v. Dentacura Co.* (1898) 57 N. J. Eq. 593, 41 Atl. 672, *Stevens, V. C.*

VI. Infringements.

There is, of course, no distinction between an infringement of the right at common law, and the copyright under the statute in literary or artistic works, and, as the greater number of cases are found to arise under statutes, no exhaustive list is to be looked for here. Those which have arisen in respect of common-law rights only, divide into several classes which it will be orderly to consider separately.

a. Names or designations.

In 1808 an injunction issued against the continued publication of a magazine under its old title, with the added words "New Series, Improved," where its owner had contracted with another publisher to issue future numbers after the termination of the original agreement with the infringer. *Hogg v. Kirby*, 8 Ves. Jr. 215.

Although the owner of a copyrighted book long out of print does not object to the publication of a serial under the same title, he may none the less prevent a subsequent publication of it in complete form, as his chosen title is a material part of his work, and has not been lost by failure to protest against the serial publication. *Weldon v. Dicks*, 39 L. T. N. S. 467, L. R. 10 Ch. Div. 247, 48 L. J. Ch. N. S. 201, 27 Week. Rep. 639.

On the other hand, under the United States copyright laws a title is not protected separately from the magazine which bears it, and no action lies for an infringement of the title alone, provided the public is not deceived. *Osgood v. Allen* (1872) *Holmes*, 187, Fed. Cas. No. 10,603.

But the presentation of a different play under the same title as a copyrighted one is not permissible. *Shook v. Wood* (1875) 10 Phila. 373. This was the "Two Orphans" case, and 51 L. R. A.

involved an English version of a French play copyrighted by its owner, and an attempt to produce under the same title a translation of another French drama. The element of public deception came into play.

There is no literary property in a pseudonym, merely as such. Its proprietor may prevent the publication under it of matter that he did not write, but not matter that he has abandoned to the public. His rights are no greater or different than with respect of his true name. *Clemens v. Belford* (1883) 11 Biss. 459, 14 Fed. Rep. 728.

The owner of an unpublished manuscript operetta, the libretto of which is adapted from an old play, but which has been given a new and distinctive name, is entitled to enjoin the performance of another operatic adaption from the same play under his chosen designation, although the songs and piano score have been published under such title, and are public property. *Aronson v. Fleckenstein*, 28 Fed. Rep. 75.

The law is now well settled that the playing of a dramatic composition is not a publication; and I think it equally clear that an author who has given a particular title or name to his composition is entitled to have that name protected. *Ibid.*, *Blodgett, J.*, 1886.

b. Abridgments.

A fair abridgment, not a servile imitation but the product of the original painstaking labor of selection and condensation, is not an infringement of a literary work. *Gyles v. Wilcox* (1740) 2 Atk. 141, Lord Hardwicke.

In 1822 it was held that an alteration and abridgment of Byron's "Marino Fallero" for representation on the stage for profit, the poem having been previously printed and placed on sale, could not be prevented. But this was because the statute of Anne did not afford protection in such a case. The subsequent English statute, 3 & 4 Wm. IV. chap. 15, was intended to remedy this. *Murray v. Elliston*, 5 Barn. & Ald. 657, 1 Dowl. & R. 299.

c. Translations.

In one case, at least, it has been held that a translation of a copyrighted book into another language is not an infringement of the English work, although there existed an authorized translation of it in the same language. The controversy arose over a version of Uncle Tom's Cabin in German. In disposing of it the court (*Grier, J.*, 1853) said: The claim of literary property after publication cannot be in the ideas, sentiments, or the creations of the imagination dissevered from the language, idiom, style, or outward semblance and exhibition of them. His exclusive property cannot be vested in the author as abstractions, but only in the concrete form which he has given them and the language in which he has clothed them. When he has said his book the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. Now a "book" necessarily conveys the idea of thought, or conceptions clothed in language or in musical characters, written, printed, or published. Its identity does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions clothed in the same words which make it the same composition. A "copy" of a book must therefore be a transcript of the language in which the conceptions of the

author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or "copy" of the same "book." Hence in questions of infringement the inquiry is not whether the defendant has used the thoughts, conceptions, information, or discoveries promulgated by the original, but whether his composition may be considered a new work requiring invention, learning, and judgment, or only a mere transcript of the whole or parts of the original with merely colorable variation. Hence, also, the many cases to be found in the reports which decide that a bona fide abridgment of a book is not an infringement of the copyright. *Stowe v. Thomas*, 2 Wall. Jr. 547, Fed. Cas. No. 13,514.

d. Reproductions.

The opinion just quoted from states the generally accepted rule concerning imitations, *i. e.*, to constitute an infringement the reproduction must be something more than a plagiarism; it must be a palpable imitation, a mere paraphrase when not a literal copy. When the verbiage of the author and his sequence of thought are directly copied there is no difficulty, but other cases are not so easy to decide.

In 1806 Lord Eldon, though he thought it dangerous to carry the doctrine of copyright too far, and led by his turn of mind to a different conclusion, nevertheless enjoined the publication of an East India Civil List Directory, constrained thereto by what he found to be the established law. He examined the cases and found every one sustained on the ground that the pirated chronology, map, chart, road-book, etc., was a colorable imitation, and not an original work, though made up of materials open to all. *Matthewson v. Stockdale*, 12 Ves. Jr. 273.

In 1839 a gazetteer was found to be made up in part of copied and partly of original matter, and enjoined as a piracy. *Lewis v. Fullarton*, 2 Beav. 6, 3 Jur. 669.

Charles Reade at first wrote a play called "Gold," and afterwards a novel "Never too Late to Mend" with the same plot and many of the scenes and much of the dialogue from the drama; and a dramatization of the novel by a playwright who had never seen the play or a copy of it was held an infringement of the play because it contained passages common to it and the novel. *Reade v. Lacy* (1861) 1 Johns. & H. 524, 30 L. J. Ch. N. S. 655, 7 Jur. N. S. 463, 4 L. T. N. S. 354, 9 Week. Rep. 531.

A copy of a work is not saved from being an infringement by reason of the original being a mere condensed compilation of public records. *Banker v. Caldwell* (1839) 3 Minn. 94, Gil. 46.

And where an alleged imitative play was defended upon the ground that it was an independent and original dramatization of the story on which the first play was founded, it was held a piracy when it appeared to contain matter in the other play, and not in the story. *French v. Conelly* (1875) 1 N. Y. Week. Dig. 196.

That a certain class of information is open to all who seek it is no answer to a claimed right of property in such information by one who at his own expense and by his own labor has collected it. One may impress upon materials open to all the world a right of property when, as the result of his own efforts and expenditure, he has collected and reduced them to a form serviceable to the public. This does not, however, preclude another person from collecting independently, by his own diligence, the same materials, and utilizing them as he chooses. *Kiernan v. Manhattan Quotation Teleg. Co.* (1876) 50 How. Pr. 194, Van Brunt, J. 51 L. R. A.

The copyright of a painting protects all reproductions of it by the owner, and is infringed when the latter are copied without his consent by one who never saw the original picture. *Schumacher v. Schwenke*, 30 Fed. Rep. 690.

e. Originals.

1. Author's own obtained surreptitiously.

This class of cases does not always depend exclusively on the principles governing literary property, but there is a close relation thereto in some of them.

It was held in 1831 that the surreptitious retention of some of the plates taken from an original copyrighted engraving by one employed to make the plate and print the copyright edition, and the subsequent putting on the market for sale of the held-out plates in competition with the other originals, was not to be prevented by injunction as an invasion of copyright, was not a literary piracy, but was rather a fraudulent breach of contract. *Murray v. Leath*, 1 Barn. & Ad. 804.

But doubtless the form in which the action was presented had a controlling influence, as cases since based on similar facts uphold the right to injunctive relief.

This was the case in *Prince Albert v. Strange* (1848) 2 De G. & S. 652, 13 Jur. 507, *supra*.

And so, too, in 1887 in another case it was held that where the plaintiff owning a picture ordered the defendant to make 2,000 copies of it for him, and defendant executed the order and at the same time made a number of additional copies for himself, which he sent into England and put on sale before the plaintiff got around to registering his pictures under the copyright acts, there could be no recovery of the statutory penalties; but that there was a good action for damages, and relief by injunction might be had as well. *Tuck v. Priestester*, L. R. 19 Q. B. Div. 629, 56 L. J. Q. B. N. S. 553, 36 Week. Rep. 93, 32 J. P. 213, *Modifying* L. R. 19 Q. B. Div. 48, where defendant succeeded.

2. Independent creations.

It is not an infringement of copyrighted music to make a perforated sheet of paper which, when used in connection with a mechanical organ, produces the same tune. *Kennedy v. McTammany*, 33 Fed. Rep. 584.

The copyright of a map of New York is not infringed by a map of Philadelphia made according to the same general scheme, system of colors, signs, etc. *Perris v. Hexamer* (1878) 99 U. S. 674, 25 L. ed. 308.

It is not an invasion of the common-law rights of the author of an unpublished work of restricted circulation—in this case a book of mercantile credit ratings—to produce another work on the same general plan, scheme, and of like character, not a copy but compiled from original sources for another locality. *Burnell v. Chown* (1895) 69 Fed. Rep. 993.

3. Combinations.

The case of *Carte v. Ford*, 15 Fed. Rep. 439, *supra*, held that the owner of an opera (Iolanthe) could not prevent its public performance without his consent when there had been a publication of the full piano and vocal score and the libretto, and nothing but the orchestration kept in manuscript, where the orchestral score had been independently made up from the piano score by a skilled musician employed for the purpose.

While it cannot be said that that decision is unsound in the light of the facts there before the court,—so much of the opera being public,

so little of it reserved,—yet several other cases somewhat impair its force.

In 1877, for instance, the English tribunals had occasion to consider a similar question, in a case, however, which really turned upon the provisions of English statutes and the convention with France, and arising over Offenbach's Opera, "Vert-Vert." The court in the first instance (Bacon, V. C., 46 L. J. Ch. N. S. 726, 38 L. T. N. S. 918, 25 Week. Rep. 745) held that the case depended wholly upon statute, and there had been a technical failure to comply with its terms, and hence the plaintiff could not recover. In that case the defendant had made up an orchestration from the published piano score, the entry of which was claimed to be defective. This decision was reversed on appeal, and Lord Thesiger, writing, said: There is an infringement of an opera when a substantial and material part of the music of the composer is performed, even though the operatic score may have been obtained by independent labor bestowed upon the unprotected pianoforte score. And again: There is scarcely any popular opera the score of which is not written within a short time after the first performance arranged for the piano, and if by reconversion of the piano arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory. *Boosey v. Fairlie*, L. R. 7 Ch. Div. 801, 47 L. J. Ch. N. S. 186, 28 Week. Rep. 178.

And there was an affirmance in 1879 in the House of Lords and Privy Council. L. R. 4 App. Cas. 711, 48 L. J. Ch. N. S. 697, 41 L. T. N. S. 73, 28 Week. Rep. 4.

In 1880 an injunction issued against the publication of the music of the Pirates of Penzance, all of which had, however, been kept in unpublished manuscripts, only sufficient copies being made for rehearsals and performances, although all of the music complained of was original work except the upper line of the score, which was a remembered melody. *Gilbert v. Bacher*, 9 W. N. C. 14, *supra*.

In 1882, Tuley, Chancellor in circuit court for Cook county, Ill., in *Goldmark v. Collmer*, issued an injunction against the public performance of an opera, where the piano score had been published, although besides the orchestration the book, too, had been kept in manuscript. The chancellor was clear that one making an independent orchestration should be restrained from using it against the will of the owner of the original opera, and asserted that by the common law a composer had the right to have his opera represented on the stage with just the combination of musical instruments he had arranged for it, notwithstanding he had published a partial score. The case is unreported, but cited and distinguished in *Carte v. Ford*, 15 Fed. Rep. 446.

A decision by Judge Lowell in 1883 directly contrary to *Carte v. Ford* is referred to and disapproved. It is to the effect that the publication of the book, piano score, and marginal notes of an oratorio gives no right to produce an independent orchestration (the original having been kept in manuscript), and publicly perform the work without the consent of the owner of the original composition. *Thomas v. Lennon*, 14 Fed. Rep. 849.

And the like question was somewhat involved, and the same views expressed, in *Aronson v. Fleckenstein*, 28 Fed. Rep. 75, *supra*.

And in the New Jersey case in 1887, *Van Fleet v. C.*, uses this language: To illustrate, if the composer of an orchestral score of an opera arranges his score for use on the piano 51 L. R. A.

either in whole or in part, and then causes his arrangement to be published, he thereby donates his music to the public for use on the piano, but that is the whole extent of his gift. He does not thereby authorize another composer to make a new orchestration of his music, and perform in public for profit. *Aronson v. Baker*, 43 N. J. Eq. 385, 12 Atl. 177.

And in 1888 a Federal court composed of Field of the United States Supreme Court and Sawyer and Hoffman, JJ., held that the public performance of an opera made up from a published European piano score and a new orchestration will not be allowed against the will of the owner of the American rights where there had been no publication or dedication with his consent, either in Europe or this country. *Goldmark v. Kreling*, 35 Fed. Rep. 661.

It is to be noted, to be sure, that some one or another feature distinguishes each of the last cited cases from *Carte v. Ford*, 15 Fed. Rep. 439, except *Thomas v. Lennon*, 14 Fed. Rep. 849, which is in direct conflict. So the point must be regarded as unsettled.

VII. Remedies.

The customary remedy resorted to, as fully appears from the cases *ubi supra*, is an injunction against the offending work. This remedy is available both when the common-law right and the statutory right are invaded. Aside from this there is a money recovery. In actions arising under the statutes this takes a prescribed form—penalties, account of profits, etc.; in cases of common-law right there is an award of damages like that in the case under annotation, and governed by the principles applicable to injuries to other intangible property rights. The right to an injunction may be lost by laches. (*vide Southey v. Sherwood* (1817) 2 Meriv. 435), and the owner of the common-law right may, in an appropriate action brought for the purpose, enjoin in his own state a foreigner from infringing it in a foreign state when the intending trespasser is found and personally served with process in the state of the forum. *French v. Maguire* (1878) 55 How. Pr. 471.

To be sure there might be considerable difficulty in punishing the defendant if he disobeyed the injunction and afterwards kept out of the jurisdiction of the court which issued it.

Sometimes there is another remedy open to the injured one—the surrender and destruction of the offending work. Two cases may be cited upon this point as indicating its limitations.

In a case in England in 1843 where the author having sold his manuscript and copyright to one publisher and then before publication was completed duplicated a chapter from it for another, it was held that he whose right had been invaded had, neither at common law nor by the English statutes as they then stood, a right to a decree ordering the incriminated copies to be delivered up to him. *Colburn v. Simms*, 2 Hare, 548, 7 Jur. 1104.

But where a dealer had surreptitiously obtained the secret code of prices and cost marks of a manufacturer from an unfaithful salesman, and copied them into a catalogue presented him by the maker, he was compelled to surrender the book to a receiver appointed for the purpose. *Simmons Hardware Co. v. Walbel*, 1 S. D. 488, 11 L. R. A. 267, 47 N. W. 814. Here the principle of confusion of goods was applied.

VIII. Liabilities.

The common-law property in the fruits of mental labor being limited, as has been seen,

to the period and status before publication, the question, What are its liabilities as property? becomes an interesting subject of inquiry.

Is it, like other personal property, subject to the claims of creditors and to bear its proportion of public taxation? Can it be seized and sold for nonpayment of taxes or upon execution for debt?

There are a few reported cases that throw a faint light upon these questions.

a. Creditors.

One jurist says: The creditors of an author cannot compel him to write, or to publish a book he has copyrighted, or to give up his manuscript; possibly they cannot, against his will, seize the books themselves, the exclusive right of vending which is vested in him by act of Congress, but when by voluntary sale he has converted this privileged property into property of a different sort, the latter is not exempt. *Cooper v. Gunn* (1844) 4 B. Mon. 596, Marshall, J.

In 1879 a Michigan court composed of four judges, including Thomas M. Cooley, all concurring, held unpublished manuscripts, abstract of title books, not the subject of levy and sale on execution. *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544.

In 1852 it was held that the right to print and publish a copyrighted map did not pass with the engraved copperplate from which it was printed on a sale by the sheriff on execution. *Stephens v. Cady*, 14 How. 530, 14 L. ed. 528.

And there was in 1854 a similar decision. *Stevens v. Gladding*, 17 How. 447, 15 L. ed. 155.

b. Taxation.

Following *Dart v. Woodhouse*, 40 Mich. 399,

29 Am. Rep. 544, in 1887, a set of abstract books in manuscript were held not taxable. In the prevailing opinion (for the court was divided) it was said that they resembled surveyors' notes, druggists' recipes, authors' memoranda, and analogous things consulted by one making an income from his acquired knowledge, useful, but not subject to seizure or assessment. *Perry v. Big Rapids*, 67 Mich. 146, 34 N. W. 530, Campbell, Ch. J., Sherwood, and Champlin, JJ., concur. Morse, J., dissents. Said the chief justice in his opinion in that case: All civilized governments respect private manuscripts, and treat them as not partaking of the nature of property open to ordinary sale and disposal. The possession of them gives no right to the possessor to use them or publish them unless by the acquiescence of the originator. In his dissenting opinion, Morse, J., distinguishes abstract books, which he says are mechanical productions only, that anyone of intelligence can make, and not like authors' manuscripts.

In 1892 an Iowa court, disapproving *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, and the last-cited case, adopted the views of Judge Morse in his dissent, and held abstract books taxable, but in doing so distinguished them from ordinary manuscripts of authors which have no value until published, and hence are not taxable; but abstract books have their highest value while they remain unpublished. *Leon Loan & Abstract Co. v. Leon Bd. of Equalization*, 86 Iowa, 127, 17 L. R. A. 199, 53 N. W. 94.

And this last case has been followed in 1894 in *Booth & H. Abstract Co. v. Phelps*, 8 Wash. 549, 23 L. R. A. 864, 36 Pac. 489, but no distinction from authors' literary manuscripts was referred to. J. B. G.

NEW HAMPSHIRE SUPREME COURT.

Edward RHOBIDAS

v.

City of CONCORD.

(.....N. H.....)

1. An injury to a servant of a municipal corporation employed on water-works, by reason of the negligence of the municipal authorities in failing to furnish him a reasonably safe place to work, to which he has a common-law right under his contract, gives him a right of action for damages, since his right, which is violated, is one which concerns an individual only, and not one which affects the whole community, or depends in any way upon the performance or nonperformance of any public duty.
2. Water commissioners to whom a city ordinance intrusts the entire management of water-works are servants of the city, and not an independent board for whose acts the city is not liable, where by the statute which authorizes the establishment of the water-works, the city is given full control, with the right to place

them under the direction of a superintendent or board of commissioners, whose powers and duties may be prescribed by the city council.

3. An action for negligence of water commissioners of a city should be brought against the city, and not against the water precinct, which includes only a portion of the city, where they are officers of the whole city.

(*Parsons and Young, JJ., dissent from proposition 1.*)

(March 16, 1900.)

REPORT by the Belknap County Court for the opinion of the full bench of a demurrer to an answer in an action brought to hold defendant liable for personal injuries received by plaintiff while employed in defendant's water-works department. *Demurrer sustained.*

The answer set up that defendant maintained the water-works solely for fire purposes, and for the benefit of defendant's citizens, without profit to the city; that the

NOTE.—On the distinction between public and private functions of municipal corporations in respect to liability for negligence, there may be found in this series the cases of *Barron v. Detroit* (Mich.) 19 L. R. A. 452, and *note*; *Gibson v. Huntington* (W. Va.) 22 L. R. A. 51 L. R. A.

561; *Wyatt v. Rome* (Ga.) 42 L. R. A. 180; and *Esberg-Gunst Cigar Co. v. Portland* (Or.) 43 L. R. A. 435.

For earlier case on the liability for an injury to a lineman employed by the city, see *Pettingell v. Chelsea* (Mass.) 24 L. R. A. 426.

sole control and management of the water-works was vested in the board of commissioners, whom defendant cannot direct and control, and who are not defendant's agents; that the water-works were established under statutory authority for a precinct which includes only a portion of the city, and is a separate quasi-municipal corporation in whose water-works defendant has no interest except in a purely governmental or legislative capacity.

Further facts appear in the opinion.

Meers. W. A. Peaslee, E. A. Hibbard, and C. B. Hibbard for plaintiff, in support of the demurrer:

A town is not exempt from liability for an injury occasioned by the negligent management of its private business, merely because that business has some connection with the discharge of a public function, or aids in the discharge of a public function.

Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Edgerly v. Concord*, 62 N. H. 8; *Eastman v. Meredith*, 36 N. H. 293, 72 Am. Dec. 302; *Rowe v. Portsmouth*, 56 N. H. 294, 22 Am. Rep. 464; *Clark v. Manchester*, 62 N. H. 577.

A municipal corporation owning water-works or gas-works which supply private consumers on the payment of toll is liable for the negligence of its agents and servants the same as like private proprietors would be.

2 Dill. Mun. Corp. §§ 954, 981; *Grimes v. Keene*, 52 N. H. 330; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Edgerly v. Concord*, 59 N. H. 78; *Edgerly v. Concord*, 62 N. H. 8; *Clark v. Manchester*, 62 N. H. 577; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Emery v. Lowell*, 104 Mass. 13; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Murphy v. Lowell*, 124 Mass. 564; *Hand v. Brookline*, 126 Mass. 324.

In all other states the rule is that a municipal corporation is liable for its torts committed in the performance of private business, although not, in general, for those committed in the performance of public business. We are not aware of any case in this state that holds otherwise.

Gilman v. Laconia, 55 N. H. 130, 20 Am. Rep. 175; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Nutt v. Manchester*, 58 N. H. 226; *Parker v. Nashua*, 59 N. H. 402; *Vale Mills v. Nashua*, 63 N. H. 136; *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

If a town's authority to make a contract involves a liability to be sued on the contract, it also involves a liability to be sued for a tort growing out of the contract relation.

The fiction of an implied promise is still in constant use, and is made even where clearly contrary to fact.

Chauncy v. Yeaton, 1 N. H. 151; *Knapp v. Hobbs*, 50 N. H. 476. 51 L. R. A.

Does justice require that this defendant should conduct its private business free from the duties imposed on other water corporations, or that it should be subject to them?

Does justice in this case require the court to invent a fictitious sovereignty of towns, and then a fictitious immunity from suit, which would not follow even from the assumed sovereignty, since statutes have clearly made this sovereign subject to the process of the court; and then to stop short and refuse to invent or recognize an implied promise to furnish its servants in its private business with safe appliances, as other employers are bound to do?

By the contract of hire the relationship of master and servant is established, and the duties of that relationship immediately attach thereto.

A town is created by the state, its beginning, duration, and end being at all times subject to the state's will. As soon as created, it becomes a legal entity, existing in a dual capacity. In one capacity it is charged with a burden of public duties, imposed upon it by its creator against its will, and from which it cannot escape; in the other capacity, the private side of its corporate life, it has powers, rights, and duties like those possessed by, and imposed upon, a natural person or private corporation. In its former capacity a town may not be liable, while in the latter it is, if a private individual would be under the same circumstances.

1 Jaggard, Torts, pp. 173, 184; Dill. Mun. Corp. § 974; Tiedeman, Mun. Corp. § 324, at p. 324; Shearn. & Redf. Neg. §§ 290 *et seq.*; Cooley, Torts, 2d ed. p. 742; 7 Thompson, Corp. § 8144; 15 Am. & Eng. Enc. Law, pp. 1141 *et seq.*; 4 Wait, Act. & Def. pp. 419, 420, title, *Master and Servant*; Buswell, Personal Injuries, § 58; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Grimes v. Keene*, 52 N. H. 330; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Parker v. Nashua*, 59 N. H. 402; *Clark v. Manchester*, 62 N. H. 577; *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Small v. Danville*, 51 Me. 359; *Woodcock v. Calais*, 66 Me. 234; *Cumberland & O. Canal Corp. v. Portland*, 62 Me. 504; *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308; *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829; *Winn v. Rutland*, 52 Vt. 481; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Emery v. Lowell*, 104 Mass. 13; *Brooks v. Somerville*, 106 Mass. 274; *Hill v. Boston*, 122 Mass. 359, 23 Am. Rep. 332; *Murphy v. Lowell*, 124 Mass. 564; *Hand v. Brookline*, 126 Mass. 324; *Coan v. Marlborough*, 164 Mass. 206, 41 N. E. 238; *Norton v. New Bedford*, 166 Mass. 48, 43 N. E. 1034; *Powers v. Fall River*, 168 Mass. 60, 46 N. E. 408; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *McCaughy v. Tripp*, 12 R. I. 449; *Wixon v.*

Newport, 13 R. I. 454, 43 Am. Rep. 35; *Pomroy v. Granger*, 18 R. I. 624, 29 Atl. 690; *Jones v. New Haven*, 34 Conn. 1; *Weed v. Greenwich*, 45 Conn. 170; *Norwalk Gas-light Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Vale Mills v. Nashua*, 63 N. H. 136; *Nutt v. Manchester*, 58 N. H. 226; *Parker v. Nashua*, 59 N. H. 402.

The question to be considered in a suit against a town is that of liability, and not of immunity; and if there is no liability, there is still no immunity. Immunity is utter exemption; want of liability goes to the merits of the case, is always a question either of law, or of fact, or of mixed law and fact, and the terms are not interchangeable.

Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; *Gilman v. Laconia*, 55 N. H. 138, 20 Am. Rep. 175.

In the machinery of municipal government, the legislatures of the states have frequently had occasion to create boards of officers for the performance of particular duties. These boards are not in general corporations, but are agencies of the municipal corporations in the sense which makes the latter liable for their contracts and torts.

1 *Thomp. Corp.* § 21; *Walsh v. New York & B. Bridge*, 96 N. Y. 437; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Rider v. Portsmouth*, 67 N. H. 298, 38 Atl. 885.

Defendants were the legal owners of the property; they occupied and managed it; and they are chargeable with negligence in its care and management the same as any other owner, whether the wrong be committed by himself or his servants.

Underhill, Trusts & Trustees, Wislizenus's Am. ed. 426, note; *Loring, Trustees*, p. 26; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker v. Tibbets*, 162 Mass. 468, 39 N. E. 350; *Schwab v. Cleveland*, 28 Hun. 458; *Benett v. Wyndham*, 4 De G. F. & J. 259; *Norling v. Allee*, 31 N. Y. S. R. 412, 10 N. Y. Supp. 97; *Ballou v. Farnum*, 9 Allen, 47; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Rogers v. Wheeler*, 43 N. Y. 598.

Messrs. Sargent & Niles, for defendant:

The city of Concord is not liable for the negligence of the superintendent of the water-works, who is an employee of the board of water commissioners.

Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256; 1 *Dill. Mun. Corp.* 4th ed. § 308; 17 *Am. & Eng. Enc. Law*, p. 236; *Horr & Bemis, Mun. Pol. Ord.* 2, 3; *St. Louis v. Boffinger*, 19 Mo. 13; *Taylor v. Carondelet*, 22 Mo. 106; *Hopkins v. Swansea*, 4 Mees & W. 621; *Gould v. Raymond*, 59 N. H. 260; *Kelley v. Kennard*, 60 N. H. 1; *State v. Hayes*, 61 N. H. 264.

Municipal corporations are not liable, in this state, for their torts, in the absence of a statute creating such liability.

The obligation of the master to the servant is derived from no different source than that of the shop-keeper to his customer, or of the railroad to its passengers, the visitors at its stations, those who customarily cross its tracks at a particular place with

its knowledge and tacit consent, or even the casual trespasser on its premises.

When it is said that the master is under obligation to provide for the servant a reasonably safe place in which to work, and reasonably safe machinery and appliances, it is not meant that he agrees to do this, so that for failure to do so an action of assumpsit will lie; but rather that the master, because of the relationship between himself and his servant, knows that the servant will be on his premises, and will use his machinery and other appliances, and those precautions are due, not by virtue of any contract, but because they would be taken, under like circumstances, by men of reasonable prudence.

Plaintiff could not sue in assumpsit for his injuries, alleging that they were due to a breach by the city of some term of the contract of service, because there is no such term. His only remedy is necessarily by an action on the case.

Riley v. Bowdendale, 6 Hurlst. & N. 445; *Buswell, Personal Injuries*, 4-6; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Bigelow, Lead. Cas. on Law of Torts*, 706; *Cooley, Torts*, 549; *Beven, Neg. 1st ed.* 313, 314.

The contract of service is in no respect the basis of the liability, which is founded upon the broad principles of liability for the negligent management of property, forces, or agencies, by persons having them under their control, which obtain among men in general, regardless of contractual relations.

Peaslee, J., delivered the opinion of the court:

The plaintiff's demurrer raises the question whether there is in this state any common-law liability of a municipal corporation, and, if there is, whether it exists in the class to which the present case belongs. While it is the law of this jurisdiction that towns are to a certain extent a part of the state, and therefore not suable at common law, no case has gone so far as to hold that this rule applies to all cases.

There are some expressions in *Wooster v. Plymouth*, 62 N. H. 193, which might, taken alone, bear such interpretation; but that this is not their meaning is apparent from the fact that the opinion is expressly limited in its application to the corporate rights of towns "so far as they are involved in this suit," and relates to "their purely public capacity." *Id.* 221.

The expressions are superfluous, if towns have not rights and duties which are not purely public. It is important to note that the question there involved was "whether, in the vindication of rights purely public, the state is constitutionally entitled to trial by jury, and, if it is not, whether in this case the defendants stand in the position of the state or in the position of a private person." *Id.* 194. The court did not understand that the earlier cases upon common-law municipal liability were involved in the consideration of this question; for, if there

had been such understanding, it cannot be doubted that those cases would have received full consideration. Again, at the same term it was said in another case: "To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers or in the execution of corporate duties, in distinction from those done in a public capacity, as a governing agency. . . . Municipal corporations may be liable for acts done under a grant of special powers not held under any general law, and from the execution of which some special profit or advantage is derived (*Rowe v. Portsmouth*, 58 N. H. 293, 22 Am. Rep. 404); and generally, for injuries received from the negligent management of property not held for strictly public purposes, corporations are liable in the same way and to the same extent as individuals." *Egerly v. Concord*, 62 N. H. 8, 19. In another opinion, also delivered at the same term, this language was used: "The city was dealing with and managing the land as a private owner deals with and manages his own property. Under such circumstances the defendants would be liable for an injury resulting from their want of care, in the same manner and to the same extent that an individual would for his negligent acts in the care and management of his property." *Clark v. Manchester*, 62 N. H. 577, 579. It is evident that many of the remarks in *Wooster v. Plymouth*, which are correct as applied to the facts and questions of law involved in that case, are not applicable, and were not intended to refer to, cases involving dissimilar questions.

The mere fact that a town is engaged in the performance of a public duty is not enough to free it from all common-law liability for its acts, if the word "public" is to be taken in the broad sense of including every enterprise which may be supported by taxation. There is no case laying down such a doctrine in this state. *Farnum v. Concord*, 2 N. H. 392, merely states the rule as applicable to an action by a traveler for damages caused by a defective highway, giving no reasons therefor. The Massachusetts case relied upon (*Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63) was decided upon the authority of *Russell v. Men of Devon*, 2 T. R. 687, and the reasons for the decision there have not been understood as going to the extent of denying all common-law liability of municipal corporations. See *Mower v. Leicester*, 9 Mass. 250, note, 6 Am. Dec. 63; *Ball v. Winchester*, 32 N. H. 435, 442; *Eastman v. Meredith*, 36 N. H. 284, 298, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Lynn v. Turner*, 1 Cowp. 87. In the case last cited, the court of King's bench, speaking through Lord Mansfield, recognized the common-law liability of a municipality fourteen years before the decision of *Russell v. Men of Devon*. In *Ball v. Winchester*, 32 N. H. 51 L. R. A.

435, 442, liability is denied upon the ground that highway surveyors are independent public officers, over whose acts the town has no control. So far as it decides that a town may, in the maintenance of highways, negligently flood the land of abutters, it is not now the law of this state. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. In *Eastman v. Meredith*, 36 N. H. 284, 288, 295, 301, 72 Am. Dec. 302, the decision is placed upon the ground that the action was based upon an injury to the plaintiff when in the exercise of a public right. If the injury had been caused by an infringement of a private right, the result might have been different. "If the defendants in the present case had laid and maintained the foundations of their town house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable." *Id.* 296. The general statements concerning liabilities of towns in *Proctor v. Andover*, 42 N. H. 362, are *dicta*. The decision is expressly put upon the ground that it was not the duty of the town to maintain the gate in question. *Hardy v. Keene*, 52 N. H. 370, only decides (so far as this case is concerned) that highway surveyors are not the agents of the town. "They are public officers, whose duties are prescribed by law. Their authority is not derived from the town but from the statute. They are not under the control of the town. Their powers cannot be enlarged or abridged by any action of the town; and what they do or omit to do, in the proper exercise of their authority, is done or omitted because the law enjoins and prescribes their duties independent entirely of municipal control or authority." *Id.* 377. *Egerly v. Concord*, 62 N. H. 8, applies the same rule to fire engineers. "They were public officers, amenable to law for their conduct, and not under control or direction of the city. They were not agents or servants of the city in any such sense as to bind it by their acts or make it liable for their defaults." *Id.* 20. In *Clark v. Manchester*, 62 N. H. 577, it is said that a town is not liable for neglect to perform "a public corporate duty;" but this falls far short of saying that it is not liable for negligence in the performance of a public work, whereby private rights are infringed. In *Sargent v. Gifford*, 66 N. H. 543, 27 Atl. 306, the nonliability of a town for defective highways at common law is upheld, because the duty to maintain them is imposed upon the town. "The duty is a public one, and it was placed upon towns without their procurement or assent. They derive no special benefit, pecuniary or otherwise, from the performance of it. The service is not due from them to the state or to the public by force of a common-law obligation, but is imposed upon them by statute." *Ibid.* Certain remarks in *Doolittle v. Walpole*, 67 N. H. 554, 38 Atl. 19, seem to be broad enough to warrant the assumption that a town is not suable in any case where the right of action is not expressly or impliedly conferred by statute, but these remarks were

limited to "the purpose of the present inquiry." In *Gross v. Portsmouth*, 68 N. H. 266, 33 Atl. 256, nonliability is put upon the same ground as in *Edgerly v. Concord*, 62 N. H. 8: "The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the waterworks." Id. 68 N. H. 267, 33 Atl. 256.

A careful consideration of these cases must lead to the conclusion that there is no general rule by which the common-law liability of towns has been ascertained. That there is such a liability in certain cases is well established in this state. See cases hereinafter cited. What cases will or will not come within this class may be determined, to some extent, by a process of elimination. It appears that towns are not liable at common law (1) for the improper discharge of a purely governmental function (*Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Doolittle v. Walpole*, 67 N. H. 554, 38 Atl. 19); (2) for neglect to perform duties imposed upon them without their consent (*Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306); (3) for the acts of officers whose powers and duties are so fixed by the legislature that the town cannot control or direct their actions (*Ball v. Winchester*, 32 N. H. 435; *Hardy v. Keene*, 52 N. H. 370; *Edgerly v. Concord*, 62 N. H. 8; *Gross v. Portsmouth*, 68 N. H. 266, 33 Atl. 256). In every case in which it has been held that there was no liability, the decision has been placed upon one of these grounds. In no case has nonliability been put upon the broad ground that there is no common-law liability of a municipal corporation. On the other hand, there are numerous cases wherein towns were held to answer for their acts without any statutory liability either expressly or impliedly imposed. *Quantum meruit* has been maintained to recover for building a highway, when the plaintiff had failed to perform a special contract. *Wadleigh v. Sutton*, 6 N. H. 15, 23 Am. Dec. 704. *Davis v. Barrington*, 30 N. H. 517. So, where a town let a house for a term of years, and the tenant made repairs, which were to be in lieu of rent, and was subsequently evicted before the end of the term, he was entitled to recover the value of the repairs to the town. *Smith v. Newcastle*, 48 N. H. 70. If a town so constructs a highway as to cause a nuisance upon the property of an abutter, the town is liable. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Cole v. Gilford*, 63 N. H. 60. The same rule applies to the construction of sewers (*Vale Mills v. Nashua*, 63 N. H. 136; *Nutt v. Manchester*, 58 N. H. 226), to a failure to properly care for highways after they are built (*Parker v. Nashua*, 59 N. H. 402), and to cases where the improper construction was not authorized, but has been paid for, and the benefit accepted (*Car-*

penter v. Nashua, 58 N. H. 37.) Where the work of maintaining sewers is voluntarily undertaken, the town is liable for injuries to private property resulting from negligence in such work. *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464. The court has also sustained actions against towns for the obstruction of a private way (*Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220), for money paid to discharge a debt due from the town (*Sanborn v. Deerfield*, 2 N. H. 251), for the expenditures of a committee to purchase land for a cemetery (*Eastman v. Hampstead*, 66 N. H. 195, 20 Atl. 975), for labor and materials performed and furnished in the construction of waterworks (*Leavitt v. Dover*, 67 N. H. 94, 32 Atl. 156), and for the expenses of a committee before the legislature (*Rider v. Portsmouth*, 67 N. H. 298, 38 Atl. 385; *Bachelder v. Epping*, 28 N. H. 534). If towns were mere divisions of the state, and could not be sued without authority from the legislature, many of these actions would have failed. The argument that the question of municipal nonliability was not raised in them is not well founded in fact. While the cases as reported do not, in most instances, mention this question, an examination of the reserved cases and the arguments of counsel will show that it was often before the court. See *Carpenter v. Nashua*, 104 Briefs & Cases, 649; *Cole v. Gilford*, 146 Briefs & Cases, 281; *Vale Mills v. Nashua*, 147 Briefs & Cases, 239.

So far as the questions involved in this branch of the law have been considered, the decisions seem to recognize three classes of cases in which towns are liable for torts at common law: (1) For negligent acts (even in the discharge of imposed duties) which interfere with the rights of others, provided such rights do not depend upon the imposed duty. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Carpenter v. Nashua*, 58 N. H. 37; *Parker v. Nashua*, 59 N. H. 402; *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220. (2) For their acts concerning property not employed in a public use. *Clark v. Manchester*, 62 N. H. 577. (3) Where duties of a public nature are voluntarily assumed. *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464. The question of the soundness of the second and third classes is not involved in this case, and is not considered. There is no substantial conflict between the decisions. The court has not said that a town was not engaged in a public or governmental service when repairing sewers (*Rowe v. Portsmouth*), and that it was so engaged when constructing waterworks (*Gross v. Portsmouth*). The nature of the work was the same in both cases, but in the latter the work was performed by persons over whose actions the city had no control, while in the former it was done by agents whom the city might direct as to time and methods of work. It is for this reason that there was a liability in one case, and not in the other. Nor are these decisions based upon an ascertainment of what is or is not a public office. It was not the nature of the duties to be performed, but

the fact that in doing them the actor was or was not subject to control by the town, that determined the question of liability. The decisions resulted from an application of the rule that one is not liable for the negligent acts of those whose conduct he has no right to direct or supervise. 2 Dill. Mun. Corp. § 974. "The maxim *respondet superior* depends on the presumed control implied by the relation between the parties." *Carter v. Berlin Mills Co.* 58 N. H. 52, 53, 42 Am. Rep. 572. Nonliability has not been put upon the same ground in all cases; nor have the cases in which a liability was found to exist all depended upon a common rule. It is only in an attempt to put upon a common ground cases which involve different principles that confusion arises. When the cases are properly classified, they appear to be consistent with each other, and, in a general way, with the law of other states. See 2 Dill. Mun. Corp. §§ 962, 966, 971, 974, 981, 985. Viewed only with reference to the work in which the town was engaged, the decision in *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, that the town was not liable at common law for injuries received by a traveler by reason of a defect in a highway, might seem to conflict with the holding that a town was so liable for building a highway so as to flow water over the abutter's land. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. But the reason for the different results is plain. To establish his case a plaintiff must show that he had a right which has been infringed. In *Sargent v. Gilford*, the only right upon which the plaintiff could rely was the public one of using the highway, and the only duty of the town was the statutory one to maintain the way. The plaintiff's injury was suffered while he was in the exercise of a public right, and for this no action lies at common law. *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302. Take away the public right, and the plaintiff would stand only as a trespasser, to whom the town would owe no positive duty as to the condition of the premises. *Buch v. Amory Mfg. Co.* 69 N. H. 257, 44 Atl. 809. "The wrong thus complained of is not . . . in violation of the plaintiff's common-law right and the defendant's common-law duty, but a violation of the statutory, highway right of a traveler, by a nonperformance of the defendants' statutory duty of keeping the highway 'in good repair, suitable for the travel thereon.'" *Doe, Ch. J., Edgerly v. Concord*, 59 N. H. 78, 79. As no private right had been infringed, the plaintiff had no cause of action at common law. In *Gilman v. Laconia* the situation was different. The right there invaded was the private right of property. The plaintiff complained, not that the town had failed to perform some public duty, but that it had invaded his property right. It was no answer to this complaint to say that the town was engaged in a public undertaking, or even that it was performing a public duty imposed upon it against its will. If such a defense were available, private rights would not be secure against arbitrary

forfeiture, and the implied constitutional provision against taking private property for public use without compensation would be abrogated. *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 511, 12 Am. Rep. 147. "We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person." The same constitutional provision that protects the right of private property against invasion by private individuals 'must protect it from similar aggression on the part of municipal corporations.'" Jeremiah Smith, J., *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 534, 12 Am. Rep. 147.

In many of the cases where a recovery has been had, the action was justified by being necessary to carry out the spirit of the supreme statute law. Although our Constitution contains no express declaration that private property shall not be taken for public use without compensation, that rule is implied from the spirit of equality which pervades its every part. *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 534, 12 Am. Rep. 147, recognizes the doctrine that this rule authorizes suits against municipalities for damage to property occasioned in the execution of a public work. It is urged that this rule applies only to property that is taken directly for, and not merely in the course of the execution of, public works. For example, if it is useful for a municipality to lay a water pipe across A's land, he is to be compensated; and, if the act be done without process of law or his consent, he may have redress. On the other hand, if in the building of the same waterworks the superintendent negligently floods B's garden, it is said that the corporation is not liable, because the act does not inure to the benefit of the municipality. If this reasoning were sound, it would follow that the measure of A's damages would be the benefit to the municipality; and the fact that he is entitled to the value of the property taken shows conclusively that the right to recover rests upon a broader principle than that of an implied promise to pay for benefits received. In these matters "the dictate of justice is that no person shall suffer unequally, and, if he does, that all should make compensation." 2 Dill. Mun. Corp. § 1051a.

It is also said that the flooding of B's land is not the result of a public work, but of the negligence of the superintendent, and therefore the municipality is not liable. The answer to this is that the law so far takes notice of the fallibility and imperfection of all human endeavor that one who intrusts his affairs to his servant, under instructions, either express or implied, to do only that which is lawful, is responsible for the neglect of the servant so to do. The general rules of agency apply to towns. They are "subject to the same implications from their corporate acts, or the acts of their agents

within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons." *Holderness v. Baker*, 44 N. H. 414, 417; *Glidden v. Unity*, 33 N. H. 571, 577; *Gray v. Rollinsford*, 58 N. H. 253; *Kinsley v. Norris*, 62 N. H. 652.

The claim is also advanced that it is unconstitutional to take the taxpayer's property to pay damages caused by the negligent acts of the superintendent; that the power to tax extends only to public purposes, and not to making reparation for injuries done by public agents. The argument proves too much. It denies the right to tax for any but strictly governmental purposes, while the law is that "in determining this question the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity." *Cooley, Const. Lim.* *488. For many years towns in this state have been called upon to respond to suits to enforce the statutory liability for damages caused to individuals by a failure to keep highways in repair. Although there was no such liability at common law, and although the nature and extent thereof under the statute have been treated of at great length, it has never before been suggested that the statute was an unconstitutional infringement of the rights of taxpayers. If their property may be taken for a liability which was unknown to the common law, much more may it be for municipal obligations which the common law recognized.

The argument that, according to a perfect theory of the nature and end of all government, municipalities partake of the sovereign character of the state, and so cannot be liable to suit except when made so by statute, has not been overlooked. The argument would be entitled to weight if this was a new question, but that is not the present situation. It may be that a corporation, in part governmental and sovereign, and in part individual and accountable, does not satisfy the demands of pure reason, or realize the ideal of those skilled in political science. The same thing may be said of many of the rules of the common law which have been adopted, yet those rules are of binding obligation. *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 506. So as to the nature of municipal corporations. The theory of their dual character is too firmly imbedded in the common law to be removed, except by the lawmaking power. Whether it would be better if they were liable for every breach of duty, as suggested in *Ball v. Winchester*, 32 N. H. 435, 442, or whether, as the defendants here contend, they ought not to be liable at all, is a question to be settled by the legislative department of the government. Ever since the time of the Roman empire, municipalities have been subject to private law relations not applicable to sovereignty. 1 *Dill. Mun. Corp.* § 3. The exact location

of the divisional line between those matters which are governmental and those which are not has not always been clearly indicated. Courts have not agreed upon the precise location of the line, but there has been no dissent from the proposition that municipalities have duties on each side thereof. This has been the law of the state for many years. It may fairly be assumed that many instances of legislative action or nonaction have been based upon it. Like the doctrine of the peculiar corporate character of proprietors of towns, the authority for it is to be found "in the records of New England, in the decisions of courts." *Proprietors of Cornish v. Kenrick, Smith* (N. H.) 270, 273. It is a part of the common law, and cannot be abolished except by the lawmaking power.

It may be, and probably is, true that the decided cases do not cover every phase of common-law municipal liability that may arise; but, as they have sufficiently established the law for the purposes of the present case, it is not essential to pursue the general subject further. Nor is it necessary to inquire whether the grounds upon which nonliability has been placed are sound. The cases in which such a conclusion has been reached are of consequence here only so far as an investigation of them is needed to show that they are not based upon a theory of general municipal immunity from suit. Taking the law as it has been declared in this state, a town is liable for the negligence of its agents which affects the private property right of others. Is it any less liable when the right involved is personal instead of proprietary? The basis of the cause of action is the infringement of a private right,—a violation of those rules of conduct which from being custom became law, and which now govern the conduct of all in their relations to others, be those relations either personal or proprietary. A private right is infringed when a person's health is injured by emptying a sewer wrongfully in the vicinity of his residence, the same as when water is wrongfully turned upon his land. "On the question of liability, it might not be material whether the invasion were of bricks or of polluted atmosphere." *Toine v. Thompson*, 68 N. H. 317, 322, 46 L. R. A. 748, 44 Atl. 492. The case does not differ in principle from that of an employee, who is entitled to be provided with a reasonably safe place in which to work, and to be associated with reasonably competent fellow servants. The landowner's right of property and the laborer's right of personal safety are alike given by the common law. They are both private rights, and the invader of the one is no more bound to answer for his acts than the infringer of the other. "The whole superstructure of the liability of municipal corporations for negligence and for trespasses upon property is built upon the same idea, since there can be no distinction on principle between the case where a municipal corporation—let us say in prosecuting some public work within its charter powers—unlawfully damages my property or injures

my person, and where, acting for its own purposes and within the scope of its charter powers, it takes my property." Seymour D. Thompson in 33 Am. L. Rev. 708.

The rule which governs this case is clearly stated by Perley, Ch. J., in *Eastman v. Meredith*, 36 N. H. 284, 295, 72 Am. Dec. 302, where it is said: "The plaintiff in cases of this character does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if in their manner of doing it they cause a private injury they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but, where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable, like an individual, for injuries caused by negligence in the process of executing the work." For more than forty years this decision has been acted upon as correctly stating the law applicable to this class of cases. It states the law, not only of this jurisdiction, but of every jurisdiction where the common law prevails. "It is . . . universally considered, even in the absence of a statute giving the action, that they [municipal corporations] are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties." 2 Dill. Mun. Corp. § 906. The case which announced the adoption here of this unquestioned rule of the common law cannot be held to have been overruled, together with the cases which have followed it, by remarks made in a case where the question was not involved, and in which these cases are not mentioned. The case at bar falls within the rule laid down by these authorities. The complaint is of wrongful acts injurious to an individual. The term "private injury," as used in *Eastman v. Meredith*, 36 N. H. 284, 295, 72 Am. Dec. 302, is synonymous with "private wrong," which is defined as "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals," as distinguished from public wrongs, which "are a breach and violation of public rights and duties which affect the whole community, considered as a community." 3 Bl. Com. 2. "Private wrongs, . . . being an infringement merely of particular rights, concern individuals only, and are called civil injuries. . . . Public wrongs, . . . being a breach of general and public rights, affect the whole com-

munity." 1 Bl. Com. 122. To determine what conditions or situations have the elements of private rights, as above defined, reference must be had to the positive law. The terms "private wrong" and "private right" cannot be defined, further than to say that they include all those duties due from one person to another, for the breach of which the law gives an action. See 4 Bl. Com. 5, note; *Ladd v. Granite State Brick Co.* 68 N. H. 185, 37 Atl. 1041. Except as to those guaranteed by the Constitution, private rights may be modified or enlarged by legislative action; but until this is done they remain as they were at the common law. So in this case the contract of the parties created a situation which gave the plaintiff the common-law right to be furnished a reasonably safe place in which to work. The existence of the right cannot be doubted. It was a "particular right" concerning the individual only, and not one which "affected the whole community." It was in every sense such a right that a negligent violation of it would be a civil injury or private wrong. It in no way depended upon the performance or nonperformance by the defendants of any public duty.

Were the water commissioners servants of the city, or were they an "independent board," whom the city could not "direct or control" "in the discharge of their duties?" The act authorizing the city to establish water-works gives the full control thereof to the city, and provides that "the city may, either before or after the construction of the same, place them under the direction of a superintendent, or board of water commissioners, or of both, with such powers and duties as may, from time to time, be prescribed by the city council of said city." Laws 1871, chap. 69, § 5. Acting under this authority the city passed an ordinance establishing a board of water commissioners, to whom it intrusted the entire management of its water-works. Rev. Ord. Concord 1894, chap. 22, §§ 2, 4. It is argued that this ordinance is in effect the same as a statute enacted by the legislature, and that therefore the commissioners come within the class of independent officers, whose acts the city cannot control or regulate, and for which it is not liable. The defect in this reasoning is apparent. The officer whose duties are fixed by the legislature is beyond the control of the city, and, however much it may desire to change those duties, it is powerless to do so. On the other hand, the ordinance in this case, although enacted in the form of legislation, is a mere rule of conduct or delegation of authority given by the city itself to those employed in its service. It may change the duties or take away the powers granted at any time, and the ordinance in express terms reserves to the city councils the right to remove the commissioners. Id. § 3. The commissioners were servants of the city. *Grimes v. Keene*, 52 N. H. 330, 335.

The defense that the suit should be against the precinct, and not against the city, is not available. "The water commis-

sioners are the officers of the whole city, and not of the precinct, are elected by the city councils, and, so far as they are answerable for their conduct, are answerable to the city, and not to the precinct." *Brown v. Concord*, 56 N. H. 375, 379.

Demurrer sustained.

Parsons and Young, JJ., concur in the result only, holding that there is a statutory liability, and dissent from the decision that there is a liability at common law.

The others concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

James W. ELLSWORTH, *Plff. in Err.*,
v.
Annie METHENEY, Admr., etc., of John
Metheny, Deceased.

(104 Fed. Rep. 119.)

1. A coal miner going through a passageway during the noon hour to another part of the mine to visit another workman is not engaged in the performance of the duties of his employment so as to bring his use of such passageway within the rule that requires the employer to provide a safe place for work.
2. The proprietor of a coal mine, who places a dangerous electric wire along a passageway which the miners are accustomed to pass through during the noon hour for the purpose of eating their dinners and for social intercourse, with the knowledge of, and without objection from, the proprietor, is charged with the duty properly to guard and protect the wire, or to give notice of the danger to those who, he may reasonably apprehend, are likely to be brought into contact therewith.

(October 2, 1900.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Before *Lurton, Day*, and *Severens*, Circuit Judges.

Mr. Fred L. Rosemond, for plaintiff in error:

No negligence of defendant, however culpable, was material in this case unless such negligence contributed proximately to cause his death.

If there was danger, and it was open and obvious, Metheny's knowledge of it is presumed.

Beach, Contrib. Neg. § 368; 1 *Shearm. & Redf. Neg.* § 203; *Wood, Mast. & S.* § 366.

If such danger were matter of common knowledge in the mine, then Metheny had such adequate means of knowing of the danger that, just as if it were open and obvious,

no warning was required or could profit or protect him.

The master is not required to point out dangers which are readily discoverable by the servant himself in the use of ordinary care.

Shearm. & Redf. Neg. § 203; *Stuart v. West End Street R. Co.* 163 Mass. 391, 40 N. E. 180; *Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. Rep. 378; *Peirce v. Clavin*, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. Rep. 550; *Norman v. Wabash R. Co.* 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. Rep. 727; *Washington & G. R. Co. v. McDade*, 135 U. S. 354, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

An employee cannot recover for an injury received when he was not in the discharge of his duty.

Wright v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106; *Knob v. Pioneer Coal Co.* 90 Tenn. 546, 18 S. W. 255; *Gillen v. Rowley*, 134 Pa. 209, 19 Atl. 504; *Frank v. Beck*, 19 Utah, 35, 56 Pac. 419; *Brunell v. Southern P. Co.* 34 Or. 258, 56 Pac. 129; *Goff v. Chippewa River & M. R. Co.* 86 Wis. 237, 56 N. W. 465; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33; 1 *Shearm. & Redf. Neg.* § 190; *Pittsburgh, Ft. W. & O. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203; *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L. R. A. 554, 37 N. E. 773; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 28 N. E. 1133; *Woolwine v. Chesapeake & O. R. Co.* 36 W. Va. 329, sub nom. *Manning v. Chesapeake & O. R. Co.* 16 L. R. A. 271, 15 S. E. 81; *Bunt v. Sierra Buttes Gold Min. Co.* 24 Fed. Rep. 847; *Pittsburgh & O. R. Co. v. Sentmeyer*, 92 Pa. 276, 37 Am. Rep. 684; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. Rep. 459; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Cleveland, C. O. & St. L. R. Co. v. Ballentine*, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. Rep. 935; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. Rep. 942.

There was an entire failure of proof below to support the allegation that the death of

NOTE.—As to necessity of furnishing safe places for miners to work, see earlier cases in this series, of Consolidated Coal & Min. Co. v. Floyd (Ohio) 25 L. R. A. 848, and note as to statutory regulations for protection of miners; also *Petaja v. Aurora Iron Min. Co.* (Mich.) 51 L. R. A.

32 L. R. A. 435; *Turner v. St. Clair Tunnel Co.* (Mich.) 86 L. R. A. 184, 47 L. R. A. 112; *Williams v. Thacker Coal & Coke Co.* (W. Va.) 40 L. R. A. 812; and *Hanley v. California Bridge & Constr. Co.* (Cal.) 47 L. R. A. 597.

Metheney was caused by the alleged negligence.

In the absence of direct evidence in its support, an allegation that one sustained injuries by reason of the negligence of the defendant is not sustained by proof of circumstances from which the fact that his injuries were so received is not a more natural inference than any other.

Lake Shore & M. S. R. Co. v. Andrews, 58 Ohio St. 429, 51 N. E. 26; *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128; *Shearm. & Redf. Neg.* 5th ed. § 56, p. 69; *Raby v. Cell*, 85 Pa. 80; *Dobblins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Geoghegan v. Atlas S. S. Co.* 146 N. Y. 369, 40 N. E. 507; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Priest v. Nichols*, 116 Mass. 401; *Brunner v. Blaisdell Bros.* 170 Pa. 25, 32 Atl. 607; *Johnston v. East Tennessee, V. & G. R. Co.* 17 Ky. L. Rep. 67, 30 S. W. 415; *Baker v. Chicago, R. I. & P. R. Co.* 95 Iowa, 164, 63 N. W. 667.

Plaintiff was not aided by any presumption of negligence from the fact of death, even if it be first inferred that the contact preceded his death and caused it, for in a case like that at bar, between master and servant, wherein the master is not an insurer, no such presumption arises.

Ruffner v. Cincinnati, H. & D. R. Co. 34 Ohio St. 96; *Pittsburgh, C. & St. L. R. Co. v. Heiskell*, 38 Ohio St. 666; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864.

Plaintiff could not recover without making out her case. If Metheney's death were caused by the contact, and that contact could be made in either of two ways, for one of which defendant would be answerable and for the other of which he would not be answerable, then plaintiff could not recover without showing that it did occur in the former way.

Narramore v. Cleveland, C. O. & St. L. R. Co. 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. Rep. 298; *Petree v. Clavin*, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. Rep. 550.

Employers are entitled to use novel machinery adapted to their uses, and so, in the advance of the electrical science, it is coming to pass that electricity largely supplants steam for mechanical uses; and yet its use is comparatively new. If courts are to raise themselves as a bar against the use of electricity merely because its use is yet somewhat experimental, they are to do what they have not yet done.

Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864; *The Francoe*, 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. Rep. 479; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999.

Mr. Robert T. Scott, for defendant in error:

It was the duty of Ellsworth to notify, not only Metheney, but all the employees in his mine, and warn them against the danger of coming in contact with the wires.

Denver v. Sherret, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. Rep. 226; *Chicago & A.* 51 L. R. A.

R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; *Doyle v. Missouri, K. & T. Trust Co.* 140 Mo. 1, 41 S. W. 255.

Had Metheney been warned of the danger he would have been on the alert, and guarded himself against a contact with the wires, but as it was he had no reason to attempt to avoid the wires on his own account.

Metheney coming in contact and receiving the current of itself proves negligence.

Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43, 11 So. 51; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700, 34 Atl. 1069; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 28 S. E. 735.

Metheney was not injured by the negligent act of some servant of the General Electric Company, the so-called independent contractor, but he was injured by the negligence of placing insufficient insulation upon the wires; and it is wholly immaterial whether it was the negligence of the so-called independent contractor or Ellsworth. It was Ellsworth's duty to have properly insulated the wire placed in his mine.

Circleville v. Neuding, 41 Ohio St. 465; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

Day, Circuit Judge, delivered the opinion of the court:

This action, brought in the state court, and thence removed to the circuit court of the United States, seeks the recovery of damages by the administratrix of John Metheney, deceased, against James W. Ellsworth, an operator of a certain coal mine in which, on or about the 7th day of October, 1896, John Metheney came to his death. Metheney had been for some time employed as a coal miner in one of the mines of plaintiff in error, and, so far as ordinary coal mining is concerned, was a man of sufficient experience to undertake such work. Some three weeks before the death of Metheney an electrical mining apparatus was placed in the mine in which Metheney was at work, consisting of certain drilling machines connected by wire, and an electrical plant for the operation thereof. After the connecting wire reached the mine, it was strung along brackets set in the wall of the entry, and which stood out a few inches therefrom. While walking along the entry, and near this wire, Metheney came in contact therewith, and almost instantly died. There is contention in the case as to whether his death was due to heart disease, with which he is shown to have been afflicted, or the electrical shock resulting from contact with the wire. The theory of the plaintiff's case was that the wire was improperly insulated, and consequently, when charged with electricity, highly dangerous; that Metheney was a man without experience in the use of electricity; that the entry was dark, or, at least, not well lighted, and under such circumstances Metheney was enti-

tled to notice of the great danger involved in coming into contact with the wire; that the employer was guilty of negligence in thus placing the wire in the mine without adequate insulation or notice to the employees. On the part of the plaintiff in error it was claimed that the mechanism was purchased from a dealer in good repute; that the negligence, if any, was that of a third person, for which plaintiff in error was not responsible; that ordinary care had been used in providing the mechanism; that decedent came to his death by his own contributory negligence, and at a place where he was not required to be in the discharge of his duty as an employee. On this branch of the case there seems to be no conflict of testimony. At least, it is well established that Metheney, at the time of receiving the injury, had left the part of the mine in which he was employed, it being during the noon hour, and proceeded to the room of a fellow workman, and, after some talk with him concerning some of the mining operations, was returning to his room, when, after stopping on two occasions to pick slate from the roof, at the same time calling the attention of a fellow workman to its condition, came in contact with the wire, exactly how is not shown. It thus appears that when the injury was received Metheney was not acting in the course of his employment or performing the duties for which he was engaged. It is equally clear that he voluntarily left the part of the mine in which he was at work, and, after the talk with the fellow miner above referred to, was returning to his room. The court held that the workmen had a right to the use of the passageway during the noon hour, and submitted the case to the jury upon the theory that the deceased came to his death while acting within the scope of his employment. In this view instructions were given to the jury as to the duty of the employer to provide a safe place for his workmen, and the obligation of the servant to observe care upon his part. It was contended by the plaintiff in error at the trial that Metheney was injured outside of the course of his employment. The court, holding the view above indicated, disposed of this proposition by instructing the jury as follows: "It is claimed, in the second place, that if the death was caused by the current escaping from the wire through the insufficiency of the insulation, yet the death was not due to the negligence of the defendant, but the negligence of deceased himself: First, because he was not in the line of his duty,—in other words, if he had been where he ought to have been, he would not have been hurt; and, second, that he was picking loose slate from the roof of the entry, and, the suggestion is, slipped and fell against the wire; and that in either case it was his own negligence that caused his death, and not the negligence of the defendant. I do not agree with the view of counsel for the defendant upon these points. The view I take of the law is this: That the men in the mine had a right to the use of this entry as a passageway to and from their work, and while they were going

to their work or from their work they were as much in the line of their duty as when they were actually mining coal, and that during the noon hour, a time set apart, not only for the men to eat their dinners, but for rest from labor, they had a right, in the enjoyment of that time of rest, to go out into the open air, or into the room of some friend adjoining, and that, in going or returning to their rooms to resume work, they were in the line of duty within the meaning of the law, and that it was not contributory negligence upon the part of the plaintiff to visit Unklebay in his room during that hour, or to pick the slate from the roof while returning from Unklebay's room; that the mere fact that he stopped for a moment to pick slate from the roof would not be such an interruption of his return to labor as would take him out of the line of duty, and deprive him of the protection afforded him while in the line of duty. It would be, in my judgment, an unreasonable limitation upon the right to rest from labor during the noon hour, if the man should be confined to the one spot where his hours of labor are spent. So that you can dismiss from your consideration the claim that he was guilty of contributory negligence because he had left his own room on his visit to Unklebay, or because he stopped in returning from Unklebay's room to his own to pick a piece of loose slate from the roof."

In other words the learned judge was of the opinion that when the decedent was injured, under the circumstances above outlined, he was in the discharge of his duty in the course of his employment, and he treated the case as though Metheney had been killed in the part of the mine where he was necessarily employed in the discharge of his duties; and this view was given to the jury as a matter of law, and they were practically told to dismiss from consideration any defense based upon the claim that the decedent was not killed in the performance of the duties of his employment. We cannot concur in this view. No authority has been cited in support of it, and it is opposed to well-considered cases. *Wright v. Rawson*, 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33; 1 Shearm. & Redf. Neg. § 190. It is to be borne in mind in this connection that Metheney was not going from, or coming to, his work. He was not engaged in the business of his employer at the time of the injury, but came to his death during the noon hour, while returning from a visit undertaken, upon his own volition, outside the part of the mine in which he was employed.

While we think there was error in treating the case as one turning upon the duty owing by the employer to the employee injured in the course of his duty, we think there is an aspect of the case which might properly have been submitted to the jury. There was testimony tending to show that the entry in which Metheney was killed was a place where the miners were accustomed to go at noon for the purpose of eating their dinners and for social intercourse; that this had

been the practice in the mine, with the knowledge and without objection from the owner. In such a case, what is the measure of obligation on the part of the employer, and in what relation to him does the employee stand? Certainly not as a mere stranger, to whom no duty is owing. It is shown to be customary to use the entry as a place where the men come from their rooms during the short time of refreshment and rest permitted to them in the course of the day's labor. The master, knowing that the entry was so used, and not objecting thereto, impliedly licenses the men to use the place in this manner. The testimony tended to show that the electric wire, in the condition which it was permitted to be, was highly dangerous to life. The entry in which the men congregated had thus introduced into it an apparatus dangerous to life, but partially disclosed in the darkness of the mine, and strung along the wall, set out therefrom, so that the men using the entry might come into contact therewith. Admitting that, while not engaged in the course of his employment, Metheney was not entitled to the protection of an employee, he was, nevertheless, a licensee using the entry with the implied consent of the employer. Under such circumstances, we do not think the employer can be permitted without responsibility to introduce a highly dangerous apparatus into a place thus used with his consent. We think the case in this particular is ruled by the principles laid down by this court in the case of *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. Rep. 350. In that case Judge Lurton, giving the opinion, quotes the following language from *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235: "Where the owner or occupant of land, who, by invitation, expressed or implied, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him, and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." And the judge goes on to say: "It seems to us that many of the American cases which we have cited failed to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by reason of subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises, and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of *Corby v. Hill*, 4 C. B. N. S. 562, and is a distinction which should not be overlooked. If there be any substantial difference between the legal consequences of permitting another to use one's premises and inviting or inducing such use, the distinction lies in the difference between active and the merely pas-

51 L. R. A.

sive conduct of such a proprietor. It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner. If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered."

Applying the doctrine herein stated to the facts developed in the present case, we do not perceive why the owner of the mine who actually changes the situation of previous safety by introducing an electric wire insufficiently insulated to prevent injury to those who may come in contact therewith, in a place where he knows or has the means of knowing that the workmen are likely to congregate, is not equally liable with the owner of premises who may "actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee." In the case at bar, as well as in the one put by Judge Lurton, we are of opinion that sound morals and just treatment demand that the licensee shall have notice of the new danger which he is likely to encounter in using the premises. In taking this view of the case, we are not undertaking to determine that the facts warrant a recovery on the line herein indicated. That is a question to be developed by testimony upon issue joined with proof directed to a case based upon this theory. Enough is shown to warrant an expression of these conclusions in view of a retrial of the case. What we intend to hold is that if the testimony shall warrant the finding that the electrical apparatus as actually introduced into the mine was dangerous to the life and safety of the employees, and they were ignorant of the dangers thereof, or could not know them in the exercise of ordinary care to avoid injury, and the same was placed in a part of the mine which the men were accustomed to use and occupy during the hour of rest and refreshment when not actively engaged in their duties, with the knowledge and consent of their employer, a duty is imposed upon the employer, in thus introducing into his mine a new and dangerous element, to properly guard and protect the same, or to give notice of the danger to those whom he should reasonably apprehend are likely to be brought into contact therewith.

For the error in treating the case as one

where an injury happened to one in the course of his employment, and charging the jury upon that theory, *the case will be re-*

versed and remanded, for further proceedings consistent with the views herein expressed.

ALABAMA SUPREME COURT.

Henrietta A. LINDSAY, *Appt.*,
v.

UNITED STATES SAVINGS & LOAN
COMPANY.

(.....Ala.....)

The power of equity to compel the payment of legal interest as a condition of canceling a usurious contract is not taken away by Code 1896, § 2630, providing that such contracts "cannot be enforced either at law or in equity, except as to the principal," while the words "either at law or in equity" were not found in the prior statutes; since the requirement that legal interest be paid as a condition of cancellation is not an enforcement of the contract within the meaning of the statute.

(*Haralson, J., dissents.*)

(June 7, 1900.)

A PPEAL by complainant from a decree of the Jefferson County Chancery Court requiring her to pay interest at the legal rate as a condition of relief from a usurious mortgage. *Affirmed.*

Complainant alleged that when obtaining the loan defendant's agent represented to her that the loan bore interest at 6 per cent, and, believing such representation, she contracted to pay only that amount; that in fact she was required to pay from 12 to 15 per cent per annum, which was illegal and usurious.

The bill contained an offer to pay whatever the court adjudged to be fairly and justly due, and the interest thereon that the court should award. The bill prayed for an accounting and permission to redeem from the mortgage.

The history of the case appears in *Lindsay v. United States Sav. & L. Assn.* 120 Ala. 156, 42 L. R. A. 783, 24 So. 171.

Upon return of the case after the former appeal, the bill was amended so as to allege that since the filing of the bill the chancery rule requiring complainant in a bill seeking relief from a usurious contract to offer to pay legal interest had been abrogated and annulled by statute, and that complainant is now required to pay back only the principal, from which is to be deducted interest already paid.

Further facts appear in the opinion.

Mr. Samuel Will John, for appellant:

The court of equity, following a well-known maxim of its jurisprudence, that "he who seeks equity must do equity," has al-

NOTE.—As to equitable relief against usury, see note to *Bexar Bldg. & L. Assn. v. Robinson* (Tex.) 9 L. R. A. on page 293.
51 L. R. A.

ways required the mortgagor, who becomes the actor in the court, to offer to do equity by paying the lawful rate of interest.

It was with this uniform construction of the law before the codifier and before the lawmaking power of the state, that the change was made in § 2630 of the Code.

The change was inserted for no purpose, can have no operation, but to enable a borrower who has contracted to pay usurious interest to go into chancery court and be relieved of that contract without paying any interest whatever.

To hold otherwise would be simply to strike this amendment out of the Code.

One party to a contract may not know, and may not intend to pay usury, while the other party may have craftily so presented the terms of the contract as to deceive the borrower and induce him to enter into a contract which in reality is usurious.

Wright v. Elliott, 1 Stew. (Ala.) 392; *Wright v. Minter*, 2 Stew. (Ala.) 453; 27 Am. & Eng. Enc. Law, p. 927.

Will this court hold that when a Code commissioner has deliberately inserted words in a statute of many years' standing, and called the attention of legislature to the fact that he did insert them there, and the legislature re-enacted the Code with that amendment included, that they mean nothing?

The legislature of Alabama can deprive a lender of all interest as the punishment for violating, or for undertaking to violate, its laws on the subject of usury.

Brotherton v. Brotherton, 41 Iowa, 112; *Dancville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179; *First Nat. Bank v. Plankinton*, 27 Wis. 177, 9 Am. Rep. 453; *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 265.

This contract, in the identical form and in all its terms, has been held by this court, in *Falls v. United States Sav., Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 14 So. 25, to be usurious.

Messrs. White & Howse, for appellee:

It was and still is a rule of equity and justice, that if the mortgagor sought relief in a court of equity against the usury, he could not get that relief unless he was willing and offered in his bill to do that which was just and right by paying the debt and the lawful interest thereon.

Eslava v. Crampton, 61 Ala. 507; *Eslava v. Elmore*, 50 Ala. 587; *Rogers v. Torbut*, 58 Ala. 523; *Garland v. Watson*, 74 Ala. 323.

This is not a rule of practice, but a principle of equity, which is as old as courts of chancery themselves.

See, specially, Story, Eq. Jur. § 301; Bishop, Eq. p. 63.

The ground upon which the defendant in such a case is allowed the benefit of this principle is that it is a just claim, so just that the court will not listen to the mortgagor asking relief from a usurious contract until he offers to allow it by the express terms of his bill.

1 Story, Eq. § 301; Code, § 10.

Sharpe, J., delivered the opinion of the court:

Prior to the adoption of the present Code the statutes relating to interest and usury declared with reference to usurious contracts that they "cannot be enforced except as to the principal." Accordingly, in suits for the enforcement of such contracts, wherever the defense of usury has been set up and sustained, courts of equity, as well as of law, have constantly refused assistance to the suitor, except upon the assumption that the principal, exclusive of all interest, constituted the entire debt. The provision, however, was never construed as interfering with the equitable principle which requires that one who seeks equity must do equity, or as interdicting its application to a borrower who, in the attitude of a complainant, seeks relief from usury. In the numerous cases involving usurious mortgages, extending from *Pearson v. Bailey*, 23 Ala. 537, to *Turner v. Merchants' Bank*, 28 So. 469, our courts have followed the generally prevailing and well-settled rule that such remedy will be afforded to a complainant only upon the condition of his paying the amount equitably due, which is considered to be the sum loaned, with legal interest. The authority of a court of equity to impose those terms is not conferred by statute, nor is it exercised for the purpose of enforcing any contractual right. "Such authority belongs to the court by virtue of its general equity jurisdiction, and, unless a statute exists providing that the party may have relief without the imposition of those terms, the rule will be invariably enforced." Tyler, Usury, 437. The power of the legislature to prohibit courts of equity from applying the maxim in cases involving usury is undoubted, and the question before us is whether the change in the wording of the statute referred to, wrought by the adoption of the present Code, has effected such prohibition. The provision now is that usurious contracts "cannot be enforced, either at law or in equity, except as to the principal." Code, § 2630. It is apparent that the insertion of the words "either at law or in equity" does not expressly affect the scope of the statute as it stood before the change. It is insisted for appellant that some change in effect, as well as in words, was intended, and that, unless the altered provision be construed as divesting courts of equity of the right to require such condition of borrowers, nothing has been accomplished by the alteration, and the doing of a useless thing must be imputed to the legislature. The assumed consequence does not follow. Statutes are

often found in separate enactments, and in Code revisions as well, which are merely declaratory of principles already recognized as existing at common law or in equity, or which have grown out of the construction placed by the courts upon some previous statute; and it frequently occurs in the revision of statutes that changes in their phraseology are made with no other intention than to render their meaning more definite and certain. The case here under consideration involves a revision, and not the construction of a subsequent independent enactment upon the subject of a former one. In *Landford v. Dunklin*, 71 Ala., on page 609, it is said: "No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology—the omission or addition of words—will not necessarily change the operation or construction of former statutes. The language of the statute as revised, or the legislative intent to change the former statute, must be clear, before it can be pronounced that there is a change of such statute in construction and operation." In *Bradley v. State*, 69 Ala., on page 322, the principle is thus stated: "In the amendment or revision or in the re-enactment of statutes, changes of phraseology, the omission of words deemed superfluous, or the addition of words rendering the intention more clear, are not infrequent. The construction or operation of the statute is not varied because of such changes. Before the courts can pronounce that the law is changed, the legislative intention to change it must be evident; language must be employed which is not susceptible of any other just construction." For the same doctrine, see *Dudley v. Steele*, 71 Ala. 423; *Sutherland, Stat. Constr.* § 256; *Sedgw. Stat. & Const. Law*, pp. 229, 365. The principle of construction above quoted, applied to the present statute, forces the conclusion that the alteration was intended to and has effect only to declare a rule as applicable to courts of equity which in those courts had previously existed, either by judicial construction of the statute, or upon the general but variable doctrine that equity follows the law, either of which sources of authority might have become a subject of dispute in the absence of a more definite statute. The change resulting from the revision imports no prohibition against the exercise of the right in equity to require that one who, in the attitude of a complainant, asks, not to enforce a contract, but to be relieved from a stipulation he has made to pay money, shall pay the borrowed money, with legal interest, as a condition to having such relief. The bill does not attack or seek to rescind the contract because of misrepresentations made to her respecting the required rate of interest. Upon the ground of usury alone the complainant has sought and obtained relief. To hold that in doing equity she should pay less than the legal rate, because her obligation was bounded by the mortgage stipulation for 6 per cent interest on the loan proper, would be, in effect, to

hold that no usury existed,—a result which would be inconsistent with the right to any relief.

Affirmed.

Haralson, J., dissenting:

On a former appeal in this cause, following the former decision of *Falls v. United States Sav., Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 13 So. 25,—identical in its legal aspects as to the transaction here involved,—it was held that the contract was usurious, a rate of interest exceeding 8 per cent having been received. *Lindsay v. United States Sav. & L. Assn.* 120 Ala. 156, 42 L. R. A. 783, 24 So. 171. The chancellor in his opinion on the trial below says: "It is alleged and shown that the contract contained in the mortgage, or the loan, is usurious," and this is not denied by the defendant. He also says: "The sole question now for determination is, 'Does the present Code, by § 2630, abrogate the long-established rule of courts of equity, which requires a borrower, coming into such court to have a usurious contract purged of illegal interest, to pay the amount borrowed with legal interest?'" That section reads: "All contracts for the payment of interest upon the loan or forbearance of goods, money, things in action, or upon any contract whatever, at a higher rate than is prescribed in this chapter, are usurious, and cannot be enforced, either at law or in equity, except as to the principal." In the former statutes, the words "either at law or in equity" did not appear, and were added when the Code of 1896 was adopted. On the 19th December, 1898, the complainant amended her bill, by setting up this amendment of said section, as relieving her from liability to account in the cause for anything more than a payment of the residue of the principal unpaid, and to have all the payments she had made deducted from the principal. Before this amendment, as appears, the statute simply provided that no usurious contract could be enforced except as to the principal; and this provision against usury was not limited as to its enforcement to courts of law, but applied also to courts of equity on a bill filed to enforce the usurious contract. A bill filed to enforce the contract was necessarily prosecuted by the lender. It was further held that where one borrowed money at a usurious rate of interest, and gave a mortgage to secure it, and afterwards resorted to a court of equity for relief against the usury, he was denied relief, except on the condition of paying the principal and legal interest; but where the payee or mortgagee became the actor in a court of equity he was required to offer to abate the whole interest, since the principal was all he was entitled to recover, and without such abatement his presence in a court of equity as held was without clean hands. *Hawkins v. Pearson*, 96 Ala. 371, 11 So. 304; *Dawson v. Burrus*, 73 Ala. 111; *Uhlfelder v. Carter*, 64 Ala. 527; *McGehee v. George*, 38 Ala. 323; *Hunt v. Aore*, 28 Ala. 580. This rule of denying a borrower relief in equity

against usury in a mortgage to secure the debt was not by virtue of any statute on the subject, but originated with courts of equity as a condition prescribed by them, on which they would exercise their discretion in granting relief to the mortgagor or borrower. It was an invention of their own, and within their discretion as conceived, in the interest of equity. 1 Story, Eq. Jur. 12th ed. § 301; *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 357, 43 L. ed. 476, 19 Sup. Ct. Rep. 179. Judge Story states the distinction observed by a court of equity between the lender and the borrower thus: "The ground of this distinction is, that a court of equity is not positively bound to interfere in such cases by an active exertion of its powers: but it has a discretion on the subject, and may prescribe the terms of its interference, and he who seeks equity at its hands may well be required to do equity." 1 Story, Eq. Jur. 12th ed. § 301. The Supreme Court of the United States answering the question, Can a borrower of money upon usurious interest successfully seek the aid of a court of equity in collecting the debt rendered void by statute without making an offer to repay the loan with lawful interest? says: "Undoubtedly the general rule is that courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor if the contract be executed, will they enable him to recover any more than the excess he has paid, over the legal interest." *Missouri, K. & T. Trust Co. v. Krumseig*. 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179. Speaking further in the same case upon the exercise of this discretion, the court said: "It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it molds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form;" citing *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495.

The chancellor construed the statute, as amended, as having made no change in respect to this principle of equity procedure, and required the plaintiff to pay 8 per cent on the loan. This construction proceeds on the ground that the statute is directed against him who seeks to enforce the usurious contract; and, inasmuch as a mortgagor or other debtor against whom a bill is filed

to enforce the collection of the debt is not one seeking to enforce its collection, he is not included within the technical provision of the statute, and stands where he did before its amendment, with no rights thereunder to avoid paying the legal interest, which he may, in any case, as is urged, be required in a court of equity to pay, on a subsisting though usurious contract. If this were true, the amendment means nothing, and the legislature is put in the category of doing a useless thing. Amendments of statutes ordinarily suggest, and are *prima facie* evidence of, a legislative intent to cure some defect in the statute amended. The supposed defect in this statute consisted in the fact that under it, according to the construction placed on it by the courts, a borrower of money seeking, whether as plaintiff or defendant, by the form of his pleading, in a court of equity, to avoid his usurious contract as to the interest, could not do so, and might be required to pay legal interest in addition to the principal. Without violent construction of the intention of the legislature, we may fairly assume that this was the defect they intended to reach by the amendment, and to make all usurious contracts voidable as to the interest, when properly pleaded by the debtor, whether in a court of equity or law; for at last a debtor by such defense is doing no more than preventing the enforcement of such a contract against him. What is the difference in principle between not allowing such a contract enforced at the instance of the lender, and forbidding its enforcement at the instance of the borrower? It always did rest for enforcement at law or in equity, —when the lender was proceeding,—upon the borrower, whether he objected or not; and but for this ancient rule in equity the principle would have been as applicable in chancery to the one as to the other. To destroy that inequality of the parties in equity as was supposed, the statute was framed making the nonenforcement of usury apply in all courts, when invoked by the borrower, as well as by the lender. Not to so construe it would seem to be a technical rather than a substantial ruling, a *petitio principii*. The construction of the statute gives some field of operation to the amendment. A statute is to be so construed as that it may have effect agreeably to the intention of the legislature. As has been well said: "Judges, in construing laws, are to inform themselves of the previous state of the law, and the mischief to be remedied, and make such construction as will advance the remedy and suppress the mischief. . . . The intention of the law is to be gathered from the cause or necessity of enacting it." *Dubose v. Dubose*, 38 Ala. 241, 42 Am. Dec. 588. It is, again, a familiar rule that "a construction which leaves to a sentence or clause of a statute no field of operation should be avoided if any other reasonable construction of the language can be given." *Lehman v. Robinson*, 59 Ala. 235. The sole object of the amendment was to suppress usury, and leave no one to be victimized by it, when he seeks

to avoid it,—passed in the interest of public policy, and for the prevention of extortion by the favored out of those not so fortunate as they.

MONTGOMERY BEER BOTTLING WORKS

v.

John B. GASTON, Judge of Probate.

(.....Ala.....)

1. The bound and permanent record filed with the secretary of state as the journal of the house of representatives, and not the bundle of papers from which this was made up, is the "journal" which, under Const. art. 4, § 22, and other sections, must contain the required entry of proceedings in the enactment of statutes.
2. A writing on the margin of a legislative journal, under instructions of the clerk, after the journal is filed with the secretary of state, is an unlawful interpolation without any legal effect to give vitality to an enactment, however honestly the clerk may have acted.

(May 29, 1900.)

CROSS-APPEALS from a judgment of the Montgomery City Court in an action to recover back money paid as a license tax under the revenue laws of the state; the defendant appealing from so much of the judgment as permitted the recovery of money paid for a license to sell as agent of a foreign manufacturer, and plaintiff appealing from so much as held that the statute imposing the license was valid so as to preclude his recovery of all of the money paid. *Affirmed on defendant's appeal. Reversed on plaintiff's appeal.*

Under an act approved February 23, 1899, complainant was required to pay \$110 for the privilege of doing business as agent for a foreign brewing company, and \$27.50 as a license tax as a retail dealer in spirituous, vinous, and malt liquors.

With reference to the foreign business, the evidence showed that the beer was bought outright by plaintiff from the foreign manufacturer, and sold in the regular course of trade by wholesale and retail, by the keg, or bottle, or draught.

At the trial a book was produced marked "Volume 2, Journal of the House of Representatives." On the margin of page 830, there was the following entry:

Report of Committee of Conference.

Mr. Speaker:

The undersigned committee of conference to consider the difference of the two houses on H. B. 935, beg leave to report as follows: After considering the matter, they recommend (1) the adoption of all the senate amendments; (2) the adoption of the fol-

NOTE.—As to conclusiveness of enrolled bill, see *State ex rel. Reed v. Jones* (Wash.) 23 L. R. A. 340, and *note*; also *Union Bank v. Oxford Comrs.* (N. C.) 84 L. R. A. 487.

lowing additional amendments: "Sec. —. Be it further enacted, that the dispensaries in each municipality shall pay 50 per cent of such state and county license as were paid by all the saloons in such municipality during the year 1898, payable quarterly, and in no case less than the amount paid by one saloon," by striking out the words "or long-distance telephones," where they occur in the 3d and 4th line thereof; by inserting in line 19, after the word "each" and before the word "company," the word "telegraph;" by inserting in line 16 of said section, after the word "lines," the following: "And each long-distance telephone company whose lines within the state do not exceed 100 miles shall pay at the rate of 50 cents per mile, and each long-distance telephone company whose lines within the state exceed 100 miles shall pay \$250."

Respectfully submitted.

D. J. Meador,

G. B. Deans,

W. D. Jelks,

On Part of the Senate.

J. J. Mitchell,

W. W. Brandon,

O. Kyle,

On Part of the House.

The house concurred in the conference report: yeas 52, nays, 0. Yeas: Messrs. Speaker, Address, Arrington, Bayles, Box, Brandon, Brown, Bruner, Burkhalter, Byars, Cameron, Capps, Cheatham, Cofer, Collier, Cornelius, Dameron, Davidson, Davis, Flewellen, Forester, Fuller, Garner, George, Gibson, Greene, Harris, Haynie, Hood, Huey, Hurt, Kelly, Killen, Kyle, Lavretta, Long, Lyle, Matthews, Mitchell, McQueen, Patterson, Poole, Reynolds, Rogers, Sloan, Speas, Stodghill, Tate, Thigpen, Vaughn, Wallace, White. (52)

The evidence tended to show that after volume 2 had been in possession of the secretary of state for about two months the clerk of the house of representatives obtained possession of it; and that, prior to the time when the volume was taken from the office of the secretary of state, it did not contain the marginal entry set out above.

At the request of plaintiff the court gave the following instructions:

"(1) Under the evidence in this case the plaintiff is entitled to recover the money paid by him as the license tax under subdivision 14 of § 16 of the revenue law, approved February 23, 1899,—the same being \$100 and commissions of \$10,—claimed by the tax commissioner for selling goods manufactured by, or the product of, a brewery of another state.

"(2) That under the evidence of this case the plaintiff was not required to take out any license under subdivision 14 of § 16 of the revenue law, approved February 23, 1899, for selling the beer bought by him from the F. W. Cook Brewing Company."

The court also refused the following:

"(1) If the jury believe the evidence, they must find for the plaintiff for the amount sued for in the ninth count of the complaint. 51 L. R. A.

"(2) If the jury believe the evidence, they must find for the plaintiff for the amount sued for in the tenth count of the complaint.

"(3) If the jury believe the evidence, they must find for the plaintiff for the amount sued for in the eleventh count of the complaint.

"(4) If the jury believe the evidence, they must find for the plaintiff for the amount sued for in the twelfth count of the complaint.

"(5) The court charges the jury that the books introduced in evidence by the plaintiff marked 'Journal of the House of Representatives, Volume 1 and Volume 2,' are the true journal of the house of representatives, of the regular session of the general assembly of 1898-99.

"(6) The court charges the jury that the journal of the house of representatives, of the regular session of the general assembly of 1898-99, does not show that the report of the conference committee on the revenue bill, known as H. B. 935, was adopted by the house of representatives by a vote taken by yeas and nays and recorded on the journal."

At the request of defendant the court gave the following instructions:

"(1) The court charges the jury that under the evidence in this case the plaintiff is not entitled to recover the money paid by him as a license tax under an act entitled 'An Act to Amend the Revenue Laws of the State of Alabama,' approved February 23, 1899,—the same being \$25, and commissions of \$2.50, claimed by the tax commissioner and paid to the defendant, for selling in the city of Montgomery, Alabama, spirituous, vinous, or malt liquors.

"(2) The court charges the jury that under the evidence in this case plaintiff was required to take out a license as a retail dealer in spirituous, vinous, or malt liquors, under the provisions of an act entitled 'An Act to Amend the Revenue Laws of the State of Alabama,' approved February 23, 1899."

The trial resulted in a verdict and judgment in plaintiff's favor for \$110.

Further facts appear in the opinion.

Messrs. Lomax, Crum, & Weil, Thomas G. Jones and Charles P. Jones, for plaintiff:

The bundle of papers is nothing but the private memorandum of the clerk, from which the Journal of the House—the two books—is made.

Cushing, Law & Practice of Legislative Assemblies, § 423.

When the framers of our several Constitutions provided for the process of lawmaking and the keeping of journals and the entering or recording of votes and proceedings on the journal, they had reference to the history and immemorial custom of parliamentary law.

State ex rel. Atty. Gen. v. Buckley, 54 Ala. 613; *Jones v. Hutchinson*, 43 Ala. 721; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 24 So. 516; *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776.

This court, by the language employed in *State ex rel. Brickman v. Wilson*, 123 Ala. 299, 45 L. R. A. 772, 26 So. 482, recognized these books, then in the custody of the secretary of state, as the Journal of the House of Representatives of the Session of 1898-9.

The journal of the house shows beyond controversy that no report of the conference committee on the disagreement of the two houses on the bill to amend the revenue laws of the state of Alabama was adopted by the house of representatives, by a vote of a majority thereof, taken by yeas and nays, and no record of the names of those voting for and against said conference report recorded thereon; while it does show that after the passage of the bill by the house of representatives it was amended by the senate, that the house refused to concur in the amendments, and that a committee of conference was asked for and appointed. It follows, of necessity, that the act to amend the laws of the state of Alabama, approved February 23d, 1899, is unconstitutional and void.

State ex rel. Atty. Gen. v. Buckley, 54 Ala. 613; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 24 So. 516; *Walker v. Griffith*, 60 Ala. 361.

Messrs. Pillans, Hanaw, & Pillans, also for plaintiff:

There is under the law, and can be, but one journal of the house; this is a well-known and recognized thing; it is a bound volume or volumes containing the record of the daily transactions of the house, and filed in the archives of the state with the secretary of state. This journal is amendable, if it contains error, by no power inferior to the legislature itself, whose solemn journal and record it is.

Cushing, *Law & Practice of Legislative Assemblies*, §§ 327, 329, 416, 423, 425, 492; Barclay, *Digest of Parliamentary Practice*, 1872; Wilson, *Digest of Parliamentary Law*; May, *Law & Usage of Parliamentary Practice*; *Detroit v. Detroit Bd. of Assessors*, 91 Mich. 86, 16 L. R. A. 59, 51 N. W. 787; *White v. Hinton*, 3 Wyo. 753, 17 L. R. A. 66, 30 Pac. 953; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. Rep. 385; *Turley v. Logan County*, 17 Ill. 151; *Stanly County Comrs. v. Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539; *State ex rel. Heron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *McCulloch v. State*, 11 Ind. 424.

Messrs. W. J. Wood and Gunter & Gunter for defendant.

Haralson, J., delivered the opinion of the court:

The only question we need consider on this appeal, according to the view we take of it, is the constitutionality of the "Act to Amend the Revenue Laws of Alabama," approved February 23, 1899 (Acts 1898-99, p. 164). The other question so elaborately discussed by counsel, of the constitutionality of the 14th subdivision of § 16 of said act, must share the fate of the general enactment, of 51 L. R. A.

which it is a part, if that be held to be unconstitutional.

The question raised by the plaintiff on this appeal is that said act of the 23d of February, 1899, was never constitutionally enacted, and is therefore void, because, as alleged, the journal of the house of representatives shows that after the passage of the bill by the house, it was amended by the senate, and the senate amendments were not concurred in by the house, by a majority of its members taken by yeas and nays, and the names of those voting for and against said amendments were not recorded in the journal, as required by § 22, art. 4, of the Constitution, and that a conference committee of the two houses was appointed, and the journal of the house does not show that a report of that committee was made and adopted by the house by a majority of its members voting for and against its adoption taken and recorded as required by said section of the Constitution. Just here the contention arises between the parties as to what constitutes the journal of the house,—the defendant insisting that a certain bundle of papers, purporting to be the fiftieth day's proceedings of the house, which show that on that day said revenue bill was, as contended, constitutionally passed, constitutes the journal of that day's proceedings; and the plaintiff, that two bound volumes in the secretary of state's office, in which said day's proceedings purport to be recorded, but in which said conference report and its adoption by the house as required by the Constitution does not appear, constitute the journal. The former shows that the alleged defect in the legislative proceedings, preventing the bill from becoming a law, does not exist, and the latter, as has been stated, that it does. The fate of the bill, therefore, must depend upon the determination of the question, Which of these two—the bundle of papers, or the two volumes—is the journal of the house? The said papers and the volumes have been certified to this court for inspection, together with all the evidence in the cause, bearing on the question, and are before us in aid of our judicial knowledge as to what constitutes the journal of the house, the same evidence having been introduced in the court below in aid of the judicial knowledge of that court.

The said bundle of papers consists of about 106 pages of paper fastened together at the upper left-hand corner with a paper brad. The first page is headed,—“Fiftieth day's proceedings, Thursday, Feb'y 23rd, 1899.” The pages are not numbered, and the writing on the different sheets—some of which are shorter than others, and of different quality of paper—is in ink and pencil, black and colored, and in different handwritings, and much of the contents of the sheets is also in typewriting. It contains many original senate, and two original executive, messages, with a statement in pen or ink of the action of the house thereon; also appear rubber stamp memoranda of different transactions of that day's proceedings, and printed slips

of the names of the members of the house, alphabetically arranged, showing the yeas and nays on different propositions, by pasting on other sheets a list of the names of members after the words "yea" and "nay," and showing the vote by striking out with pen or pencil the names on these two lists, according to the vote of yeas or nays of the members, respectively; also original reports and copies of reports of committees pasted on legal cap paper, concluding with the name of the speaker, attested by the clerk.

Among these papers is a sheet of legal cap paper on which are written, in pencil, the same words and figures that appear on the margin of the page 839 of the second volume of the two bound books certified to us, and claimed by the plaintiff to be the true journal of the house. These papers do not purport to contain the proceedings of any day, except the last, or fiftieth day of the session.

The books referred to were two large, well and substantially bound record books, from 2½ to 3½ inches thick, one containing 600 and the other 853 numbered pages of written matter, the volumes being labeled on their backs, "Journal of House of Representatives, Session 1898-9, volume 1 and 2." On the first page of the first volume are written the words, "Journal of the House of Representatives, Session 1898-9. Montgomery, Ala., Nov. 15th, 1898;" the calling of the house to order, the swearing of the members, and the usual and customary proceedings of the organization of the house; each page contains a part of the proceedings of the house through each day, and the proceedings of the twenty-fifth day of the session, as appears on the last page of volume 1, are continued on the first page of volume 2. The proceedings of each day from the first to the fiftieth day each, inclusive, follow in regular chronological order, and at the end of the fiftieth day's proceedings in said second volume is the statement that the session adjourned *sine die*, and it is signed "Charles E. Waller, Speaker of the House of Representatives," and is attested by Massey Wilson, clerk. It is shown that on page 839 of the second of these volumes the interpolation complained of—which will be set out in full in the report of the cause, and may also be found in the report of the case of *State ex rel. Brickman v. Wilson*, 123 Ala. 299, 45 L. R. A. 772, 26 So. 485—was made on the margin of said page, after the 2d of May, 1899, about two months after the final adjournment of the general assembly, and after said volumes had been placed or filed by the clerk in the office of the secretary of state.

Charles E. Waller, the speaker, testified for plaintiff, that he had examined the second volume of the book above referred to; that his signature as speaker appeared at the end of the writing in this volume; that the two volumes referred to are the journal of the house of representatives for the session of 1898-99, and that the proceedings transcribed into said books were signed by him a day or two after the adjournment of the

session; that he signed the books as the original journal of the house of representatives; that the clerk of the house kept on a board reports of committees and other papers, and from that (the reports and papers on this board) the journal was made, and that journal was just like a clerk would write what had taken place; that the clerk kept a file already referred to, on which were the reports of committees and other papers, and he signed that also, to go to the printer; that the journal of the house is a correct history of what takes place in the house, and "has no business with the original reports on it, and does not contain the original papers." Said Waller also testified that the last day's proceedings of the house were never read therein; that he had no knowledge that these books were ever in the house; that the clerk never kept but one journal, and no other journal was ever presented to the house as its journal in any shape or form except the bound volumes, and that the papers referred to, which the clerk kept on a frame, were the data from which he had to write up the journal.

Massey Wilson, the clerk, testified for defendant, that he kept a journal of the proceedings of the house on the fiftieth day; that the first thing he did with this—the fiftieth day's proceedings (in manuscript sheets)—was to turn it over to a clerk to be copied into volume 2 of the book testified about by others in the cause, and that he then sent it to the state printer at Jacksonville, Florida. This is the batch of papers above described, and claimed by defendant to be the journal of the house. Witness explained these papers by stating—to use his own language—that "as a step was taken in the house a note was made of it, and after the house adjourned I got it out and would write it up, and in doing that, if I could get some of the notes and use them by pasting them on the back of sheets, I would do it, and sometimes I would use a little rubber stamp when I could. These papers contain substantially or actually the same thing as appears on the marginal entry on page 839 of the book. These papers were made out first, and the book copied from it; the papers were signed a very few days after we made them up. . . . I put the clerk to making up the book (copying it) about ten or twelve days after the legislature first convened; the house had ten or twelve days' proceedings when I first begun copying that book. This whole book [referring to the book which witnesses for plaintiff testified about] is a transcription of the original papers,—the papers that I made up daily, and which papers I sent to the state printer. I have seen these books [referring to the books introduced in evidence by plaintiff]; that is my signature at the end of that book [volume 2]. After it was signed, I left the books [volumes 1 and 2] in the office of the secretary of state. . . . I never deposited with the secretary of state the journal which I kept. The balance of this [referring to the papers kept by this witness, and intro-

duced in evidence by defendant] is now in the hands of the printer in Jacksonville, Florida . . . I wrote the printer, after this suit began, to send me by express these papers [referring to the papers which this witness testified he kept as the journal of the fiftieth day's proceedings]; the printer wrote in reply that he had forwarded them, and when I got here this morning I received the papers from the secretary of state, but they reached the secretary of state last night. . . . I never gave the printer in Florida, or any one else, any directions to send these papers or any part of them back to me until a week ago, but I directed the printer to preserve them, every sheet of them. It [the batch of papers] is the journal I sent the public printer. I get pay for copying. I was paid \$400. I know how the marginal entry on page 839 of the second volume of the books introduced by the plaintiff came there; I directed it to be made shortly after the convening of the last extra session of the legislature."

Section 13, art. 4, of the present Constitution contains the provision that "each house [of the general assembly] shall keep a journal of its proceedings, and cause the same to be published immediately after its adjournment, excepting such parts as, in its judgment, may require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one tenth of the members present, be entered on the journals. Any member of either house shall have liberty to dissent from, or protest against, any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered in the journals." The words "entered in the journals," where they occur above, we have italicized for more convenient reference, as will be the case further on in this opinion, where we italicize in any quotation the words of the Constitution or statutes of the state. In like manner, § 21, of the same article, requires the names of the members voting on the final passage of a bill to "*be entered on the journals*;" and § 22, requiring that no amendments to bills by one house shall be concurred in by the other, except by a vote of the majority thereof, taken by yeas and nays, "and the names of those voting for and against, *recorded upon the journals*." Section 27 requires that the fact of the signing of bills and joint resolutions passed by the general assembly "*shall be entered on the journal*." Section 13, art. 5, in respect to the veto of the governor, requires that his objections to the measure vetoed shall be returned to that house in which it originated, "*who shall enter the objections at large upon the journals*;" and again, in the same section, in requiring, in case the bill is passed over the veto, that "the names of the members voting for or against the bill *shall be entered upon the journals of each house respectively*."

The statutory provisions in reference to the journals of the two houses are as follows:

Section 2221 of the Code: "At the close of each session, the secretary of the senate, and the clerk of the house of representatives, and secretary of state must select all the papers belonging to the general assembly, except such as relate to unfinished business, and deposit them in the office of the secretary of state."

Section 2222. "The engrossed copies of all laws and joint resolutions passed by the general assembly must be preserved by the chairman of the enrolling committee and deposited in the office of the secretary of state."

Section 2223. "The secretary of the senate and the clerk of the house of representatives must, within ten days after the adjournment of each session, assort all the papers and documents of their respective houses, relating to the unfinished business of the session and arrange them in files as follows:"—(designating the class of papers).

Section 2240. "Within forty days after the adjournment of any session of the general assembly, the secretary of the senate and the clerk of the house of representatives must file and arrange the papers of their respective houses in the office of the secretary of state, and copy and deliver to the public printer the journals of their respective houses, with proper indexes thereto, and for such services, when performed, they shall receive, respectively, the sum of four hundred dollars."

Section 1074. It is the duty of the secretary of state (among other things prescribed) "to keep the state seal, the original statutes and public records of the state, the records and papers belonging to the general assembly, keeping the papers of each house separate."

The foregoing are our constitutional and statutory provisions touching the question of the kind of journal the houses of the legislature are required to keep.

We have decisions bearing on the question, to which reference must be made. It seems, no doubt ever before arose in the legislative or professional mind as to what constitutes the journal. That one was required by law to be kept, and what it should contain, all agree, and when, in judicial utterances, the journal has been referred to, it was done, as if everywhere and generally it was known what was meant by the term "journal." Whatever else it may mean, it certainly does refer to the record which the legislature keeps and is required to keep of its proceedings, and like all other records required by law to be kept, it imports absolute verity. *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 613. It is one, and not two or duplicate, journals or records that must be kept; and it cannot be that both the batch of papers and the two bound volumes,—placed before us from the secretary of state's office,—together, constitute the journal of the house. The one or the other is the journal required by law to be kept. *State ex rel. Brickman v. Wilson*, 123 Ala. 209, 45 L. R. A. 772, 26 So. 482. In that case, involving in another form the matter here complained of in respect to the alleged interpolation into

the journal of unauthorized matter, we said: "It cannot be doubted, we think, and it is indeed quite obvious, that the clerk's official connection with the original journal—all his duties in respect of it except the duty of copying it for the printer—ceases upon his delivering it to the secretary of state for safe-keeping after it has been signed by the speaker and himself. From and after that time, he has no custody of it, no control over it, no right to its possession except for the specific purpose above referred to, no power to alter it nor to prevent others altering it, and is under no duty to keep it safely or to preserve it from mutilation or interpolation." This extract from that case is indulged to show that the journal, whatever it may be, is the one record required by law to be filed with the secretary of state as the journal, as well as to show that it cannot thereafter be amended or added to by the clerk. All our decisions refer to this memorial in the secretary of state's office, as the record to which courts will look in ascertaining at last whether a statute has legal existence. In *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28, it was held that the journals of the two houses of the general assembly are public records, of which the courts will take judicial notice, and if it appears from them that an act was not passed according to the forms of the Constitution, it will be held not to have the force of law. In that case it appears from the opinion that the court examined the journal of the senate at pages 458, 524, and house journal at page 560, in aid of their judicial knowledge. In that examination of the journals they gave the place in the senate journal, containing the matter with which they had to do, as at page 458, showing that the journal was in the form of a record—with numbered pages. See also *Moog v. Randolph*, 77 Ala. 599; *Jones v. Hutchinson*, 43 Ala. 721. In *Wilson v. Dunoon*, 114 Ala. 668, 21 So. 1017, it appears, the court examined the legislative record on file in the office of the secretary of state, called the "journal," to correct an error in the published acts. See also *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 24 So. 516. In *State ex rel. Brickman v. Wilson*, 123 Ala. 299, 45 L. R. A. 772, 26 So. 482, where the integrity of the journal was assailed and sought to be corrected, in reference to this same interpolation upon its margin, the alleged change was referred to as in volume 2, p. 839, and this book was also referred to, throughout, as the journal, though it must be added, the question of what constituted the journal was not raised in that case.

From an inspection of the legislative records in the office of the secretary of state, in aid of our judicial knowledge, we ascertain that in each of the cases above referred to, when the pages of the journals were given by the court, the number of these pages, with an error in one instance which may be presumed to be typographical, are correctly stated as appear in well-bound volumes similar to the ones before us for inspection in this case.

51 L. R. A.

Mr. Cushing in his *Law & Practice of Legislative Assemblies* (§ 415) says: "The official record of what is 'done and past' in a legislative assembly is called the journal. It is so called because the proceedings are entered therein, in chronological order as they occur from day to day, the business of each day forming the matter of a complete record by itself; hence, the record is frequently spoken of in the plural as the journals." § 416. In the two houses of Parliament the clerks take minutes of all the proceedings, orders, and judgments of their respective houses as they occur, and make short entries of them in their minute-books. . . . From these, and from the papers on file, it is the duty of the clerks, afterwards, to prepare the journals, in which the entries are made at greater length, and with the forms more distinctly pointed out. . . . All persons may have access to the journals of the two houses, in the same manner as to the records of the courts." The same author furthermore says (§ 422): "A record or minute of the proceedings of a deliberative assembly of any kind is so essential to the convenient and efficient exercise of its functions that it must be considered as a necessary incident to the existence of every such body. But the importance of having and preserving such a record of the votes and acts of a legislative body, in a form accessible to the public, has been considered so great in this country as to be required by express constitutional provisions." Still again he says (§ 327): "The clerk and his assistant attend at the table and take notes of the orders and proceedings; from which the votes, as they are called, are made up and printed each day, agreeably to the order of the house 'under the direction of the speaker.' At the end of the session it is the business of the clerk to see that the journal of the session is properly prepared, and fairly transcribed, from the minute books, the printed votes and the original papers that have been laid before the house." "The phrase 'to keep a journal' seems borrowed from the technical language, as the keeping of a journal corresponds to the practice of mercantile bookkeeping." § 423.

In the case of *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829, where the question was as to whether an act had been constitutionally adopted, the court, touching the question as to whether resort might be had to parol evidence to impeach the validity of its adoption, said: "Counsel have exhibited unusual industry in looking up the various cases upon this question; and, out of a multitude of citations, not one is found in which any court has assumed to go beyond the proceedings of the legislature, as recorded in the journals required to be kept in each of its branches, on the question whether a law had been adopted. And if reasons for this limitation upon judicial inquiry in such matters have not generally been stated, it doubtless arises from the fact that they are apparent. Imperative reasons of public policy require that the authenticity of laws should rest upon public

memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals."

As to the journals of the general assembly required by the laws of this state to be kept, it may be said that the Constitution and statutes as plainly imply as if they had contained the express language, that these journals shall be in permanent, substantial book form, written or printed in ink. Thereby, their greater accessibility and convenience to their contents by all the public can be promoted, their keeping and handling rendered safer and easier, and their permanent preservation the better secured. All these considerations enter into the matter of keeping the journals, as required by law. Common and judicial knowledge alike assure us that such has been the manner of making up and keeping these journals during the history of the state. Such journals as these are found and preserved in the archives of the state for the examination of courts, lawyers and all interested parties. No other form of preserving the original legislative history of the state would subserve the constitutional and legislative requirements. Words are to be construed in their popular sense,—the plain sense in which the people generally understand them,—unless it plainly appear from the writing in which they appear that they were intended to be employed in some other sense. *Harrison v. State*, 102 Ala. 170, 15 So. 563. That the word "journal" in popular use, and according to popular understanding, means such books as are kept for a journal of legislative proceedings in the secretary of state's office, and not to a file of memorandum sheets from which it was made up, is too clear for dispute. This is in keeping, also, as we have seen, with similar requirements in respect to the journals of legislative bodies elsewhere, with no more definite directions as to their keeping than ours, and is consonant with authority, public policy, and common sense. What claims, let it be asked, has the batch of papers before us to be declared the journal of the house? It is as unsubstantial, as wanting in durability, convenience, and qualities as a journal of legislative proceedings, as can well be devised. As has been said, its pages are not numbered, and it is difficult of handling and examination, is not in proper documentary shape even for filing, and, as the evidence clearly establishes, was never gotten up or considered as a final journal, such as the law directs to be kept. If so, why did the clerk send it off to the public printer at Jacksonville, Florida, as a transcript of the journal, required by law to be made, from which to print the volume of legislative proceedings, called the printed journal? Section 2240 of the Code required him within forty days after the adjournment of the session to copy and deliver to the public printer a copy of the journal of the house, and for such serv-

ice he was entitled to receive \$400. The clerk swore he sent this batch of papers and similar batches of the other days' proceedings of the session to the printer in Florida, without any instructions to return them, and not until the purposes of this suit required it was this particular batch ordered back by him. The other batches, as he shows, are still in Florida, and he never deposited these as the journal with the secretary of state. He says, also, he received for these papers the compensation allowed by law for a copy of the journal for the printer. If this was the original, what business had the printer in Florida with it, and if not a mere copy of the original, how could the clerk treat it as a copy and get pay for making it as such under the statute? It clearly appears from his own evidence, as well as from the speaker's, that he got it up to answer the purposes of a copy, and to save himself the labor of making a transcript of the original journal as contained in these two volumes before us. He sent it off as a copy, and got pay for it as such, and, so far as appears, without intending reflection on the clerk, it was never thought of as the legislative journal until the necessities of this suit suggested it.

It may be asked again, How can such parts of the legislative proceedings as are required to be "entered in the journals," to be "entered at large on the journals," to be "recorded upon the journals," find a place in such a batch of papers as this? To record means to recite, repeat, and in the sense used in the Constitution, to transcribe something upon the journal. To record and to enter upon are used synonymously in the Constitution, and it is past the reasonable comprehension of the judicial mind to understand how a mass of papers tacked together as these are, and for the purposes intended, can furnish a convenient, permanent, and safe receptacle for entering and recording the legislative proceedings required under our law. The tacking together of such papers is not the entry or recording upon the journals spoken of in the Constitution.

Aided and instructed by the evidence before us, we declare as of our judicial knowledge that these books before us constitute the true and legal journal of the house of representatives for the session of 1898-99, and said batch of papers cannot in any sense be considered as such. The journals show that said conference report on the senate amendments to the revenue bill was never concurred in by the house in the manner required by the Constitution to make it a legal enactment, and for that reason the entire act must be held to be void and of no effect.

The writing on the margin of this journal at page 839 of what purports to be the conference report of the two houses and its adoption by the house, placed there under the instructions of the clerk, however honestly done and with the best of motives, which we do not question, was an unlawful interpolation of the journal, and is without any legal effect to give vitality to the enactment of said revenue bill. *State ex rel.*

Brickman v. Wilson, 123 Ala. 299, 45 L. R. A. 772, 26 So. 482.

It follows, the court erred in refusing to give the first six charges requested by plaintiff, and in giving the charges numbered 1 and 2 requested by defendant; and that it did not err in giving the charges numbered 1 and 2 requested by plaintiff.

The judgment in case 154a will be affirmed on the cross-appeal of J. B. Gaston, as judge, etc., and in case 154, the original appeal, the judgment of the court below will be reversed and the cause remanded.

William BROWN, Appt.,
v.
JOHNSON BROTHERS.

(.....Ala.....)

The addition by the payee, after delivery of a note to him, of the name of another person as comaker, is such an alteration as relieves the maker.

(May 17, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Hale County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a promissory note. *Reversed*.

The facts are stated in the opinion.

Mr. Thomas E. Knight, for appellant: In no sense is either prejudice to the original maker, or fraud, to be considered in the matter of determining whether any given alteration in a contract avoids that contract as to parties not consenting to such alteration.

Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Montgomery v. Cross-thwait*, 90 Ala. 553, 12 L. R. A. 140, 8 So. 498.

The promisor has the right "to stand upon the very terms of his contract; and if a variation is made which extends its liability to another person, or to any other subject, or for any other period of time, than such as may be included in its words, and he does not assent to it, such variation is fatal to his obligation, whether he is injured thereby or not."

Anderson v. Bellenger, 87 Ala. 334, 4 L. R. A. 680, 6 So. 82; *Miller v. Stewart*, 9 Wheat. 681, 6 L. ed. 190; *Taylor v. Johnson*, 17 Ga. 521; *Gardner v. Walsh*, 5 El. & Bl. 89; *Bowers v. Briggs*, 20 Ind. 139; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Dickerman v. Miner*, 43 Iowa, 508; *Montgomery v. Hughes*, 65 Ala. 204.

Avoidance will result "if the alteration is one which makes the instrument to speak a language different in legal effect from that it originally spoke."

NOTE.—On the question of materiality in the alteration of a note, see other cases in this series as follows: *Wilson v. Hayes* (Minn.) 4 L. R. A. 196, and note; *Palmer v. Poor* (Ind.) 6 L. R. A. 469, and note; *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743, and note; *Montgomery v. Crossthwait* (Ala.) 12 L. R. A. 51 L. R. A.

Mahaiwe Bank v. Douglass, 31 Conn. 170; *Tiedeman*, Com. Paper, § 394; *Montgomery v. Crossthwait*, 90 Ala. 570, 12 L. R. A. 140, 8 So. 498; *Reeves v. Pierson*, 23 Hun, 185; *Morrill v. Otis*, 12 N. H. 466; 3 Randolph, Com. Paper, § 1743.

That the altered contract may involve less liability to the defendant is of no moment.

Montgomery v. Crossthwait, 90 Ala. 553, 12 L. R. A. 140, 8 So. 498.

Mr. E. M. Douglas, for appellees:

That the payee of a promissory note procures others to unite in the making of a note, without any fraudulent purpose, is not a material alteration.

Montgomery R. Co. v. Hurst, 9 Ala. 513.

The addition of a name under the signature of the defendant did not in the slightest degree affect, or in any manner increase or vary, the liability of the defendant. His promise continued to be several, and was neither increased nor diminished; and that is a true test of a material alteration.

Rudolph v. Brewer, 96 Ala. 189, 11 So. 314.

Haralson, J., delivered the opinion of the court:

The plea of defendant on which the case was tried, and a demurrer to which was sustained, presents the only question for review. The plea of *non est factum* set up that William Brown, the defendant, gave to Johnson Bros., the plaintiffs, the note sued on against him alone, for \$99.99, and after its execution and delivery to the plaintiffs, without the consent or authority of defendant, they caused or procured the note to be signed by one Bob Jackson, as a comaker with defendant of said instrument; that at the time defendant executed and delivered the note sued on, he was the sole maker of the same, and that the addition of the name of Bob Jackson as a comaker with the defendant thereof, was without the knowledge, consent, or authority of defendant.

The question presented is one of conflicting opinion in the adjudications of courts. In *Toomer v. Rutland*, 57 Ala. 385, 29 Am. Rep. 722, this court stated the reason of the rule against alterations in notes to be the necessity of guarding against and punishing all tampering with the instrument the parties have entered into, and made the sole memorial and exposition of their contract. The court further said: "The motive of the creditor in making the alteration may not be fraudulent—as in the present case, *mala fides* may not be imputable to him; yet as the alteration changes the legal identity and effect of the instrument, the debtor may well say it is not the contract into which he entered, and he is not therefore bound by it, and that the identity and legal effect of the contract into which he did enter have been

140; *Walton Flow Co. v. Campbell* (Neb.) 16 L. R. A. 468; *Simmons v. Atkinson & L. Co.* (Miss.) 23 L. R. A. 599; *Erickson v. First Nat. Bank* (Neb.) 28 L. R. A. 577; *Citizens' Nat. Bank v. Williams* (Pa.) 35 L. R. A. 464; and *Newman v. King* (Ohio) 35 L. R. A. 471.

voluntarily destroyed by the creditor ceasing to exist. *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725. The principle does not rest on the hypothesis that fraud is an indispensable element of the alteration,—it proceeds as well on the necessity of preventing, as punishing, of fraud. *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272.”

At an early day in this court while holding that if an alteration be material, and made by the party claiming under it, he cannot enforce it, it was also held that the addition of two names as makers of a several promissory note, placed there without the consent of the maker, would not avoid it, unless placed there for a fraudulent purpose. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

This doctrine, however, seems to have been departed from in later decisions of this court. In *Anderson v. Bellenger*, 87 Ala. 334, 4 L. R. A. 680, 6 So. 82, while holding that alterations in the writing by a third person, who was not a party to it, cannot change its legal operation and effect, and do not discharge the surety on the original paper, it was further held that a surety (as in that case) has the right to stand upon the very terms of his contract, and if alterations change the real meaning of the undertaking, whether presumptively to the detriment or advantage of the surety, and whether the effect is to add to or take from the liability, by the introduction of different parties or otherwise, the security is discharged,—citing authorities to the point.

In the later case of *Montgomery v. Cross-thwait*, 90 Ala. 553, 12 L. R. A. 140, 8 So. 498, in discussing such alterations, the court said: “The law proceeds on the idea that the identity of the contract has been destroyed,—that the contract made is not the contract before the court,—that the party did not make the contract which is before the court; and so adjudging, it cannot go further, and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him.” After alluding to the fact that there were expressions in the books to the contrary, the court added: “The sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in *Anderson v. Bellenger*, 87 Ala. 334, 4 L. R. A. 680, 6 So. 82,

and there applied to a surety: that any material alteration, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all the parties not consenting. It is enough that if the instrument were genuine it would operate differently from the original, or, as otherwise expressed, avoidance will result ‘if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke.’ . . . That the alteration was a material one, we have no doubt. The considerations just adverted to demonstrate that it was; and the authorities are full to the point that the addition of other names as makers discharges parties already bound by the paper;” citing authorities. As to the materiality of such changes, and the rule for determining them, the court lay down the doctrine that “the court is to determine the materiality of the alteration by an inspection of the instrument. Evidence *aliunde* will be received to show the fact of alteration, and, in a proper case, also that the alteration was in accordance with the intention of the parties; but with these exceptions the court cannot, on the question of materiality, look beyond the paper. Considering the original by comparison with the altered paper, it is to determine whether the latter, assuming its genuineness, evidences a contract materially variant from the former. It can make no difference that the parties, the addition of whose names constitutes the alteration, are not in fact bound by the instrument. On the face of it they are bound. On its face, therefore, the contract is not identical with the original. The legal identity of the first is destroyed, and parties not consenting thereto are discharged.” *Haskell v. Champion*, 30 Mo. 136; *Ford v. First Nat. Bank*, (Tex. Civ. App.) 34 S. W. 684; 2 Am. & Eng. Enc. Law, 2d ed. p. 233, and authorities there cited.

Whatever may be the rule, as maintained in some of the courts, it must be held as firmly settled in this court that such an alteration as is set up in defendant's plea avoids the contract as to the original maker of the note. The demurrer to said plea should have been overruled.

The judgment of the Lower Court is reversed and the cause remanded.

Rehearing denied.

INDIANA SUPREME COURT.

William H. SMITH, Appt.,
v.
STATE of Indiana.
(.....Ind.....)

1. The prohibition of the possession

NOTE.—As to constitutionality of game laws, see earlier cases in this series of Terr. v. Evans (Idaho) 7 L. R. A. 288; American Exp. Co. v. People (Ill.) 9 L. R. A. 138; Com. v. Gilbert (Mass.) 22 L. R. A. 439; State v. Mrozinski (Minn.) 27 L. R. A. 76; State ex rel. Corcoran 51 L. R. A.

of quail during the closed season, made by Burns's Rev. Stat. 1894. § 2209 (Horner's Rev. Stat. § 2106), which declares it unlawful to shoot, destroy, or have in possession any quail between January 1 and November 10 of any year, is not in violation of U. S. Const. 14th Amend., forbidding

v. Chapel (Minn.) 32 L. R. A. 131; People v. O'Neil (Mich.) 33 L. R. A. 696; Haggerty v. St. Louis Ice Mfg. & Storage Co. (Mo.) 40 L. R. A. 151; State v. Schuman (Or.) 47 L. R. A. 158; and State v. Snowman (Me.) 50 L. R. A. 544.

the taking of property without due process of law, or of Ind. Const. art. 1, § 21, providing that no man's property shall be taken without just compensation, even as to persons in possession of quail in the closed season which were acquired during the open season, but is a legitimate exercise of the power of the legislature to protect game.

2. Possession of quail acquired during the open season is, nevertheless, unlawful if continued after the closed season begins, under Burns's Rev. Stat. 1894, § 2209 (Horner's Rev. Stat. § 2106), making it unlawful to have possession of quail between January 1 and November 10 of any year.

(Jordan, J., dissents.)

(December 18, 1900.)

APPEAL by defendant from a judgment of the Criminal Court for Marion County convicting him of violating the game laws by having quail in possession during the closed season. *Affirmed.*

The facts are stated in the opinion.

Messrs. McBride & Denny, for appellant:

The act, in terms, seeks to change the legal status of property at midnight of a certain day. This cannot be lawfully done. To say that one who has rightfully acquired property cannot thereafter, at his pleasure, enjoy the same, is to say that he may be deprived of his property "without due process of law."

Allen v. Young, 76 Ma. 80; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1; *Ex Davenport*, 102 Fed. Rep. 540.

Mr. William L. Taylor, Attorney General, and Alfred E. Dickey, for appellee:

The original property in game being in the state, the legislature has power, in granting the right to kill it and acquire property therein, to couple that permission with such restrictions as to the use of such property as it may deem for the public interest.

State v. Lewis, 134 Ind. 250, 20 L. R. A. 52, 33 N. E. 1024; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Laughton v. Steele*, 162 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Affirming* 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 878, 51 Hun. 643, 6 N. Y. Supp. 15; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805; *State v. Weller, Prosecutor, v. Snover*, 42 N. J. L. 341; *People v. Brooks*, 101 Mich. 98, 59 N. W. 444; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *State ex rel. Corcoran v. Chapel*, 64 Minn. 130, 32 L. R. A. 131, 66 N. W. 205; *Thomas v. Northern Pacific Exp. Co.* 73 Minn. 185, 75 N. W. 1120; *Haggerty v. St. Louis Ice Mfg. & Storage Co.* 143 Mo. 238, 40 L. R. A. 151, 44 S. W. 1114; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524; *State v. Farrell*, 23 Mo. App. 176; *Magner v. People*, 97 Ill. 320; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Stevens v. State*, 89 Md. 669, 43

Atl. 929; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Organ v. State*, 56 Ark. 267, 19 S. W. 840; *State v. Northern Pacific Exp. Co.* 58 Minn. 403, 59 N. W. 1100; *Com. v. Gilbert*, 160 Mass. 167, 22 L. R. A. 439, 35 N. E. 454; *Gentile v. State*, 29 Ind. 409; *People v. Doxtater*, 75 Hun. 472, 27 N. Y. Supp. 481; *State v. Roberts*, 59 N. H. 485.

A statute fixing penalties for the possession of game in the closed season is based upon the difficulty of proving when or where such game was killed, and the consequent opportunity for evasion of the law, and this reason applies with equal force, no matter when or how lawfully it was originally acquired.

State v. Rodman, 58 Minn. 393, 59 N. W. 1098; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *People v. Gerber*, 92 Hun. 554, 36 N. Y. Supp. 720; *State v. Judy*, 7 Mo. App. 524; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Javins v. United States*, 11 App. D. C. 345; *Magner v. People*, 97 Ill. 320; *Roth v. State*, 51 Ohio St. 212, 37 N. E. 259; *State v. Randolph*, 1 Mo. App. 15; *Whitehead v. Smithers*, L. R. 2 C. P. Div. 553; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1; *Geer v. Connecticut*, 161 U. S. 528, 40 L. ed. 797, 16 Sup. Ct. Rep. 600; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37.

Messrs. Merrill Moores and C. C. Hadley also for appellee.

Hadley, J., delivered the opinion of the court:

Appellant was convicted before a justice of the peace under § 2209, Burns's Rev. Stat. 1894 (Horner's Rev. Stat. § 2106), which reads as follows: "Whoever shoots or destroys . . . or has in his possession any quails . . . during the period from the first day of January of any year to the tenth day of November of the same year, . . . shall be fined," etc., upon an affidavit charging him with having in his possession on the 5th day of February, 1900, one quail. Upon appeal to the criminal court, the appellant, having pleaded not guilty, was again convicted and fined upon the following evidence: "Said defendant admitted in open court that on the 5th day of February, 1900, he did have in his possession, at Marion county, in the state of Indiana, one quail, as charged in the affidavit filed herein, but that said quail had come to his possession on the 30th day of December, 1899, at which time he received it, and placed it in his refrigerator, where it had remained from said date continuously until said 5th day of February, 1900. And this was all the evidence given in the cause."

Under the assignment of errors the appellant affirms two propositions: (1) The unconstitutionality of the statute, and (2) the guiltlessness of the act proved within the true meaning of the statute. The appellant contends that, if the statute is to receive a literal construction, and make guilty one who rightfully receives possession of

quail in the permissive season, and becomes vested with the right of property in a wholesome article of food, to compel a disposition of the property by a fixed date, without reference to the use it can be put to, is practical confiscation, and violative of the 14th Amendment of the Federal Constitution, which provides that "no state shall make or enforce any law which shall . . . deprive any person of . . . property without due process of law," and of § 21, art. 1, of the state Constitution, which provides that "no man's property shall be taken by law without just compensation." It is important to note that American quails are game birds, and as such belong to the state in its sovereign capacity as the trustee of the citizens in common. Such game is a valuable and wholesome article of food, diffused and accessible to all, and its preservation a matter of general interest to the people. The primary object of government is mutual safety and benefit; and to promote these ends it has long been held that the state possesses such police power as enables it to employ drastic measures to protect the public health, morals, safety, and such other concerns as affect the happiness and general welfare of the citizens. To deny such power is to deprive the government of one of its essential forces. Nor is it apparent how there can exist any real ground of complaint. The individual has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state. The power to grant embodies the power to impose conditions; and in granting the privilege of reducing quail to possession with proprietary right it is competent for the state to prescribe such conditions of enjoyment as are deemed reasonable and necessary to protect the common interest. The citizen, when he accepts the state's grant, accepts it impressed with all the restrictions and limitations laid upon it; and when he acquires property under such license he does so with full notice of his qualified right; and so, if he loses that which he has taken, or held possession of, upon forbidden terms, he has lost nothing that belonged to him, and there has been no taking of property without due process of law, or without just compensation. Quails not only supply a delicate and nutritious food highly valued by the people, but from their wild and agile nature offer alluring sport to hunters, which, if unrestrained, would probably lead to their ultimate extinction. Hence any measure which, in the judgment of the legislature, is reasonably calculated to avoid such result, and preserve these food birds for future benefit, even to the extent of restricting the use of or right of possession in the birds after they have been taken or killed, must be held to be a legitimate exercise of legislative power. *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Haggerty v. St. Louis Ice Mfg. & Storage Co.* 143 Mo. 238, 40 L. R. A. 151, 44 S. W. 1114; *State v. Judy*, 7 Mo. 51 L. R. A.

App. 524. Other decisions which uphold the validity of such legislation, but which turn upon the defense that the game was lawfully acquired outside the state, are as follows: *Magner v. People*, 97 Ill. 320; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600. Decisions of the state sustaining legislation for the protection and preservation of fish rest upon the same principle. See *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52, 33 N. E. 1024.

Upon the second point it is contended that, if the law is constitutional, the words "whoever has in his possession any quails" should not be construed to embrace quails rightfully acquired in the open season, and continuously kept by the owner in his possession to a period within the closed season. We must assume that the lawmakers rightfully apprehended the meaning of the words employed by them in stating their intention, and, in the absence of some fact relating to the subject-matter legislated upon, or other provisions of the act, inconsistent with the ordinary meaning of the language used, we must conclusively presume the meaning to be that which is usually conveyed by the words. To arbitrarily give an unusual meaning to the words would be to change the law, and this we have no power to do. It has long been the policy of the state to preserve its fish and food birds from destruction or immoderate diminution. In 1857 there was passed "An Act to Provide for the Protection of Wild Game, Defining the Time in Which the Same May be Taken and Killed." Acts 1857, p. 39. In this first act it was provided by § 3 that it should be unlawful to shoot, trap, or net quails and pheasants between February 1st and November 1st of each year, and by § 6 it was made unlawful to have in possession any quails or pheasants killed or taken within the prohibited season. It will be perceived that at the beginning of legislation upon this subject the legislature limited the wrongful possession to birds taken or killed within the forbidden season. This act was amended by contracting the permissive season in 1861, and again in 1863. In 1867, the first act, "to Provide for the Protection of Fish, Defining the Time in Which They may be Trapped, Netted, or Seined," was enacted, making a violation of the provisions of the act a misdemeanor. Acts 1867, p. 128. At the same session another act was passed, entitled "An Act to Provide for the Protection of Wild Game." Acts 1867, p. 128. By this act it was made unlawful to shoot or trap quails or pheasants between February 1st and October 1st, and to net quails at any time, and unlawful to transport quails killed or taken in violation of the act. In 1871, another act "to Provide for the Protection of Fish" was passed (Acts 1871, p. 24); and in 1877 still another act "to Pro-

vide for the Protection of Wild Game," by which act the netting and trapping of quails is absolutely prohibited at all times (Acts 1877, p. 69). Again, in 1879, another step was taken by the legislature "to provide for the protection of wild game," § 9 of which act reads as follows: "It shall be unlawful to sell, keep, or expose for sale, or have possession of, any quails or pheasants between the fifth day of January and the first day of November in any year. . . . Any person violating the provisions of this section shall be fined one dollar for each and every quail . . . so unlawfully kept, sold, exposed to sale, or possessed." Acts 1879, p. 242. Other laws relating to the same subject were passed in 1881. See Acts 1881 (Rev. Stat. 1881, §§ 2106, 2112-2115, inclusive), prohibiting the destruction of quails, the selling or possession of quails in a particular season, the selling or possession of quails at all times that have not been killed by shooting, the transportation of quails within the state killed or taken in violation of law, and their transportation out of the state at any time. In 1893 the method of protection was again emphasized by the act set out at the beginning of this opinion, and under which this prosecution is had. In 1897 there was passed "An Act to Prevent the Destruction of Quail," which makes it unlawful to kill any quail for the purpose of sale, or to sell, barter, or offer to sell any quail caught or killed in the state. Acts 1897, p. 122. The enacting clauses of the foregoing laws clearly disclose the general purpose of the state; and the progress made in restrictive measures affirms the inadequateness, in legislative opinion, of previous provisions to accomplish the purpose intended. At the beginning, more than forty years ago, it was made unlawful to shoot, trap, or net quails between February 1st and November 1st, and to have quails in possession that had been taken or killed in the closed season. Next it was made unlawful to shoot or trap them between February 1st and October 1st, and to net them at any time; and as the next step trapping was prohibited altogether. For twenty years it had been a good defense to a charge of wrongful possession to prove that the bird had been taken or killed in the open season, but in 1879 it was made unlawful, not only to sell, but to offer for sale, or have in possession, within the closed season, any quail, without reference to when killed or acquired. As a further step, in 1881 the right to sell or have quails in possession in the open season was confined to such birds only as had been killed by shooting, and in 1897 the right to sell at any time was wholly denied. The constantly increasing stringency in repressive measures illustrates the difficulty encountered by the legislature in framing a law that was effective for the protection of quails; and the provision under review, making the act of possession within the closed season *ipso facto* a crime, after its adoption in 1879, and its reaffirmance three times in the same words, must be accepted as evidencing leg-

islative opinion that such provision is an essential means of preventing an evasion of the law. As was well said in *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098: "What this provision aims at is not the mere fact of possession of game lawfully obtained, but to prevent its being unlawfully taken or killed. If it were permitted to have possession during the closed season, without limitation, of game taken or killed during the open season, it would inevitably result in frequent violations of the law without the least probability of a discovery. Game is usually found in secluded places; away from habitations of men, with no one to witness the killing but the hunter himself. The game would have no earmarks to show whether it was taken or killed in the open or closed season, and hence conviction under this statute would ordinarily be impossible, and the law would become practically a dead letter. In these days of cold-storage warehouses, the mere lapse of time after the expiration of the open season would furnish little aid in an effort to prove that the game had been taken or killed out of season." In such misdemeanors the motive is of no consequence. It is the act, and the act only, that constitutes the offense. *State v. Engle* (this term) 58 N. E. 698. The simple words are, "whoever has in his possession any quail" is guilty. The language is so clear and unambiguous as to leave no room for construction. How or when the possession was acquired is not made material by the legislature, and we have no power to make it so. See cases cited above.

Judgment affirmed.

Jordan, J., dissenting:

I cannot concur in the majority opinion in this case so far as it, in effect, holds that the possession of the quail by the appellant, under the facts, was a penal offense in the meaning and spirit of the statute in controversy. The admitted facts conclusively show that the quail in question had come into the possession of the accused on the 30th day of December, 1899, the same being a day within the open season, when it was lawful to kill or take quails, and reduce the same to possession. On that date, it seems, it was placed by appellant in his refrigerator, and there remained until the 5th day of the following February. The statute, as enacted, and whereby the legislature has declared the period which shall constitute the closed season in respect to the killing or taking of such game, reads as follows: "Whoever shoots or destroys, or pursues for the purpose of shooting or destroying, or has in his possession, any quails or pheasants during the period from the first day of January of any year, to the 10th day of November of the same year, or shoots or kills any wild turkey between the first day of February and the first day of November of any year, shall be fined in the sum of two dollars for each quail, wild turkey, or pheasant so killed, and the sum of one dollar for each quail or pheasant so pursued, or had in his

possession." *Barns's Rev. Stat. 1894, § 2209* [*Horner's Rev. Stat. § 2106*]. This act, under its provisions, neither assumes nor professes to deal with or to have any reference or application to quails which were lawfully taken and reduced to possession by the taker during the open season. From my view of the law, it would certainly appear to be a very harsh and unreasonable interpretation of this statute to hold that the legislature thereby intended to make the possession of quail, when such possession was lawful at the taking, a criminal offense by the mere lapse of time; or, in other words, that a continuation of such possession over into the closed season should constitute a crime. In the absence of an express declaration to that effect, can it be asserted that the legislature intended, by this statute, not only to make the possession of quails killed or taken during the forbidden time an unlawful act, but under its provisions it was intended to go further, and trace, if necessary to constitute the offense, the possession of such game back into the open season, and forbid, under a penalty, a continuation of such possession over into the closed season? Before a judgment of a court in a criminal cause which would lead to such an unjust and unreasonable result is rendered, the language of the statute involved should be clear and mandatory, and free from all reasonable doubt in respect to its meaning. Before the statute in question is enforced against the accused, under the facts in the case, the court ought to be fully satisfied that the act which the statute imputes to him is made unlawful, not only by the letter, but that it also falls within the spirit and intent, of the law; for the principle is elementary that a thing within the intent of a statute is as much within it as if it were within the letter, and a matter, although within the letter of the law, is not within its provisions if contrary to the intent and spirit of the act. *Conn v. Cass County Comrs.* 151 Ind. 517-525, 51 N. E. 1062. It is a well-settled canon in respect to the construction of laws that, where the language of the legislature is fairly susceptible of two meanings, the one which excludes or prevents consequences which are mischievous and unjust will be preferred and adopted by the court. In fact, statutes are not always, nor should they be, literally construed. *Donnell v. State*, 2 Ind. 658; *Hooper v. State*, 56 Ind. 153. The rule is well settled that in the construction or interpretation of a criminal statute all reasonable doubt which may arise in respect to its meaning must be resolved in favor of the person accused thereunder. I recognize the rule of the law which affirms that the title or right to all animals, birds, fowls, or fish, *feræ naturæ*, is held by the state, the sovereign power, in trust for the benefit of all the people of the state, and that the latter, by its legislature, may impose such conditions, regulations, or restrictions as may be deemed proper or necessary in respect to the taking or having in possession any of such animals, birds, fowls, or fish, and that he

who acquires the ownership or possession under such imposed conditions, regulations, or restrictions will be held to be subject thereto, and his title or right of possession will be controlled thereby. But that is not the question involved in this appeal. It may be conceded that the state has the power to make the possession of quails in the closed season unlawful although such possession was acquired in the open season, and continued over into the closed period. But this concession does not solve the question involved in this appeal, which is, Can it, in reason, be asserted, under the rule governing the interpretation of statutes, that the legislature, under the statute in dispute, intended, under the circumstances, to make such possession unlawful? That this question must be answered in the negative to me appears to be quite evident, and beyond successful controversy. Had the legislature intended by this law to make it unlawful for a person to have in his possession quails taken during the open season, considering the importance of the question, it may be assumed that the legislative will to this effect would have been expressed or declared in clear and positive language.

A statute of the state of Maine prohibited, under penalty, the hunting or killing of deer between the 1st of January and the 1st of October. By this act it was also made an offense for any person to carry or transport the carcass or hide of any deer during the prescribed closed period. One Young was prosecuted under the statute for transporting, on February 17, 1883, the carcasses of two deer. It was shown by the evidence that he killed and came into the possession of one of the animals in the state of Maine on the 30th day of the previous December, and of the other animal on the 31st day of the same month; that the carcasses of the deer were taken by him from the place where he had killed them in that state to his own home, and there remained until February 17th following, and then transported by him to the railroad station, to be shipped by rail to Boston, Massachusetts, for the purpose of sale. The case was appealed to the supreme court of Maine. See *Allen v. Young*, 76 Me. 80. In deciding the question as therein involved, which was identical with the one in issue in the case at bar, the court said: "The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them. We think it is not. True, the transportation at such a time seems to be within the letter of the law, but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. We can readily see that it would be in furtherance of the purposes of the act to make such transportation prima facie evidence of guilt, and thus throw the burden of proof upon the party to show his innocence, as is done in § 5 with respect to possession; but we fail to see any

motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed, and is lawfully in the possession of the one who transports it. Certainly, one may reasonably doubt whether such could have been the intention of the legislature; and, the act being a penal one, a reasonable doubt is sufficient to make it the duty of the court to adopt the more lenient interpretation, and construe the term 'such animal' as meaning an animal unlawfully killed, as was done in construing a similar statute in *Com. v. Hall*, 128 Mass. 410, 35 Am. Rep. 387." In the case of *State v. McGuire*, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666, the defendant was prosecuted under a statute of that state for having in his possession certain fish during the period when the law made it unlawful for any person to receive or have any such fish in his possession. The defendant offered to prove, as a defense to the prosecution, that the fish in controversy had been lawfully caught in the open season, and belonged to fish dealers in the city of Portland, and had been by such dealers placed in his possession only for the purpose of cold storage. It was held in that case that by reason of the fact that the fish were caught in the open season the possession thereof thereafter during the prohibited period would not render the possession unlawful within the intent of the statute. The cases pro and con in respect to the law upon the question involved are fully collected and reviewed by the court in that appeal. The trial court, it seems, in construing the statute involved in that prosecution, held that the possession of the fish by the defendant during the closed season constituted a crime regardless of the fact as to when or where they were caught or taken. The supreme court, in considering the construction placed upon the statute by the lower court, said: "The effect of this construction is to declare that, in order to protect the salmon in this state, it was the intention of the statute to punish the offering for sale or the having in possession of salmon of the varieties specified during the prohibited seasons, no matter whether they were lawfully caught within or without the state; in a word, that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish or game lawfully caught or taken to be the subject of an offense by the simple possession of it. A construction leading to such injustice ought to be avoided, if it can be reasonably done. Salmon fish is an article of food, and the law interdicting the catching of them at certain seasons is not because they are unfit for use, or unwholesome, but to protect and preserve such fish in this state." In the case of *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1, the defendant was accused of having in his possession, in violation of a statute of the state of Michigan, a number of quail in the month of April, 1888; this latter month, under the 51 L. R. A.

law, being within the closed season in that state. The evidence established that he had purchased these birds in the state of Missouri, and had received them into his possession in the month of December, 1887; this latter month being within the open season in the state of Michigan. The supreme court in that appeal held that under the facts the possession was not unlawful, within the spirit or meaning of the criminal statute involved. Champlin, J., speaking as the organ of the court, in respect to the interpretation of the law, said: "A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must be, not only within the letter, but within the spirit, of the law, to gain my assent to its enforcement. Our statute requires no such strict or harsh construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the state of Michigan." That eminent and learned jurist, Judge Campbell, in concurring in the opinion of his associates, said: "I do so for the further additional reason that I do not think it would be competent for our legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound." *Com. v. Wilkinson*, 139 Pa. 304, 21 Atl. 14; *James v. Wood*, 82 Me. 173, 8 L. R. A. 448, 19 Atl. 160; *Com. v. Hall*, 128 Mass. 410, 35 Am. Rep. 387,—also sustain the doctrine asserted and adhered to in the cases from which I have quoted. It cannot be said that there is any real merit in one of the reasons given for the construction placed upon the statute by the majority opinion, which reason is to the effect that such a construction is necessary in order to prevent an evasion of the law; or, in other words, to enable the state to more successfully secure convictions thereunder. That is a question more properly for the consideration of the legislature. If it had been intended by the law-making power to make the mere possession of quail during the prohibited season a criminal offense, without any regard to where, when, or how lawfully, such game had been killed or taken, surely language could and would have been employed to clearly express such intention. Under the holding in the prevailing opinion, the hunter who kills any quail on December 31st, the end of the open season, intending to eat them at his New Year's dinner, will discover that he is in a position of peril. He will be compelled to either eat the birds on the day he killed them, cremate them, or in some other manner destroy them; or at least he must in

some way rid himself of their possession ere the clock strikes the hour of midnight, otherwise, if he continues the possession of the birds over until the beginning of the next day, he will be a violator of the law, and liable to be subjected to its penalty. In many of the cases cited in the majority opinion the legislature appears, in the particular statute, by some provision, to have

emphasized its intention to make the law apply to and include game without regard to the question as to when, where, or how the same had been killed, taken, or received. Without further commenting upon the question, I am convinced that the conviction of the appellant in the trial court under the facts was wrong, and that the judgment ought to be reversed.

IOWA SUPREME COURT.

W. H. MERENESS, Admr., etc., of Isaac Mereness, Deceased, Appt.,

v.

FIRST NATIONAL BANK OF CHARLES CITY.

(.....Iowa.....)

1. The statute of limitations commences to run on a demand certificate of deposit at its date, since such a certificate is no more nor less than a promissory note.
2. The death of the depositor does not interrupt the running of the statute of limitations on a certificate of deposit.
3. Knowingly false representations by a bank amounting to a denial of liability to the estate of a decedent, and of the fact that there is evidence on its books of a deposit by him for which a demand certificate had been given, which was afterwards lost, do not interrupt the statute of limitations that began to run in favor of the bank at the time the certificate was issued.

(October 4, 1900.)

A PPEAL by plaintiff from a judgment of the District Court for Floyd County in favor of defendant in an action brought to recover the amount alleged to be due on a certificate of deposit which had been issued by defendant in favor of plaintiff's intestate. *Affirmed.*

Statement by Ladd, J.:

The petition was filed October 19, 1895, alleging that on April 12, 1881, Isaac Mereness deposited with defendant \$1,000, for which is issued a demand certificate of deposit, since lost; that said Mereness died October 10, 1888, and plaintiff was appointed administrator of his estate in May, 1889; that plaintiff demanded of defendant the money due on said certificate in June, 1899, whereupon he was falsely informed by defendant's cashier and president that there was no money due said Isaac Mereness on said certificate, or his representative, and refused payment; that said misstatement was knowingly made, for the purpose of preventing plaintiff from collecting the same; that to a written inquiry addressed the cashier

he responded the same year that he had made an examination of the books of the bank and could find no money to the credit of said Mereness, or belonging to him or his heirs, and requested plaintiff to look the matter up, whereas he knew said books showed a deposit of \$1,000 due and owing to said Mereness or his representative, and made the communication with an intent to mislead and deceive plaintiff and conceal from him the facts; that plaintiff discovered the truth but a few months prior to bringing this action, and he asks judgment for the \$1,000, with interest from date of deposit. The defendant's demurrer that the cause of action appeared to be barred by the statute of limitations was sustained. From judgment dismissing the petition, plaintiff appeals.

Messrs. Springer & Clary for appellant.

Messrs. Ellis & Ellis, for appellee:

A certificate of deposit like the one involved herein is a promissory note, payable upon demand.

Story, *Promissory Notes*, §§ 3, 11, 12; *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357; *Curran v. Witter*, 63 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Cate v. Patterson*, 25 Mich. 191; *Bean v. Briggs*, 1 Iowa, 488, 63 Am. Dec. 464.

The statute in this case commenced to run at the date of the certificate. It was issued by the bank, payable upon demand, and the holder was entitled to demand payment thereof forthwith. If he did not do so it was his own neglect, and no party could, by delaying to make a demand when he had the right so to do, delay the running of the statute of limitations.

Prescott v. Gonser, 34 Iowa, 175; *Hint-rager v. Hennessy*, 46 Iowa, 600; *Beecher v. Clay County*, 52 Iowa, 140, 2 N. W. 1037; *First Nat. Bank v. Greene*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; *Baker v. Johnson County*, 33 Iowa, 151; *Squier v. Parks*, 56 Iowa, 407, 9 N. W. 324; 13 Am. & Eng. Enc. Law, p. 726; *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605; 2 Parsons, *Notes & Bills*, pp. 642, 643, and notes.

NOTE.—Running of statute of limitations as affected by concealed fraud, see earlier cases in this series as follows: *Carrier v. Chicago, R. I. & P. R. Co.* (Iowa) 6 L. R. A. 799, and note; *Peck v. Bank of America* (R. I.) 7 L. R. A. 826, and note; *Amaker v. New* (S. C.) 8 L. R. A. 511, R. A.

A. 687, and note; *Texas & P. R. Co. v. Gay* (Tex.) 25 L. R. A. 52; note to *Schellenberger v. Ransom* (Neb.) 25 L. R. A. 564; *Sanborn v. Gale* (Mass.) 26 L. R. A. 864; *Morrill v. Palmer* (Vt.) 33 L. R. A. 411; *Lieberman v. First Nat. Bank* (Del.) 48 L. R. A. 514.

Where the statute of limitations begins to run against one in his lifetime, it is not suspended by his death, and is not interrupted in any manner except as specially provided by statute.

7 Wait, Act. & Def. 278; *Grether v. Clark*, 75 Iowa, 383, 39 N. W. 655; *Parsons, Notes & Bills*, 646; *McNeil v. Sigler*, 95 Iowa, 587, 64 N. W. 604.

Ladd, J., delivered the opinion of the court:

In the early case of *Bean v. Briggs*, 1 Iowa, 498, 63 Am. Dec. 464, this court held a time certificate of deposit, in the usual form, negotiable, for that it possessed all the characteristics of a promissory note. Story defines a "promissory note" to be "a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story, *Promissory Notes*, § 1. The ordinary certificate of deposit is precisely within this definition, and it is generally held that such certificates are, in effect, promissory notes, and governed, with certain exceptions, by the same rules. *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 11 N. E. 799; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; note to *O'Neill v. Bradford* (Wis.) 42 Am. Dec. 575; 5 Am. & Eng. Enc. Law, 2d ed. p. 803, and cases collected. The decisions reaching a contrary conclusion seem to rest on the peculiar wording of particular certificates. See *Patterson v. Poindester*, 6 Watts & S. 227, 40 Am. Dec. 554; *O'Neill v. Bradford*, 1 Pinney (Wis.) 390, 42 Am. Dec. 575. The exceptions referred to relate to the necessity of a demand before suit may be maintained or the statute of limitations begins to run. The cases so holding seem to rest on the theory that the transaction not alone creates a debt against the drawer of the certificate, but is also in the nature of a bailment,—in contemplation of law a deposit, and not a loan,—and hence that a demand is essential before the holder is entitled to the return of his money. *Payne v. Gardiner*, 29 N. Y. 146 (divided court); *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Brown v. McElroy*, 52 Ind. 404; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *McGough v. Jamison*, 107 Pa. 330; *Shute v. Pacific Nat. Bank*, 136 Mass. 487. The settled doctrine of this court, however, seems to be that, when a person deposits money in a bank in the usual course of business, he loans it to the bank, which becomes his debtor to the amount of his deposit, and not his bailee therefor. *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280. See cases collected in 3 Am. & Eng. Enc. Law, p. 826. The title to the money passes to the bank, and becomes subject to its absolute control. The depositor cannot lay claim to the specific money, nor can he maintain an action in replevin or trover therefor. His sole remedy is assumpsit. A promissory note

payable on demand is due presently, and the statute of limitations begins to run from its date. See note to *Merritt v. Todd* (N. Y.) 80 Am. Dec. 243.

Why a different rule should be applied to a contract held to be an exact equivalent of such a note we are unable to discover. Certificates of deposit in the usual form are no more nor less than promissory notes by the banks issuing them, and, if there is any valid reason for declaring the one due at its date and the other only on demand, this has not been disclosed by the very eminent courts making such a distinction. The reasoning of *Payne v. Gardiner*, 29 N. Y. 146, is quite as persuasive when applied to a demand note. There appears to be no tenable ground for not applying the rule pertaining to promissory notes payable on demand, and holding that the statute of limitations commenced to run at the date of this certificate. *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Brumagim v. Tallant*, 29 Cal. 504, 89 Am. Dec. 61; *Lynch v. Goldsmith*, 64 Ga. 42; *Hunt v. Divine*, 37 Ill. 137. See *First Nat. Bank v. Security Nat. Bank* (Neb.) 15 L. R. A. 380, and note.

2. It is a settled doctrine of this state that, where a party against whom a cause of action has accrued in favor of another by actual fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will begin to run from the time the right of action is discovered or might have been discovered by the exercise of ordinary diligence. *Boomer Dist. Twp. v. French*, 40 Iowa, 601; *Findley v. Stewart*, 40 Iowa, 655; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Wilder v. Secor*, 72 Iowa, 161, 33 N. W. 448; *Carrier v. Chicago, K. I. & P. R. Co.* 79 Iowa, 80, 6 L. R. A. 799, 44 N. W. 203. See note to *Shellenberger v. Ransom* (Neb.) 25 L. R. A. 506. As we have seen, the action accrued at the time the money was deposited, October 12, 1881, and, as no fraud against deceased is charged, the statute commenced to run at that time. It was not interrupted by his death. *Grether v. Clark*, 75 Iowa, 383, 39 N. W. 655; *Murphy v. Chicago, M. & St. P. R. Co.* 80 Iowa, 26, 45 N. W. 392. And, generally, the statute may not be suspended after beginning to run. *Black v. Ross*, 110 Iowa, 112, 81 N. W. 220. There are exceptions to this rule, as when no opportunity is afforded to resort to the courts, as in case of war (*Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537), or absence from the state (Code, § 345). But we have discovered no case holding that deception by the party liable will toll the statute. Here what is alleged to have been said and written amounted to no more than a denial of liability, and that evidence thereof existed in the books of the bank. The deceased must have known otherwise, and plaintiff acquired the right of action as his representative more than seven years after it had accrued. Surely, under such circumstances, the claim

of the reputed debtor, though knowingly false, that he owed nothing, and had no evidence to the contrary, furnished no reason or excuse to the creditor for not instituting suit within the statutory period.

Affirmed.

Granger, Ch. J., not sitting.

N. J. STEICHEN *et al.*

v.

L. F. FEHLEISEN, *Appt.*

(112 Iowa, 612.)

1. A contract by which a partnership making a sale of its business binds itself by the partnership name not to re-engage in such business for a certain period within the same place, though signed by the individual partners, does not preclude them from again re-engaging in such business as individuals.
2. A partnership covenant against re-engaging in business is not made operative upon the former partners as individuals by virtue of Code, § 3465, giving a right of action against any or all of the parties where two or more are bound by contract, as that statute applies, not to create a liability, but to provide a remedy in case there is a liability.

(December 22, 1900.)

A PPEAL by defendant from a judgment of the District Court for Boone County in favor of plaintiffs in an action brought to recover damages for breach of an alleged contract to refrain from conducting a lumber business in Boone, Iowa. *Reversed.*

The facts are stated in the opinion.

Messrs. Jordan & Goodykoontz, for appellant:

When several persons execute an instrument upon the same consideration at the same time and for the same purpose and taking effect from a single delivery, it is joint.

Lawson, Contr. § 116; *Stage v. Olds*, 12 Ohio, 158.

A contract which imposes its obligations in its entirety upon two or more persons on the one hand, and confers a right upon two or more upon the other hand, is a joint contract.

7 Am. & Eng. Enc. Law, 2d ed. p. 101; *Noyes v. Barnard*, 11 C. C. A. 424, 15 U. S. App. 527, 63 Fed. Rep. 782.

Where the obligation is joint the remedy is against all jointly.

7 Am. & Eng. Enc. Law, 2d ed. p. 102; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Marie v. Garrison*, 83 N. Y. 14; *Linder v. Lake*, 6 Iowa, 164.

Joint interest makes a contract joint.

Dumanoise v. Townsend, 80 Mich. 302, 45 N. W. 179.

Where an obligation is undertaken by two or more it will be presumed a joint contract in the absence of express words to render it joint and several.

Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399; 1 Parsons, Contr. 11; Pom. Rem. & Rem. Rights, 2d ed. § 185; *Noyes v. Barnard*, 11 C. C. A. 424, 15 U. S. App. 530, 63 Fed. Rep. 782; *Capen v. Barrows*, 1 Gray, 376.

A contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if they are not inconsistent with it.

Lawson, Contr. p. 133; *Yorks v. Peck*, 14 Barb. 647; Story, Eq. Jur. 162-164; *Bradley v. Burwell*, 3 Denio, 261; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Carpenter v. Provost*, 2 Sandf. 537.

Where the consideration is joint the promise is joint.

2 Wharton, Contr. ed. 1882, § 826.

Messrs. Dyer & Stevens, for appellees:

After the sale of the goodwill of a business the seller is bound to do no act which will divert the business which he transfers to the purchaser.

Grimm v. Warner, 45 Iowa, 106.

It is more reprehensible to seek to evade than to openly violate the contract. The law will not permit evasions; one cannot do that indirectly which he would not be permitted to do directly.

Finger v. Bahn, 42 N. J. Eq. 606, 8 Atl. 654; *Richardson v. Peacock*, 28 N. J. Eq. 151; *Davis v. Barney*, 2 Gill & J. 382; *Sander v. Hoffman*, 64 N. Y. 248; *Whitney v. Slayton*, 40 Me. 224.

If the obligation imposed rests in its entirety with each of the persons bound, on the one hand, or the right so given is complete, on the other hand, in whose favor the contract runs, the contract is several.

1 Bouvier, Inst. 681; 7 Am. & Eng. Enc. Law, 2d ed. p. 101.

The contract upon which this action is based was executed, not by the Boone Lumber Company, not by G. W. & L. F. Fehleisen as a partnership, but by G. W. and L. F. Fehleisen as individuals, and, being so executed, it rests in its entirety on each of them, and is therefore a several contract.

A construction most beneficial to the promisee will be adopted if other things are equal, when the terms of an instrument and the relation of the parties leave it doubtful whether words are used in an enlarged or a restricted sense.

Webster v. Duxelling House Ins. Co. 53 Ohio St. 558, 30 L. R. A. 719, 42 N. E. 546; *Rockefeller v. Mcrritt*, 35 L. R. A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed.

NOTE.—For earlier cases in this series as to contracts in restraint of trade generally, see *Western Wooden Ware Asso. v. Starkey* (Mich.) 11 L. R. A. 503; *Gamewell Fire Alarm Teleg. Co. v. Crane* (Mass.) 22 L. R. A. 673, and *note*; *Cowan v. Fairbrother* (N. C.) 32 L. R. A. 829; 51 L. R. A.

Lufkin Rule Co. v. Fringell (Ohio) 41 L. R. A. 185; *Anchor Electric Co. v. Hawks* (Mass.) 41 L. R. A. 189; *Trenton Potteries Co. v. Ollphant* (N. J. Eq.) 46 L. R. A. 255; *Stovall v. McCutchen & Co.* (Ky.) 47 L. R. A. 287.

Rep. 909; *Lowler v. Murphy*, 58 Conn. 294, 3 L. R. A. 113, 20 Atl. 457.

Section 3465 of the Code of Iowa, 1897, is conclusive upon this question, and provides: "Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them."

Eyerson v. Hendrie, 22 Iowa, 480; *Sellon v. Braden*, 13 Iowa, 365; *Ballinger v. Tarrbell*, 16 Iowa, 491, 85 Am. Dec. 527.

Sherwin, J., delivered the opinion of the court:

The defendant and his brother were engaged in running a lumber yard in Boone, Iowa. On the 28th day of December, 1895, they entered into a written contract with the plaintiffs, agreeing to sell them the real estate, office, sheds, and scales of the Boone Lumber Company in Boone, Iowa, at the agreed price of \$5,500. The contract contained this provision also: "It is further agreed that first party shall execute to second party a contract, providing for liquidated damages of \$2,000, that they will not start a fourth or new lumber yard in Boone, Iowa, for the term of three years; said contract to be executed before January 20th, 1896." In pursuance of such agreement the following contract was executed by the defendant and his brother and delivered to the plaintiffs:

In consideration of and in pursuance of a contract made and entered into between the undersigned and N. J. Steichen and Raymond S. Farr, and dated December 28th, 1895, the undersigned hereby agree that they will not start a new or fourth lumber yard in the city of Boone, Boone county, Iowa, for the term of three years from January 20th, 1896, or the undersigned will pay to the said N. J. Steichen and Raymond S. Farr the sum of two thousand dollars (\$2,000) as liquidated damages therefor.

G. W. Fehleisen.

L. F. Fehleisen.

The plaintiffs took possession of the yard bought of G. W. & L. F. Fehleisen in January, 1896. In the fall of 1897 the appellant opened a new and fourth yard in Boone, in his wife's name, and now claims that the yard belonged to her, and that his connection therewith was as a manager only. The appellant also contends that the contract sued on was the joint contract of himself and G. W. Fehleisen as a partnership, and that the court erred in instructing the jury that he would be liable thereon if it found that he was the real owner of the business which he was conducting.

It will be noticed that the contract for the sale of the yard to the plaintiffs recites that the "real estate, sheds, office, and scales of §1 L. R. A.

the Boone Lumber Company" are to be transferred to them. It is also provided therein that the stock of said company is to be inventoried and taken at a specified price, and the contract as a whole clearly discloses the fact that the plaintiffs were contracting with a partnership composed of the appellant and his brother, G. W. Fehleisen. This contract was signed: "G. W. Fehleisen. L. F. Fehleisen." But, notwithstanding the way it was signed, it stipulated only that the first party should execute a contract to not open a new yard in Boone, etc. The first party to the contract was the partnership of G. W. and L. F. Fehleisen, doing business as the Boone Lumber Company, and when the contract in suit was drawn it made direct and explicit reference to the previous contract which had provided for it. It says, "In consideration of and in pursuance of a contract made and entered into between the undersigned, . . . the undersigned agree that they will not start a yard," etc. The last contract was signed in the same way as the first one, and appellees urge that it was an individual agreement not to engage in the lumber business in Boone. There can be no question as to the character of the contract for the sale of the yard and stock. Each partner held an undivided interest in all they contracted to convey and transfer, and both were charged with the obligations of the contract in its entirety. The manner of signing it could in no way change or modify these imposed obligations, because the contract itself shows what they were in fact. The interests of the defendant and his brother in the subject-matter of the contract were clearly joint, and hence, under well-settled rules, the contract was joint. 7 Am. & Eng. Enc. Law, 2d ed. p. 101; *Lawson, Contr.* § 116; *Parsons, Contr.* 6th ed. 19; *Lindley, Partn.* 192; *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. 179; *Beach, Modern Law of Contracts*, § 668. The contract sued on, being to carry out the purposes of the original, must be read in connection therewith, to arrive at the true intent of the parties, and when so read and considered, it is very plain that it is also a joint contract, and provides only that the partnership of G. W. and L. F. Fehleisen will not start a new lumber yard in Boone. If it be conceded that the defendant was the real owner of the lumber business he was conducting, was there a violation of the contract? Clearly not, for he had never agreed not to engage in the business as an individual. His contract, as a member of the partnership, was that the firm would not enter said business within the time specified. The contract might have been so drawn as to cover the individual acts of each partner, and it may have been the intention of the plaintiffs to reach such a result, but it does not do so; and the law, not favoring contracts in restraint of trade, will construe it strictly. *Greenhood, Pub. Pol.* 734; *Haldeman v. Simonton*, 55 Iowa, 144, 7 N. W. 493. But the appellees contend that this case falls within the provisions of § 3465 of the Code, which provides that

"where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, . . . the action . . . may . . . be brought against any or all of them." The statute is not applicable to this case, because here there is no liability anywhere. It is not claimed that the partnership of which the plaintiffs purchased has violated its contract, and surely until the obligations of the contract have been broken suit may not be maintained against any one. If the partnership had broken the covenant in question, then the statute would apply, and the cases cited would be in point. The trouble with appellees' position is that they are invoking the aid of the statute to reform their contract, and this, of course, cannot be done.

We are of opinion that the court should have sustained the motion to direct a verdict for the defendant, under the contract, and the undisputed evidence that the old partnership had not again entered the lumber business.

The judgment is for this reason reversed.

STATE of Iowa *ex rel.* Milton REMLEY,
Attorney General, *Appt.*,

v.

Byron F. MEEK *et al.*

(112 Iowa, 338.)

1. The abatement of a nuisance does not constitute a taking of private property for public purposes for which compensation is required by Const. art. 1, § 18.
2. The power of a state to require fishways in dams across streams extends to a navigable stream that flows beyond the bounds of the state, so long as intercommunication between the states is not thereby affected.
3. The power of the state to compel a fishway to be made in every dam across a stream, as required by Code 1897, § 2548, extends to a dam which the state itself made without any fishway and conveyed in that condition, without expressly reserving any right to exercise police power over it.
4. Oral evidence is admissible in support of a plea of *res judicata* to show the facts determined on the former trial.
5. An information charging defendants with maintaining a nuisance by owning and maintaining a dam over which they had failed to construct a fishway is sufficient under Acts 17th Gen. Assem. chap. 188, §§ 1, 2, to give jurisdiction of the crime of maintaining a nuisance, although the maintenance of the dam without the fishway is, by §§ 1, 3, made punishable by a fine, since § 2 declares such dam a nuisance, as the intent of the act was not only to punish for past derelictions, but to remedy matters for the future.

NOTE.—The power of the state to require fishways in dams is fully treated in the note on governmental control over right of fishery, which is found with the case of *People v. Truckee Lumber Co. (Cal.)* 39 L. R. A. 531. 51 L. R. A.

6. The offense of maintaining a nuisance by a dam without a fishway is not beyond the jurisdiction of a justice of the peace, although by Code 1873, § 4092, a fine of \$1,000 may be imposed for maintaining a nuisance "where no other punishment therefor is specially provided," since a special penalty which a justice may lawfully impose is provided for this particular offense by Acts 17th Gen. Assem. chap. 188, § 3.

7. An acquittal in a criminal action is a bar to a subsequent civil action to secure a forfeiture which would have been part of the penalty to be imposed in the criminal proceeding.

8. An acquittal on the charge of maintaining a nuisance by a dam without a fishway, on the ground that defendants have a contract right to maintain it, is *res judicata* in a subsequent suit to abate such dam as a nuisance.

(October 24, 1900.)

APPEAL from a judgment of the District Court for Wapello County in favor of defendants in an action brought to abate as a nuisance a dam maintained in the Des Moines river in violation of a statute requiring dams to be maintained with passeways for fish. *Affirmed.*

Statement by Waterman, J.:

The statement of the issues we take from the brief of appellant's counsel. Its correctness is conceded, save as to one matter, which will be noticed in proper connection. The state of Iowa, as a part of the plan for the improvement of the navigation of the Des Moines river, authorized by chapter 113, Acts 1st Gen. Assem., and subsequent acts, constructed a dam, with locks, at Bonaparte. The dam was completed in the year 1852. The state transferred the use of the dam to the Des Moines Navigation & Railroad Company, but afterwards, upon a settlement with that company, resumed its ownership of the dam. Thereafter the state, pursuant to the provisions of chapter 25, Acts 8th Gen. Assem. by commissioners as therein provided, conveyed to the ancestors of the defendants, Byron F. Meek, Kirk L. Meek, and Hugh H. Meek, for the price of \$200, "all the interest of the state in and to the locks and dam at Bonaparte and the land opposite thereto and the water power there to belonging." After the completion of the dam and locks, they were used for purposes of navigation, and continued to be so used until some time probably as late as 1865 or 1866. At some time, the date of which does not appear in the record, but after the conveyance to the Meeks, the gates and the locks were closed by a wall built across the lower end of the lock. About the year 1870 the owners of the dam built across the river, just below the old structure, a series of cribs, making a continuous structure, with a space varying from a few inches to 4 feet between the new and the old part, which was filled with gravel and rocks, and the whole covered with planks, making a structure 25 feet wide, the new structure being perhaps 3 or 4 inches higher than the old. In that condi-

tion the dam is perpendicular, and constitutes an absolute obstruction to the passage of fish. In 1893 an information was filed before J. G. Thomason, justice of the peace, charging the defendants with a violation of the provisions of chapter 188, Acts 17th Gen. Assem. A trial was had, which resulted in a judgment of "Not guilty." The present action is brought in equity, under § 2548, Code 1897, to abate, as a nuisance, the dam so maintained without a fishway. The defenses interposed by the answer are: (1) That the statute (§ 2548) is void, because in violation of § 18, art. 1, and § 20, art. 1, of the Constitution of Iowa, and of § 10, art. 1, of the Constitution of the United States, for that it is a taking of private property for public use without making compensation, and impairs the obligation of a contract existing between the state of Iowa and the ancestors of defendants; (2) that the questions here involved were adjudicated and determined in proceedings had before a justice of the peace in 1893. Upon a hearing, plaintiff's bill was dismissed, and all costs were taxed to the state. From this judgment the present appeal is taken.

Messrs. Milton Remley, Attorney General, E. R. Harlan, and Read & Read, for appellant:

The statute requiring fishways to be constructed is a valid exercise of the police powers of the state, and, as all contracts, as well as all property in the state, are held subject to the exercise by the state of its police powers, it necessarily follows that the requirement of the statute neither impairs the obligation of the contract, nor does it amount to the taking of property for public use without compensation.

Cooley, Const. Lim. 4th ed. 716; Rode-macher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Ohio & M. R. Co. v. McClelland, 25 Ill. 140; Gorman v. Pacific R. Co. 26 Mo. 441, 72 Am. Dec. 220; Com. v. Certain Intoxicating Liquors, 115 Mass. 153; Prentiss, Pol. Powers, p. 15; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 559, 24 L. ed. 1036.

No express contract was made such as is claimed, and that no implied contract will be inferred is equally clear.

Newton v. Mahoning County Comrs. 100 U. S. 548, 25 L. ed. 710; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The state cannot divest itself of its police powers.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Metropolitan Nacise Board v. Berrie, 34 N. Y. 657; Cooley, Const. Lim. 4th ed. pp. 341-345; Weber v. State Harbor Comrs. 18 Wall. 51 L. R. A.

57, 21 L. ed. 798; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 559, 24 L. ed. 1036; Tiedeman, Pol. Power, § 190; Com. v. Alger, 7 Cush. 53; Prentiss, Pol. Powers, pp. 52-283; Smith v. Rochester, 92 N. Y. 477, 44 Am. Rep. 393; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079.

The title to the bed of the Des Moines river is in the state.

Serrin v. Grefe, 67 Iowa, 196, 25 N. W. 227; Wood v. Chicago, R. I. & P. R. Co. 60 Iowa, 456, 15 N. W. 284; McManus v. Carmichael, 3 Iowa, 1.

But the title to such property is a title other and different from that by which it holds property designed for sale. Such property is vested in the state in its sovereign capacity as trustee for all the people of the state, and may not be disposed in such manner as to deprive the people of their use of it, or so as to divest the state of its power to control the same for the public benefit and for the public welfare.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

Where a special privilege to exercise a particular franchise is conferred it is upon the implied understanding that the franchise shall be prudently exercised, and in such manner as to inflict the least injury upon others.

Wood, Nuisances, 1st ed. § 754.

In the case of the grant of a franchise or right to erect or maintain dams in streams frequented by fish, there is necessarily involved a reservation by the state of the right, in the exercise of its police powers, to compel the construction of fishways.

Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; State v. Franklin Falls Co. 49 N. H. 240, 6 Am. Rep. 513; Rundle v. Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 335.

A statutory provision for the establishment of dams confers no vested right; it is merely a taking by the state, and is held by the will of the state.

Gould, Waters, § 591; Rundle v. Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 335; Pratt v. Brown, 3 Wis. 603; French v. Owen, 5 Wis. 112.

The statute requiring fishways to be constructed in dams is a legitimate exercise of police power in the state, and not in violation of constitutional provisions.

Parker v. People, 111 Ill. 600; West Point Water Power & Land Improv. Co. v. State ex rel. Moodie, 49 Neb. 223, 66 N. W. 6; Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; State v. Franklin Falls Co. 49 N. H. 240, 6 Am. Rep. 513; Lunt v. Hunter, 16 Me. 9; People v. Truckee Lumber Co. 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

A judgment is an adjudication of questions of law and fact only so far as essential to support the judgment.

St. Joseph Union Depot Co. v. Chicago, R.

I. & P. R. Co. 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. Rep. 648; *Gordon v. Kennedy*, 36 Iowa, 167.

To constitute an estoppel the precise point which is to constitute the estoppel must be put in issue and decided.

Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; *Abbe v. Goodwin*, 7 Conn. 377; *Eastman v. Symonds*, 108 Mass. 567; *Howard v. Kimball*, 65 Me. 308; *Crum v. Bose*, 48 Iowa, 433.

An acquittal on a charge of a violation of the statute for the sale of intoxicating liquors is not a bar to an action to enjoin the maintenance of a nuisance by the sale of intoxicating liquors.

Martin v. Blattner, 68 Iowa, 292, 25 N. W. 131, 27 N. W. 244; *Crawford v. Bergen*, 91 Iowa, 675, 80 N. W. 205; *Britton v. State*, 77 Ala. 202.

Messrs. Mitchell & Sloan and Wherry & Walker, for appellees:

The contract clause of the Federal Constitution prohibits a state from passing a law that would impair one of its own contracts, as fully as it prohibits the passage of a law that would impair a contract only between individuals; and a grant is a contract.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303.

The Des Moines river was a navigable river.

Wood v. Chicago, R. I. & P. R. Co. 60 Iowa, 450, 15 N. W. 284; *Serrin v. Grefe*, 67 Iowa, 190, 25 N. W. 227.

Herein is a fundamental difference between the *Beardsley Case* and the case at bar: In the *Beardsley Case* the dam was across a non-navigable stream; it was built by the riparian owner, owning on each side, and consequently, as the stream was not navigable, also owning the bed of the river. In the case at bar, the state was the owner of the bed and also of the abutting riparian lands; and the state built the dam with no fishway in it; maintained it for years with no fishway in it; and, with no fishway in it, the state sold all its interest in and to it to defendants' ancestors.

It is reasonable to suppose, had it been the intent that the state would add to defendant's enjoyment of the dam further burdens, they would have been specified; having expressed some, all others are deemed excluded.

Com. v. Pennsylvania Canal Co. 66 Pa. 41, 5 Am. Rep. 329.

"Police power" must not be used as a guise under which to evade the Constitution.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 667, 29 L. ed. 522, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 60 N. W. 355.

Dams are not *per se* public nuisances, though they may be kept in such manner as to become public nuisances.

51 L. R. A.

State v. Olose, 35 Iowa, 570.

The precise point involved in the case at bar was involved in, and tried and determined by the justice in, the proceedings on information.

Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; 2 Black, Judgm. § 522.

Waterman, J., delivered the opinion of the court:

Nothing is claimed in argument by defendants on the issue that § 2548 of the Code, which declares any dam constructed or maintained without a fishway to be a nuisance, is in violation of § 18, art. 1, of the Constitution of the state. This provision of the Constitution prohibits the taking of private property for public use without making just compensation. Because of the fact that this matter is not pressed in argument, we might properly pass it without further remark; but we deem it proper to say that this point is settled against defendants' pleaded claim by the case of *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138. The authorities sustaining the proposition that a statute of this nature is a valid exercise of the police power will be found collected in that opinion. We need not again review them.

This leaves for our consideration but two questions: (1) Is § 2548 void as to defendants because of impairing the obligations of a contract? and (2) are the matters herein involved *res judicata*?

The history of the Des Moines river land grant is so well known that we need not repeat it, further than to say that the state accepted the grant of lands from the general government, and undertook to improve the navigation of that stream by erecting a system of dams and locks. As a part of this system, it constructed and maintained for some years a dam on the site of the one in question. After a time, in the year 1860, by an act of the general assembly commissioners were appointed to sell the interest of the state in this and other dams on said river. These commissioners were authorized to make deeds without warranty, and containing covenants on the part of the purchasers that they, their heirs and assigns, would forever keep said locks and dam in good repair, and that they would, at all reasonable times, pass boats through said locks, and charge only such tolls as should be agreed upon between such commissioners and the purchasers, not exceeding the maximum rates prescribed in the contract by the state of Iowa with the Des Moines Navigation & Railroad Company. On the 31st day of October, 1861, a conveyance was made by the commissioners, in pursuance of this power and in conformity therewith, to Robert Meek, Isaiah Meek, and Joseph Meek, of Van Buren county. The interests of Robert and Joseph Meek were thereafter conveyed to Isaiah Meek who died some years since. The defendants are sons of the latter, and, through inheritance and conveyances from other heirs, have become vested with all of their father's rights in and to said dam.

There was no express reservation in the deed from the commissioners of any right on the part of the state to exercise police powers with reference to the property conveyed. Defendants claim something because of the fact that the Des Moines river is a navigable stream. It is thought that for this reason a distinction exists between this case and that of *State v. Beardsley*, cited above. While the dam in the *Beardsley Case* was across a non-navigable stream, yet it will be seen that the writer of that opinion in reaching his conclusion assumed the right of the state to compel the construction of fishways over dams across navigable streams, and thought it necessary only to adduce arguments to show that this right extended also to dams across streams not navigable. If there is any distinction to be made, it would seem to us the state's rights are clearer in case of navigable streams than those not navigable.

The right of fishing in navigable waters has always been held common in the public, and subject to legislative protection and control. The question most discussed by the courts is whether such control extends to non-navigable streams, where the right to fish is vested exclusively in the proprietors of the land on either side. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *Oliver v. Bailey*, 85 Me. 161, 27 Atl. 90. But, if adjudicated cases are desired to sustain directly the right of the state to prevent obstructions to the passage of fish in navigable streams, they are not wanting. See *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133. It is not claimed on this point that the action of the state in enforcing a police power is in any way restricted by the terms of the Federal Constitution, nor could any such claim be supported. The power of the state to control the right of fishing in navigable waters is ample and complete, so long as intercommunication between the states is not thereby affected. Gould, Waters, §§ 35-43. The cases sustaining this rule will be found collected by the learned author in the note to the first of these sections. See also Tiedeman, Pol. Power, 619.

The main contention, however, of defendants on the constitutional question presented, stated in the language of their counsel, is this: "In the case at bar the state was the owner of the river bed and also of the abutting riparian lands, and the state built the dam with no fishway in it, maintained it for years, and sold all its interest in and to it to defendants' ancestors. In this case the state did not sell and grant to us the right to build a dam; it sold and granted us a dam already built." For these reasons and upon these grounds it is sought to further distinguish this case from *State v. Beardsley*.

Defendants rest their claim that the action here sought to be taken by the state impairs the obligation of their contract of purchase on the case of *Com. v. Pennsylvania Canal Co.* 68 Pa. 41, 5 Am. Rep. 329. In that case the state, owning a canal, had erected dams in the Susquehanna river to aid

in supplying the canal with water. It sold both canal and dams, and thereafter, under a statute similar to our § 2548, sought to compel the purchaser to construct, at his expense, fishways over some of the dams. The court holds that, inasmuch as no such right was reserved in the grant, the statute could not be enforced against defendants; that the power which was attempted to be exercised was that of eminent domain, and was a taking of private property for public purposes without first making compensation therefor, and for this reason amounted to an impairment of the purchaser's contract. The opinion of the trial judge, which is set out in the report, and which is expressly adopted by the appellate court, repudiates the suggestion that the statute was an exercise of the police power, but it recognizes that a different rule prevails in Massachusetts. So, too, a different rule prevails in this state; for in *State v. Beardsley* the opinion is based largely upon Massachusetts cases, and the holding is expressly made, as we have already said, that the statute in question is a legitimate exercise of the police power of the state. This being true, the right or power of the state would be the same, in case of a dam built by it and sold, as it would where a franchise was given to build a dam.

If the state had originally granted a franchise to defendants' ancestors to build a dam, fixing its height and breadth, would there not be as much reason for saying the statute could not be enforced as in the case at bar? Yet the *Beardsley Case* in principle holds that in such an instance as that we have supposed the statute would apply. In some states it is held that, independent of any statute, one who erects a dam is required to maintain a passageway for fish. *State v. Gilmore*, 141 Mo. 506, 42 S. W. 817; *Linton v. Welsh*, 9 Pick. 87; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236. But it is said by defendants that the state by its grant bargained away its right to exercise this police power. If we were to concede that the state might do this in a case of the kind we have here, we should be obliged to say that it must be done in express terms. "While the charters of private corporations are contracts, yet whenever privileges are granted, and the grant comes under review in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and nothing passes but what is granted in clear and explicit terms." *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133. Nothing is to be taken as against the state but what is expressly given. *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710. Although no right was reserved in the grant under consideration to require the construction of fishways, nevertheless such right remained in the state, because it was not expressly surrendered in the grant. Defendants' ancestors acquired by the grant the dam and the interest of the state in the land opposite thereto; that is, they obtained the dam and the means and right to main-

tain it. Nothing more than this was conveyed; and such a grant by the state does not abrogate its right to exercise thereafter a police power over the thing granted. In our opinion, no constitutional right of defendants is involved in this proceeding.

2. The plea of *res judicata* is founded upon the fact that in 1893 an information was filed before a justice of the peace against these defendants and some others, charging them with the crime of nuisance, in that from April 9, 1892, up to the date of filing the information, they had maintained this dam without a fishway, and that more than a reasonable time necessary for the construction of such fishway had elapsed since the passage of chapter 188, Acts 17th Gen. Assem. Upon a plea of not guilty, there was a trial, which resulted in an acquittal. This information was filed, as appears from its terms, under said act of the 17th general assembly. That chapter is in three sections. Section 1 requires the owner of any dam to construct, within a reasonable time, and maintain, a suitable fishway across it. Section 2 declares a dam without a fishway to be a nuisance, which may be abated. Section 3 imposes a fine of not more than \$50, nor less than \$5, for violating the provisions of the act; that is, for failing to construct such fishway within a reasonable time, or to maintain it thereafter. For a second offense the minimum penalty is \$20. It appears from oral evidence that defendants, on the hearing before the justice, admitted the maintenance of the dam without a fishway, and set up their grant from the state, in justification of their right to do so. It is also shown by the testimony of the justice that the sole ground of his judgment was that defendants had a right, under their contract with the state, to maintain the dam without a fishway. This evidence was admissible, and sufficient to establish the facts upon which the judgment was founded. *Freeman, Judgm.* § 273; *American Emigrant Co. v. Fuller*, 83 Iowa, 599, 50 N. W. 48; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 62; *Black v. Miller*, 75 Mich. 323, 42 N. W. 837; *Wood v. Faut*, 55 Mich. 185, 20 N. W. 897; *Follansbee v. Walker*, 74 Pa. 306.

But it is urged on behalf of the state, as to this information, that while it named the offense charged as maintaining a nuisance, it described only the misdemeanor of failing to put in a fishway within a reasonable time; and it is said the justice had no jurisdiction to try defendants for the crime of maintaining a nuisance. The information, in describing the offense, stated that defendants owned and maintained a dam over which they had failed to construct within a reasonable time, and to maintain, a fishway. By the terms of the law under which the information was filed, these acts and omissions constituted a nuisance. That act creates but one offense, and that is maintaining a nuisance. Sections 1 and 2 are to be read together. The intent of the act was not only to punish a defendant for past derelictions, but to remedy matters for the future. It is thought, because the general penalty for the

offense of maintaining a nuisance may be a fine of \$1,000, the justice had no jurisdiction of that offense. Section 4092, Code 1873, which provides this penalty, expressly states that it is to be imposed "where no other punishment therefor is specially provided." As we have seen, a special penalty is provided for the particular offense we have under consideration, and it is one which a justice of the peace may lawfully impose. A judgment of guilty by the justice would have been a finding of the existence of the nuisance, and upon this finding it would have been his duty to issue a warrant for its abatement. Code 1873, § 4094. The section preceding this one provides that, when a person is adjudged guilty of a nuisance on indictment, complaint, or action, such nuisance may be abated by the court. Section 4094 recited that, when "conviction is had upon an action before a justice of the peace," he may issue a warrant of abatement. That a criminal proceeding is referred to is sufficiently evident from the use of the word "conviction."

It is further contended by appellant that an acquittal in a criminal action is not a bar to a subsequent civil proceeding founded on the same facts. That is the general rule. 1 Greenl. Ev. § 537; *Freeman, Judgm.* 319a; 2 Van Fleet, *Former Adjudication*, § 488. One reason for this, even where the parties are the same, is the difference in the degree of proof necessary to make a case in the two instances. In the criminal proceeding the state can secure judgment only on proof which excludes all reasonable doubt, while in the civil action its case is made by a preponderance of the evidence. But to this rule there is one notable exception. Where the civil action is to secure a forfeiture, which would have been part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *Coffey v. United States*, 116 U. S. 437, 29 L. ed. 685, 6 Sup. Ct. Rep. 437. In the case of *United States v. Jaudicke*, 73 Fed. Rep. 100, the *Coffey Case* is considered, and the reasons taking its holding out of the general rule are explained. We think the doctrine of the *Coffey Case* applies here. The state is plaintiff in this action, and what is sought to be recovered or affected is what would have been part of the penalty imposed by law, had there been a conviction before the justice. This action is therefore in the nature of a second prosecution for the same offense of which defendants have been acquitted. Counsel for the state rely, in this connection, upon the case of *Martin v. Blattner*, 68 Iowa, 292, 25 N. W. 131, 27 N. W. 244. That was an action to enjoin a liquor nuisance, brought after defendant had been acquitted before a justice of the peace upon an information which charged him with selling such liquor. It is enough to show the want of application of that case to the issues here to call attention to the fact that the parties to the two actions were not the same. But we may say, further, that the justice in that case had no power to abate the nuisance, or to impose

any penalty therefor; the punishment prescribed being beyond his jurisdiction. Criminal prosecutions for that offense must be by indictment. Code, § 2384. It is true that an acquittal on the charge of maintaining a nuisance does not bar another prosecution under changed conditions. But here the conditions have not changed. The testimony of the justice shows, as we have said, that he held defendants to have a contract

right to maintain the dam without a fishway. Unappealed from, that judgment is final; for there is no showing that defendants have lost the right since the former trial.

The plea of *res judicata* is sustained, and the judgment below affirmed.

Granger, Ch. J., not sitting.

KENTUCKY COURT OF APPEALS.

Mary NEWCOMB, *Appt.*,

v.

W. S. NEWCOMB.

(.....Ky.....)

1. A certificate of naturalization of a person since deceased is admissible without further proof, as evidence of his citizenship, upon the question of the forum having jurisdiction of proceedings to administer his estate.
2. The foreign citizenship of a person whose estate is to be settled is shown by a certificate of naturalization issued by the clerk of the proper court in the foreign country, followed by a deposition certified by the United States consular agent, of the present clerk of such court, that the records of the court show the granting of the order of naturalization.
3. The fact of probate of a will in a foreign court may be shown by an exemplification of the probate signed by the registrar of the court, a certificate of the judge that the will shown by the exemplification appears to have been duly proved, and the probate to be in force, and that the registrar had jurisdiction and his attestation was duly made, all of which is certified by the United States consular agent and accompanied by a deposition showing service on nonresident interested parties as authorized by the laws of the country.
4. Probate of a will granted under statutory authority by a tribunal of one country upon the estate located there of one who died its citizen in another country will be binding upon the courts of the latter country, and the liability of the executrix must be tested by the law of the former.
5. Property located in one country and covered by a will entitled to probate there for the purpose of disposing of such property cannot, after such probate, be the subject of litigation or adjudication in the courts of another country where the testator was domiciled at the time of his death.

(May 30, 1900.)

APPEAL by defendant Mary Newcomb from a judgment of the Circuit Court for Henderson County in a proceeding against the Ohio Valley Banking & Trust

NOTE.—The effect of probate of wills in foreign countries is considered in a note to *Dunstan v. Higgins* (N. Y.) 20 L. R. A. 673.

As to the effect of the probate of wills in other states in this country, see note to *Martin v. Stovall* (Tenn.) 48 L. R. A. 130. 51 L. R. A.

Company, administrator, etc., of E. B. Newcomb, deceased, and Mary Newcomb, widow of decedent, *et al.*, for a settlement of the estate, in which the widow was sought to be made liable for the proceeds of certain tobacco which had come into her possession. *Reversed.*

The facts are stated in the opinion.

Mr. T. L. Edelen, for appellant:

Chapter 114, 24 & 25 of Victoria, known as Lord Kingdown's Act, conferred upon British subjects domiciled abroad the right to a probate of the will of such British subject when valid according to the law of the testator's domicile.

The probate authorized by this act is an original, and not an ancillary, probate. The probate depends solely upon the act, and not upon the domicile of the testator.

Goods of Rippon, 3 Swabey & T. 177; *Wms. Exrs.* p. 300.

E. B. Newcomb was a British subject, and his certificate of naturalization is conclusive that the preliminary steps necessary to its issuance were in fact taken.

Freeman, Judgm. § 607; *State v. Penney*, 10 Ark. 621; *McCarthy v. Marsh*, 5 N. Y. 263; *State ex rel. Kickbush v. Hoeflinger*, 35 Wis. 393; *Spratt v. Spratt*, 4 Pet. 393, 7 L. ed. 897; *Stark v. Chesapeake Ins. Co.* 7 Cranch, 420, 3 L. ed. 391; *Banks v. Walker*, 3 Barb. Ch. 438; *People ex rel. Brackett v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254; *Van Fleet*, Collateral Attack, §§ 550, 567; *Kitchie v. Putnam*, 13 Wend. 524; *People ex rel. Shimer v. Branch County Circuit Judge*, 17 Mich. 67; *People v. Snyder*, 41 N. Y. 408.

The original exemplification of probate is proved strictly in accordance with the Kentucky statutes.

The English high court of justice, probate division, had jurisdiction of *Wm. S. Newcomb* because the statutes conferred upon the court the right to make rules for bringing nonresidents before the court, and the testimony shows that such a rule was made, and the pleadings show that a copy of the writ was in fact served upon *Wm. S. Newcomb*.

The judgment of the English court of probate upon the validity of the will of March 1, 1890, was a judgment *in rem*, and not subject to collateral attack.

Fletcher v. Sanders, 7 Dana, 345, 32 Am. Dec. 96; *Adams v. Adams*, 11 B. Mon. 77;

Marrett v. Babb, 91 Ky. 88, 15 S. W. 4; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280, 22 Am. Dec. 33; *Crain v. Vincent*, 17 Ky. L. Rep. 1026, 32 S. W. 759; *Reed v. Reed*, 91 Ky. 267, 11 L. R. A. 513, 15 S. W. 525; *Kerr v. Moon*, 9 Wheat. 565, 6 L. ed. 161; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337; *Goodwin v. Jones*, 3 Mass. 514, 3 Am. Dec. 173; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; Woerner, American Law of Administration, § 226; Black, Judgm. § 823; Van Fleet, Collateral Attack, 585; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Broderick's Will*, 21 Wall. 503, *sub nom.* *Kieley v. McGlynn*, 22 L. ed. 599; *Vaughn v. Barret*, 5 Vt. 333, 28 Am. Dec. 306; *Tompkins v. Tompkins*, 1 Story, 547, Fed. Cas. No. 14,091; *McDermott v. Copeland*, 9 Fed. Rep. 536.

Those cases in Kentucky which authorized the suing of a foreign administrator found in this state with the assets in his possession expressly limited a recovery to a recovery according to the law of the place of the appointment.

Manion v. Titworth, 18 B. Mon. 582; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280, 22 Am. Dec. 33; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153.

It is not necessary to probate the will in this state for Mrs. Newcomb to justify a retention of the assets when sued for their conversion.

Moss v. Rowland, 3 Bush, 505; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,104.

Messrs. John W. Lockett and Malcolm Yeaman also for appellant.

Messrs. John Young Brown and Clay & Clay, with *Messrs. S. B. Vance and E. D. Vance*, for appellee:

It not being shown that, as claimed, E. B. Newcomb was a British subject, no validity can attach to the alleged English probate.

Ky. Stat. § 1638; U. S. Rev. Stat. § 1674; Ky. Stat. § 1641.

The judgment of probate of the alleged will by the English court is not authenticated or proved, so as to be competent evidence at common law, nor is it authenticated as required by the statute.

1 Greenl. Ev. § 514; *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249; 2 Freeman, Judgm. § 414; 2 Black, Judgm. § 840; Story, Confl. L. 8th ed. § 645; Ky. Stat. § 1638; *Faustre v. Com.* 92 Ky. 34, 17 S. W. 189.

Probate, in common form, is not allowed by the English statute, and, for lack of the requisite statutory process and service, the English court not having jurisdiction of appellee, W. S. Newcomb, in the probate proceeding, the judgment therein was void as to him.

37 Vict. chap. 66, pp. 48-58; *Galpin v. Page*, 18 Wall. 354, 21 L. ed. 959; *Kerr v. Condy*, 9 Bush, 372; *Gebhard v. Garnier*, 12 Bush, 321, 23 Am. Rep. 721.

A foreign administration is merely ancillary, and the deceased's movables, whether

he die testate or intestate, are to be distributed by the laws of his domicile at the time of his death, and the foreign personal representative, residing in the country of the domicile, will hold them subject to its laws.

Dacey, Confl. L. pp. 674, 675, and notes 1, 2, pp. 677-679, 684, 689-691, 786, 787; Story, Confl. L. §§ 379, 380; *Dixon v. Ramsay*, 3 Cranch, 319, 2 L. ed. 453; 2 Kent, Com. 429; *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 580; *Whicker v. Hume*, 7 H. L. Cas. 124.

A court of Kentucky cannot recognize an instrument as the will of one who dies domiciled there, simply for its English probate.

Ky. Stat. §§ 4849, 4852; *Barnes v. Brahear*, 2 B. Mon. 380; *Carmichael v. Elmendorf*, 4 Bibb, 484; *Williams v. Saunders*, 5 Coldw. 60.

It was a fraud upon the court of the domicile, and upon the heirs of E. B. Newcomb, for the executor named therein to withdraw his will from its jurisdiction for foreign probate, for which such foreign probate will be disregarded.

Ky. Stat. § 4849; *Wood v. Wood*, 78 Ky. 624.

The foreign executor, residing in the country of the domicile of the deceased, is answerable in its courts for the distributable surplus in his hands.

Dorsey v. Dorsey, 5 J. J. Marsh. 280, 22 Am. Dec. 33; *Atchison v. Lindsey*, 6 B. Mon. 86, 43 Am. Dec. 153; *Manion v. Titworth*, 18 B. Mon. 582.

The title to the tobacco in Europe vested in appellant on her qualification as executrix in the Henderson county court, and by virtue thereof, as shown by her inventory, came to her possession, and she therefore holds its proceeds, subject to the law of the domicile from whose court she received her authority.

Putnam v. Pitney, 45 Minn. 242, *sub nom.* *Re Washburn*, 11 L. R. A. 41, 47 N. W. 790.

BURNHAM, J., delivered the opinion of the court:

In 1890 E. B. Newcomb died, domiciled in Henderson county, Kentucky. He left surviving him a widow, two children by her, and one son, the appellee herein, the offspring of a former marriage. At the time of his death he left three papers, each purporting to be his last will and testament. One was dated in July, 1888, one (in his own handwriting) was dated March 1, 1890, and the other was dated March 4, 1890. On the 25th day of August thereafter the Henderson county court admitted to probate the will dated March 4, 1890, on motion of appellant, who was the principal devisee in each paper, and named as executrix thereof, and she duly qualified as executrix. Subsequently she returned to the office of the clerk of the county court an inventory of the estate of her husband, which came to her hands as executrix, which was duly recorded therein. An appeal was taken by appellee, W. S. Newcomb, from the judgment of the

county court to the Henderson circuit court; and upon a jury trial the judgment of the county court was reversed, and the instrument held not to be the last will of E. B. Newcomb, deceased. Mrs. Newcomb appealed to this court, and in an opinion rendered October 30, 1894, reported in 96 Ky. 120, 27 S. W. 997, the judgment of the circuit court was affirmed. The bulk of the estate left by decedent consisted of 1,227 hogsheads of tobacco, which were in the hands of commission merchants in London and Liverpool, England, when E. B. Newcomb died. After the qualification of appellant as executrix of the will of March 4, 1890, and before any appeal had been taken from the probate thereof, she executed a power of attorney authorizing one A. E. Gilliatt, who resided in England, to have ancillary probate of the will taken there, and to qualify thereunder in accordance with the English law, which he did, and took possession, under the authority thereby conferred, of all of the tobacco, sold it, paid the outstanding charges against it, including taxes to the government, the debts of E. B. Newcomb to persons residing in England, and held the surplus subject to the order of the court. There also came to the hands of appellant, under her appointment as executrix by the Henderson county court, something over \$2,000 in cash. After the affirmation of the judgment of the circuit court by this court in October, 1894, Mrs. Newcomb produced to the Henderson county court, and offered for probate, the holographic will dated March 1, 1890. Appellee, W. S. Newcomb, suggested to the court that the will dated July, 1888, was also in the possession of appellant; and upon his motion a rule was awarded against her to produce that paper, which she did, and offered both of these wills for probate in the alternative. Before the county court had determined the question as to the last wills offered for probate, Mrs. Newcomb, being the sole beneficiary therein, with the consent of contestant abandoned her motion to probate either of these wills in the Henderson county court, and withdrew them therefrom. She subsequently took these two papers to England, and offered them for probate, in the alternative, in the probate division of the high court of justice of England; and that court decided that the paper of March 1, 1890, was the true will of decedent, and entered a judgment accordingly on the 22d day of August, 1895, at the same time revoking the ancillary probate theretofore granted of the will of March 4, 1890. Appellant was also permitted to qualify as executrix thereof, and an order was entered directing A. E. Gilliatt to turn over to her, as such executrix, the net assets of the estate held by him under the ancillary probate of the will of March 4, 1890, which is shown by the evidence herein to have been \$58,398. After the affirmation by this court of the judgment of the circuit court rejecting the paper of March 4, 1890, as the last will of deceased, the Ohio Valley Banking & Trust Company was appointed, by an order of the

Henderson county court, administrator of the estate of E. B. Newcomb, deceased, and duly qualified thereunder. And subsequently, on the 14th day of August, 1895, appellee instituted this suit in the Henderson circuit court for a settlement of the estate of E. B. Newcomb, deceased, against the Ohio Valley Banking & Trust Company, administrator, and also made Mary Newcomb and her children, Mary and David B. Newcomb, defendants. He asked that Mrs. Newcomb should be required to account for the money in her hands arising from the proceeds of the tobacco which had been sold in England, which he alleged amounted to the sum of \$180,000. The trust company, as administrator, answered and united in the prayer of plaintiff's petition, making its answer a cross petition, in which it also sought to recover from Mrs. Newcomb the proceeds of the same tobacco.

Mrs. Newcomb, in her answer, both to the original and amended petitions of W. S. Newcomb and the cross petition of the trust company, set out in detail all of the facts heretofore stated as to the character of the estate left by E. B. Newcomb, its location at the time of his death, the probate of his will in the Henderson county court, the subsequent ancillary probate thereof in England, and qualifications of Gilliatt thereunder, and, by way of further defense, answered that at the time of the death of E. B. Newcomb he was a British subject; that in the year 1862, being then a citizen of the United States, residing in the Dominion of Canada, he made application for naturalization in accordance with the laws of said dominion, and that thereafter, on the 14th day of December, 1865, his application was granted, and a certificate to that effect delivered to him; that he then and there took the oath of allegiance to her majesty, Queen Victoria, required by law, and remained a British subject until the time of his death. She further alleged that at the time of his naturalization as a British subject, and continuously since that time, the laws of Great Britain provided, and have provided, that "every will and other testamentary instrument made out of the United Kingdom by a British subject, whatever might be the domicile of such person at the time of making the same, or at the time of his or her death, should, as regards personal estate situated in the territorial limits of Great Britain, be held to be well executed for the purpose of being admitted in England and Ireland to probate and in Scotland to confirmation, and to pass title to the property if the same were made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made;" and, further, that "the laws of Great Britain at the time of the death of E. B. Newcomb provided, and have continuously since provided, that her majesty's high court of justice, probate division, in England, should have jurisdiction to grant original or ancillary probate of any will or other

testamentary paper disposing of personal assets and effects within the territorial limits of England; . . . that at the time she intermarried with E. B. Newcomb, in 1804, in the Dominion of Canada, and continuously since that time, the laws of Great Britain provided, and have provided, that any foreign woman married, or should be afterwards married, to a natural born or naturalized subject of her Britannic majesty, Queen Victoria, should be deemed and taken to be herself naturalized, and to have all the rights and privileges of a natural born subject; that at the time of her marriage she was a citizen of the United States, and that by the laws of the United States, and the treaties made pursuant to the Constitution thereof, and especially of the treaty between the United States and Great Britain, which became a law on the 16th day of September, 1870, she became entitled, by virtue of the facts hereinbefore recited, to have the will of her husband probated in the probate court of Great Britain, and to administer the assets of the estate of E. B. Newcomb; and that the will of her husband, legally probated there, cannot be attacked in the courts of the United States."

Appellee, for reply to the answer of appellant, Mary Newcomb, to his original and amended petitions, denies that at the time of his death E. B. Newcomb was a British subject, and avers that he was during his life and at his decease a citizen of the United States, and of the state of Kentucky; denies all of the averments as to his naturalization, as to his British citizenship and that of the defendant Mary Newcomb, and as to the English probate of the will of March 1, 1890, and avers that, if so probated, such probate does not supersede the necessity of the probate required by the law of Kentucky, the place of his and her domicile, and was in fraud of the jurisdiction of the courts of this state, and therefore void; alleges that the title to the tobacco in Europe vested in appellant on her qualification as executrix in the Henderson county court, and by virtue thereof, and that she therefore holds its proceeds subject to the law of the domicile from whose court she received her authority; that the foreign probation is merely ancillary, and that the personal estate of decedent must be distributed according to the laws of his domicile at the time of his death; and that the foreign personal representative, residing in the country of his domicile, will hold it subject to the laws thereof.

The pleadings being made up, and proof taken, judgment was rendered against Mrs. Newcomb for two ninths of the net amount of the English assets, in favor of appellee, and from that judgment she has appealed.

The claim that E. B. Newcomb was a British subject, and was therefore entitled to have his will probated in the English court, and his personal estate in Great Britain administered by the executrix appointed there, is the foundation of the defense relied on in this proceeding, and will be first considered. "The doctrine of per-

petual allegiance was one of the settled principles of the English common law, and was maintained in the United States by high authorities during the earlier period of our Federal history." See 2 Kent, Com. 49; 3 Story, Const. 3; Wharton, St. Tr. 654; Wharton, Conf. L. § 5; Lawrence's Wheaton, International Law, ed. 1863, 995. It was asserted by Great Britain as a basis for the claim to impress all native Britons in foreign ships. Lord Grenville, in writing to the American Secretary of State (Mr. King) March 27, 1797, said: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part." See 2 Am. State Papers, 149. But the right of expatriation has been most vigorously asserted by the government of the United States for many years, and the Congress of the United States, by an act adopted July 27, 1868, declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness," and prescribes "that any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this government." See Rev. Stat. § 1999. And treaties recognizing the right of expatriation were executed, with various modifications in detail, with most of the governments of Europe. The negotiations with England were very protracted, but were at last closed by the adoption by the imperial Parliament on May 14, 1870, of an act by which it is declared "that any British subject who has, at any time before, or may, at any time after, the passing of this act, when in any foreign state, and not under any disability, voluntarily become naturalized in such state, shall, from and after the time of his having become so naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien." One of the articles of this treaty so made with Great Britain was in this language: "Citizens of the United States who have become or shall become and are naturalized according to the law within the British dominion as British subjects shall, subject to the provisions of article 2, be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States. Reciprocally, British subjects who have become or shall become and are naturalized according to law within the United States of America, as citizens thereof, shall, subject to the provisions of article 2, be held by Great Britain to be in all respects and for all purposes citizens of the United States, and shall be treated as such by Great Britain." By this treaty the United States

bound itself to guarantee to British subjects domiciled in the United States all rights belonging to them as British subjects, whether they were born such, or became so by naturalization. On the 6th day of August, 1861, previous to the alleged application of E. B. Newcomb for naturalization as a British subject, the British Parliament, by an act to amend the law with respect to wills of personal estates made by British subjects, provided, in the 1st section of the act, that "every will and every other testamentary paper made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same, or at the time of his or her death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required, either by the law of the place where such person was domiciled when same was made, or by the laws then in force in any part of her majesty's dominions where he had his domicile of origin." And it is evident that, if E. B. Newcomb was a British subject at the date of the execution of the will in contest and at his death, he was, by virtue of the treaty made by the United States with Great Britain, and under the provisions of the English statute of wills of personal property made by British subjects, quoted *supra*, entitled to have his will admitted to probate in England, if such will was valid, either by the English law, or by the law of the place where the testator had his domicile, no matter where such domicile was.

In support of the claim that E. B. Newcomb was a naturalized British subject, there is filed in the record the original certificate of naturalization, signed by the clerk of the naturalization court of the county of Lincoln and province of Canada, and dated the 14th day of December, 1865. It is in due form of law, and is shown by the evidence to have been found among the papers of deceased; and it is further shown that by virtue of that naturalization he always claimed to be a British subject, and never voted, sat on juries, or performed any of those duties which the subject owes to the state, during his subsequent domicile in Kentucky. And the law is well settled that a paper of this character can only be impeached by showing that the court which granted it was without jurisdiction, or that fraud consisting of intentional or dishonest misrepresentation or suppression of material facts by the party obtaining the judgment was practised upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law. See 2 Wharton, International Law, § 174. The certificate of naturalization was admissible as evidence without further proof, but in support of its genuineness appellant had filed the deposition of the present clerk of the court which granted the certificate, who is the successor in office of the clerk who signed the certificate of

51 L. R. A.

naturalization relied on, and the custodian of the records of the said office, and who certifies that he finds in the minute or session book of the court for the year 1865 that on the 12th day of December of that year the following entry was made by the clerk of the court, *viz.*: "Certificates of naturalization of Eleazer B. Newcomb read,"—and that on the 14th day of the same month, being the last day of the general sessions of the peace, there is entered of record in the said session book the following, *viz.*: "Certificate of naturalization of Eleazer B. Newcomb ordered to be granted;" and he further certifies that, according to the invariable rule of said court, the certificate of naturalization would, as of course, be issued to the said Newcomb, in pursuance of the act respecting the naturalization of aliens then in force in the Dominion of Canada. This deposition is certified to by the consular agent of the United States, and it seems to us sufficient to establish the claim that decedent was a British subject.

Appellant produced on the trial of this case in the court below a paper which purported on its face to be an original exemplification of the probate of the will in England, wherein it is recited that:

It appearing that on the 22d day of August, 1895, the last will and testament of Eleazer Burbank Newcomb, late of the city of Henderson, in the state of Kentucky, in the United States of America, tobacco merchant, deceased, who died at No. 1 Rue Lincoln, Champs Elysées, Paris, in France, on the 18th day of July, 1890, was proved in the said high court of justice by Mary Newcomb, widow, the relict, the sole executrix named in the said will; the right honorable, the president of the probate, divorce, and admiralty division of the said court, having on the 18th day of August, 1895, in a certain action entitled "Newcomb vs. Newcomb," pronounced for the force and validity of the said will, and which probate now remains of record in the said registry. The true tenor of the said will is in the following words, to wit: [Here the will is copied, and it is further recited:] In faith and testimony whereof these letters testimonial are issued. Given at London, as to the time of the aforesaid search and the sealing of these presents, this nineteenth day of December in the year of our Lord 1895.

[Signed] D. H. Owen, Registrar.

I, the Right Honorable Sir Francis Henry Jenne, knight, president of the probate, divorce, and admiralty division of her majesty's high court of justice, hereby certify that the will, a copy whereof is contained in the within exemplification, appears to have been duly proved, and the probate thereof to be in force, and that the attestation of David Henry Owen, esquire, has been duly made, with the seal of office annexed, by the said David Henry Owen, who is one of the registrars of the principal probate registry of the said high court of justice, having power to receive the origi-

nal will and to grant probate thereof. As witness my hand this 20th day of December, 1895.

[Signed]

F. H. Jenne.

And this certificate was certified, as provided by the Kentucky statutes, over the signature and seal of Patrick Collins, consulate general of the United States at London.

The deposition of Mr. Hutchins, who was solicitor for Mrs. Newcomb, shows that the will was offered for probate in the court which, according to the laws of Great Britain, had jurisdiction. It also appears that W. S. Newcomb was before the court at the time of the probate, by writ of summons served upon him in Henderson, Kentucky, by Judge Yeaman; that the English probate court had authority to make rules for the purpose of bringing nonresidents before the court; and that the service upon W. S. Newcomb was pursuant to such rules. We are therefore of the opinion that the evidence as to the admission by the English court of the will of E. B. Newcomb to probate therein is sufficient to show such fact, and authorized the introduction of the exemplification of such probate as evidence in the trial of this proceeding. And this brings us to the consideration of the last question involved in this litigation; i. e., the effect which must be given in courts of this state to the will of a British subject, disposing of personal property in England, which has been duly admitted to probate in the courts of that country, but who at the time of the execution of the paper was domiciled in this state.

It seems to be the well-settled law that settlement of estates is governed by the law of the state or country where the property is situated, and from whence the fiduciary derives his authority to take possession and control of the property; and the personal assets of a decedent have a situs for the purpose of administration entirely distinct from the domicile of the decedent, except when necessary to pay debts. See *Story*, Conf. L. § 422, and numerous authorities there cited. It will be conceded that the law of the domicile of a decedent must govern in the distribution of personal estate among his heirs, and that this distribution is to be made under the authority of the court within whose jurisdiction the decedent had his domicile, in cases of intestacy. The *situs rei*, as well as the presence of the parties, confer jurisdiction to decree distribution according to the law of the domicile, and such a jurisdiction is not inconsistent with international policy; but it seems to us that this doctrine can have no application under the facts of this case, where there are no creditors complaining, and where a will disposing of the personality within the foreign jurisdiction has been duly admitted to probate. This seems to be the view generally taken by the Kentucky decisions to which our attention has been called, and the Federal authorities seem to be of the same tenor. In the case of *Kerr* 51 L. R. A.

v. Moon, 9 Wheat. 565, 6 L. ed. 161, the court said: "But, could it even be conceded that this was personal property, it would still be property within the state of Ohio; and we hold it to be perfectly clear that a person claiming under a will proved in one state cannot intermeddle with or sue for the effects of a testator in another state, unless the will be proved in that other state, or unless he be permitted to do so by some law of that state." In *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337, the court said: "It follows as a necessary inference from these well-established principles 'that, where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator,'"—citing *Story*, Conf. L. § 522. In *Reed v. Reed*, 91 Ky. 267, 11 L. R. A. 513, 15 S. W. 525, this court said: "The probate of a will is an *ex parte* proceeding, and essentially one *in rem*. It determines the status of the property. The order of probate, while it remains in force and not superseded, is binding, not only upon the interested parties, but is valid as to all the world." In *Mitchell v. Holder*, 8 Bush, 302, it was said: "It has been repeatedly held that the probate or rejection of a will by the proper court, having the case regularly before it, was like a sentence *in rem*, conclusive while it remained in force in the same and all other courts, and between all persons, whether formal parties to the record or not." In 21 Wall. 503, in the *Broderick Will Case*, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599, which came up from California, the supreme court of that state, in an elaborate opinion delivered by Judge Norton, said: "Upon examining the decisions of the Supreme Court of the United States and of the courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern cases arising under the probate laws of this country, and that in the United States, wherever the power to probate a will is given to a probate court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court." We have been cited to a large number of other cases which, in effect, hold the same doctrine; and as the English court had jurisdiction, under act 24 & 25 Vict., to grant probate of the will of E. B. Newcomb, all the personality belonging to his estate then situate in England vested in the executrix for administration under the English law, and her liability as executrix can only be tested by that law.

But it is insisted for appellee that, even if it be conceded that the English court had jurisdiction to probate the will, such foreign probate is only ancillary, and, after the payment of all debts and other claims

provable against the estate in England, the personal representative of the deceased, under the law of Victoria, must hand over the distributable residue to the personal representative of the deceased, under the law of his domicil, and leave to such representative the distribution thereof among the beneficiaries, and that all persons who claim a share in the decedent's estate may enforce their claims before the tribunals of his domicil; citing Dicey on Conflict of Laws in support of this contention. The effect of such a construction as this would be to absolutely ignore the disposition made by testator of his property. When it is conceded that the will of testator is entitled to probate in the English court for the purpose of disposing of personal estate located in England, it necessarily follows that such property must go and be disposed of in accordance with the terms of the will itself, and cannot again be the subject of litigation or adjudication in the courts of the domicil. In *Goods of Rippon*, 3 Swabey & T. 177, cited in Jacob, Fisher's Digest, col. 13,698, it was held that where a British subject died abroad, leaving a will executed in England, it was immaterial to consider whether he had or had not acquired a foreign domicil. In Jarman on Wills, 5th ed., the author

says that the act to amend the law with respect to wills of personal estate made by British subjects was passed to obviate the question arising between an original and an ancillary probate; that it affects British subjects only, and can only be enforced where the property in question is locally situate within British jurisdiction; that foreign courts are not bound to recognize the act in determining whether a given instrument is a valid will of personal property within their own jurisdiction, and thus the personal property, British and foreign, of the British subject, may be distributable according to two distinct laws. When it has been determined that the English court has, by virtue of the English law, jurisdiction to probate the will of a British subject as to personal estate located in England, without regard to the place of his domicil, it is a necessary sequence that neither the validity of such will nor the disposition of personal estate located in England, covered by it, can be assailed in the courts of this country.

For the reasons indicated herein, the judgment appealed from is reversed, with instructions to the lower court to dismiss the amended petition of W. S. Newcomb, and for other proceedings consistent herewith.

NEW JERSEY COURT OF ERRORS AND APPEALS.

OCEAN CITY ASSOCIATION, *Piff. in Err.*,

v.

William SHRIVER.

(64 N. J. L. 550.)

1. Land remade by accretion after it had been washed away belongs to the original proprietor.
2. Accretions on the seashore belong to the original owner of the mainland, and not to his remote grantee, although the latter's tract when he obtained title thereto extended to the line of ordinary high tide, if the tract, when conveyed by the original owner, did not extend to that line, but was cut off from the shore by intervening land to which title was retained by the grantor, but which has since been washed away.

(*Magie, Ch., and Dison and Collins, JJ., dissent.*)

(June 18, 1900.)

NOTE.—Right to follow accretions across division line previously submerged by the action of the water.

The decisions upon this subject are very few, but the question seems to have occasioned the courts needless difficulty. The subject of accretions primarily relates to the adjustment of rights between the owner of the water bed and the adjoining upland. The rule is that where the boundary is the water line a gradual imperceptible formation of land will not change the boundary, but it will still remain at the water line. Also that if a portion of the land is suddenly submerged the owner will not lose his title if the original boundaries can be traced 51 L. R. A.

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. D. J. Fancoast for plaintiff in error.

Messrs. Albert A. Howell, Samuel W. Beldom, and S. H. Grey, for defendant in error:

When, if ever, the Ocean City Association owned the land between lot 849, as delineated on the map, and the ocean, its easterly boundary was the ambulatory line of high water of the Atlantic ocean. The strip immediately oceanward of it—that is, the land between high and low water marks—was the absolute property of the state.

Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 350; *Gough v. Bell*, 22 N. J. L. 441, 23 N. J. L. 624; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269.

and the land reforms within a reasonable time. See note to *Chicago v. Ward* (Ill.) 88 L. R. A. 849. The doctrine was gradually expanded and applied to the settlement of titles on the opposite sides of streams which originally extended to the centers. In such cases where the bed of the river gradually changes, adding land on one side and taking it from the other, the division line is still the center of the stream.

Thus, where a portion of an island is washed away, and accretions forming from the main land extend over the place where such portion stood, they will belong to the owner of the shoreland, and not to the owner of the island. *Buse v. Russell*, 86 Mo. 209. And the principle of

The boundary of this riparian strip is movable, and as it advances inward, if it does, by gradual steps, private ownership is absolutely destroyed to the extent of such advance.

Scrutton v. Brown, 4 Barn. & C. 485; *Re Hull & S. R. Co.* 5 Mees. & W. 327.

There are numerous authorities to the effect that where land is overflowed by the violence of the sea, but again reappears, it shall be returned to the original owner. Under circumstances, not defined, this is the *dictum* of a number of learned treatises of antiquity. But nowhere has that *dictum* been applied, or considered applicable, when the land so made was attached to fast land, which, at the time of the accretion, was not the property of the original owner, unless, perhaps, the changes were by rapid strides and not by imperceptible progress.

Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581.

The land which has been attached to defendant's lot by gradual formation or gradual recession of the sea is his property.

Rees v. Yarrowburgh, 3 Barn. & C. 91; *Atty. Gen. v. Rees*, 4 DeG. & J. 55; *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Benson v. Morrow*, 61 Mo. 352; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Camden & A. Land Co. v. Lippincott*, 45 N. J. L. 405; *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565.

that case was followed in *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589; *Kees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; and *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592.

But it has been held that where the bank of a river is suddenly washed away its owner does not lose his title to the *locus in quo*, but if subsequently land is formed in the stream over the place where the land formerly was, he will have the title to it, and such title cannot be claimed by the owner of an island on the opposite side of the river in another state, by the mere fact that the land is attached by accretion to such island in the process of formation. The right of accretion to an island in a river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river as such riparian proprietors. *St. Louis v. Rutz*, 138 U. S. 228, 34 L. ed. 941, 11 Sup. Ct. Rep. 337, affirming *Rutz v. Seeger*, 35 Fed. Rep. 188. But in that case it appeared that the island was a mere mass of alluvial deposits, and had traveled for more than a mile from one state into another; and the court said that in such a case the law of title by accretion can have no application, for its progress is not imperceptible in a legal sense. Where the stream or water's edge is not the boundary, the rule does not apply.

Thus, where a plat is made of upland and land beneath the water, and land is sold with reference to the plat, the fact that the shore is washed away until interior land becomes riparian will not give it the riparian right of reclaiming the land lying beneath the water and sold to third parties according to the plat. *Gilbert v. Eldridge*, 47 Minn. 210, 13 L. R. A. 311, 40 N. W. 679.
31 L. R. A.

Depue, Ch. J., delivered the opinion of the court:

This was an action of ejectment brought by the Ocean City Association against William Shriver to recover possession of a lot of land in Ocean City lying between Ocean avenue and the Atlantic ocean. The Ocean City Association is an incorporated land company. In 1880 it purchased a tract containing several thousand acres of wholly unimproved land, lying between Peck's beach, in the county of Cape May, and the Atlantic ocean. On this tract a summer resort known as "Ocean City" has grown up. Shortly after the purchase the association had a map made from a survey made by one Lake. The map was lithographed, and a copy filed in the office of the clerk of Cape May county, and some lots were sold by the association by reference to it. In 1883 the association caused a more extensive map or plan to be made by Lake, which was lithographed, and a copy also filed in the clerk's office. By the map of 1880 it appeared that there was a considerable space of undivided land lying between that portion of the association's property and the Atlantic ocean. On this map Ocean avenue was delineated practically parallel with, and some distance from, the ocean. Streets were delineated extending from Ocean avenue westerly, among which Sixth, Seventh, Eighth, and Ninth streets only are material to this case. On the map of 1880 Ocean avenue was delineated only as far as Eighth street. The premises which have given occasion to this litigation front on Ocean avenue, and lie be-

This is further illustrated by accretions across side lines.

Thus, in *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581, affirming 29 Hun, 660, it is said that, however accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his conterminous neighbor. In that case a bar separated from the main land by a lagoon was claimed as accretion by the owner of the portion of the bar where the formation began. It appeared that the bar merely replaced a formation which had been in part washed away, and the court said that the owner of the nucleus of the bar could not, even if the process of its enlargement and extension was effected by accretion, claim beyond the point where such accretion began to be adjacent to the property of adjoining owners.

If the rule does not apply where the title is not the boundary, it cannot be applied where, by the action of the water, the riparian land is all washed away until the water reaches non-riparian lands. What is there in this situation to destroy the title of the former riparian owner? As between him and his inland neighbor his title is still intact, although his land lies in the bottom of the river. When, therefore, the land can be reclaimed, either naturally or artificially, it would seem that it belongs to the former owner. And so is the weight of authority supporting *OCEAN CITY ASSO. v. SHRIVER*.

Where land is so situated on a river bend that the current washes away a portion of it until former nonriparian land becomes riparian, and then, beginning on the shore of the latter, the land reforms until it extends across

tween Eighth and Ninth streets. On the map of 1883 Ocean avenue is delineated as extending beyond Eighth street down to Fourteenth street, crossing Eighth, Ninth, and Tenth streets, and the other streets below. On that map is delineated a line of high water in 1882. That high-water line is located about 250 feet east of the easterly line of Ocean avenue, and between that line and Ocean avenue appears a space of unplotted land—land which had not been laid out in lots for sale. This map was used as the sales map. By a deed bearing date October 29, 1884, the association conveyed lot No. 849 to one Henry B. Howell. This lot is on the westerly side of Ocean avenue, between Ninth and Tenth streets. It had, between it and the Atlantic ocean, Ocean avenue, and also the strip of unimproved or unplotted land between that avenue and the ocean. The description of the premises conveyed to Howell is as follows: "All that certain lot or piece of ground situate, lying, and being in Ocean City, on Peck's beach, Upper Cape May township, Cape May county, state of New Jersey, and numbered 849 in section C on the plan of lots of the said Ocean City Association. Beginning on the northwesterly side of Ocean avenue, at the distance of one hundred and fifty feet southwesterly from the southwesterly line of Ninth street, containing in front or breadth on the said Ocean avenue fifty feet, and of that width extending northwesterly, between lines parallel with the said Ninth street, one hundred and thirty-five feet, to a fifteen-foot-wide street." It is manifest from this description that the sale to Howell was made

by reference to the map of 1883. Howell, by deed dated April 21, 1895, conveyed this lot to Shriver, the defendant in this suit, by the same description; that is, of a lot on the northwesterly side of Ocean avenue. Both parties claim title by accretion. It will be assumed that the alluvial deposits that changed the line of high water were such as by the common law would extend the title of a riparian owner to the line of high water as it was at the commencement of this suit. The material proposition for consideration is which of these parties is by law entitled to the increment by alluvion. The call in the deed for Ocean avenue as a boundary carried the grantee's title to the middle line of the avenue. *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229. The avenue, as delineated on the map, is a fixed monument in the description in the deed; and in that respect it differs from a boundary on the ocean, where, by force of the description itself, the title of the grantee will advance or recede as the line of high water changes from time to time, and he will hold by the same boundary, including the accumulated soil that has arisen from alluvial formations. *Sorattion v. Brown*, 4 Barn. & C. 485; *Rea v. Yarborough*, 3 Barn. & C. 91; s. c., in House of Lords, *sub nom. Gifford v. Yarborough*, 5 Bing. 163; *Camden & A. Land Co. v. Lippincott*, 45 N. J. L. 405. There is evidence that, when the map of 1880 was made, Ocean avenue was actually laid out on the ground above high water; but on that map Ocean avenue did not extend below Eighth street. The testimony is conflicting with respect to the line of ordinary high tide in

the former line, the nonriparian owner will not be entitled to claim the whole of it, but can follow it only to the former division line between the two estates, if the effect of such division will be to give the former riparian owner his original water front. *Crandal v. Allen*, 118 Mo. 403, 22 L. R. A. 591, 24 S. W. 172.

A riparian owner will not lose his property and the right to accretions by the temporary engulfing of the property by a violent storm, if, soon after the subsidence of the storm, accretions begin to form on what has become the shore line, which restores such owner's property and carries the line further out into the water. *Gale v. Kinsie*, 80 Ill. 132.

In *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746, a riparian owner recovered land reformed upon a place formerly occupied by land washed away, as against the claims of an adjoining owner who insisted that the formation commenced against his land. But the decision turned more upon the finding of the jury than upon the law involved.

The opposite doctrine originated in a *dictum* in a Connecticut case.

In *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 585, it was held that when the river has gradually washed away all of the tract belonging to one person, and continues to change in that direction until it has worked so far into the land of his adjoining owner that all of the land of the former and part of that of the latter is now on the other side of the river, the title of the latter will not stop at the place of his old division line, but he will continue to follow the river, and he will remain a riparian owner, although by so doing he absorbs land formerly belonging to the other owner. The court 51 L. R. A.

in deciding the case says if a particular tract is entirely cut off from the river by an intervening tract, and the intervening tract should be gradually washed away until the remoter tract is reached by the river, the latter tract will become riparian as much as if it had been originally such. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot and finally all that had been taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot.

And the doctrine has been distinctly applied in Kansas, where it is held that where land between a nonriparian owner and the river is washed away so that his land becomes riparian, after which it reforms along his line until all of his land and a part of the adjoining land is restored, his rights as a riparian owner are not destroyed by the restoration of his tract, but he is entitled to follow the accretion to the river bank to the exclusion of the right of the owner formerly intervening between him and the river. *Peuker v. Canter* (Kan.) 63 Pac. 617. The court places its ruling upon *Welles v. Bailey*; disapproving *OCEAN CITY ASSO. V. SHRIVER*.

H. P. F.

1883-84. There is evidence that the ocean, after 1880, gradually worked inland, carrying away the avenue, or part of it, in front of lot No. 849, and that in 1895 the ordinary high water came up to this lot. In 1897 the ocean began to recede, and the map of the riparian commissioners indicates a high-water line in Ocean avenue. On the 3d of August, 1897, Shriver obtained a grant from the riparian commissioners covering in terms a strip of land 50 feet in width between the extended lines of the lateral boundaries of lot No. 849 from the high-water line as indicated by the commissioners to the commissioners' exterior line, a distance of 985 feet. This suit was commenced in 1898. The controversy concerns the title to the strip of land within the description of the riparian grant, 50 feet wide, extending from the westerly side of Ocean avenue, easterly about 150 feet. I have above assumed the advance of high water to or upon the lot 849 at the times above mentioned, but there is little evidence with respect to the line of ordinary high tide before 1897. The distinction between the waters by the action of the sea overflowing lands, and the line of ordinary high tide, is of importance in deciding the problem involved in this case.

Although the call in the deed from the association to Howell is for Ocean avenue as a fixed monument, I do not consider that fact decisive in this case. The doctrine of dereliction and accretion depends upon principles that are peculiar to that subject. The right to alluvion depends upon the fact of the contiguity of the estate to the water, and, to give a right to accretion and accretion, there must be an estate to which the accretion can attach. *Saulet v. Shepherd*, 4 Wall. 502, 18 L. ed. 442. The doctrine whereby title is acquired by accretion is founded on the principle of compensation. The proprietor of lands having a boundary on the sea is obliged to accept the alteration of his boundary by the changes to which the shore is subject. He is subject to loss by the same means that may add to his territory, and, as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations. This rule is vindicated on the principle of natural justice that he who sustains the burden of losses imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion. *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818; 1 Am. & Eng. Enc. Law, 2d ed. p. 476, note 1. Lands gained from the sea are *per alluvionem* (or land washed up by the sea) and *per relictionem* (derelict land or land left dry by the retirement of the sea). Hall, Rights of Crown, 108. The doctrine of accretion applies in both these instances; for, as was said by Lord Hale, "there is no alluvion without some kind of reliction, for the sea shuts out itself." *Id.* 114. There is another condition under which the doctrine of accretion is presented; that is, of ground once *terra firma*, but since flooded, which has been recovered. Mr. Callis puts this case: "The sea overflows a field where divers men's grounds lie, promiscuously, and 51 L. R. A.

there continueth so long that the same is accounted parcel of the sea; and then after many years the sea goes back and leaves the same, but the grounds are so defaced as the bounds thereof be clean extinct, and grown out of knowledge, it may be the King shall have those grounds; yet in histories I find that Nilus every year so overflows the grounds adjoining that their bounds are defaced thereby, yet they are able to set them out by the art of geometry." Callis, Sewers, p. 51. To which Mr. Hall says: "At this day it may be concluded that the former ownership may be identified by mensuration, so that if the sea suddenly swallow up 10 acres, and after several years leave 20 acres dry, the 10 acres may be reclaimed by admeasurement; but then the locality must be proved." Hall, Rights of Crown, 130. The common law is stated in Hale's *De Jure Maris* in these words: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if, by situation and extent of quantity, and, bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety."

. . . But suppose the inundation of the sea deface the marks and boundaries, yet, if the certain extent or contents from the land not overflowed can be evidenced, though the bounds be defaced, yet it shall be returned to the owner, according to those quantities and extents that it formerly had. Only, if any man be at the charge of innning of it, it seems, by a decree of Sewers, he may hold it till he be reimbursed his charges, as was done in the *Case of Burnell*, before alleged. But, if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea." Hargrave's Law Tracts, 15, 16, 17. Lord Justice Lindley, speaking on this subject in 1878, said: "Our own law may be traced back, through Blackstone, Hale, Britton, Fleta, and Bracton, to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject." *Foster v. Wright*, L. R. 4 C. P. Div. 438, 446. "The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question." Alderson, B., in *Re Hull & S. R. Co.* 5 Mees. & W. 333. *New Orleans v. United States* is the leading case in this country. The court there said: "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and, as he is without remedy for his loss in this way, he can-

not be held accountable for his gain." 10 Pet. 602, 9 L. ed. 573; *Jones v. Boulard*, 24 How. 41, 16 L. ed. 604; *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818; *Saulet v. Shepherd*, 4 Wall. 502, 18 L. ed. 442; *St. Clair County v. Livingston*, 23 Wall. 46, 23 L. ed. 59; *Jeffers v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518.

To entitle a proprietor to the right of accretion, he must be a riparian owner, and his land must adjoin the line of ordinary high tide. In *Fitzgerald v. Faunce* this court held that a strip of land 4 feet in width interposed between the lands of an adjacent proprietor and the water deprived the latter of the rights of a riparian owner, although that strip was conveyed for use and enjoyment for purposes of fishing. 46 N. J. L. 536. So, also, if a strip of land, however small, intervene between the premises conveyed and the water at ordinary high water, the owner will not be entitled to the accretion. *Saulet v. Shepherd*, 4 Wall. 502, 18 L. ed. 442; *East Hampton v. Kirk*, 84 N. Y. 215. And, as between vendor and vendee, the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title. Gould, Waters, § 156. In *Johnston v. Jones* the facts were these: One Robert A. Kinzie was the owner of a tract of land situate in the bend of the Chicago river. In February, 1833, he laid out an addition to the town of Chicago upon this fractional section, and made a plat of the same, which was recorded in the recorder's office of the county on the 18th day of January, 1834. On this plat lots Nos. 34 and 35 were delineated as water lots. Johnston, plaintiff in the ejectment, was the owner of No. 34; Jones, the defendant, of No. 35. The controversy between them was with respect to the title to alluvion that had been made by the cutting of a new channel in the river. September 1, 1834, Kinzie conveyed to Jones, describing the lot as being water lot No. 35, etc., "agreeably to the town plat recorded," etc., "to which reference may be had if necessary." On the 22d of October, 1835, Kinzie conveyed to Johnston, the plaintiff, lot No. 34; describing it as a water lot, and by the same reference to the town plat. In 1833 the government commenced the construction of the harbor of the city by the erection of two piers, the effect of which was to turn the river from its sweep southerly across the sand bars to the waters of the lake between the two piers. After the construction of the harbor and extension of the piers, the shore was greatly changed; the firm land having increased by the washing of sand and earth and the recession of the waters to the extent of some 1,200 feet in width. The parties, respectively, claimed title to their share of the increment. In determining this question the court held that the true rule was to ascertain whether the lot claimed by the plaintiff had any water front at the time the deed under which he claimed was executed, and not at the time when the lot was originally laid out. There was an instruction by the court on the assumption that lot No. 34 should be located

on the ground as of the time of the survey and plat of February, 1833, some two years and nine months previous to the conveyance to the plaintiff, and not the date of the conveyance, and, if at that time the dividing line between 34 and 35 would strike the lake north of where the north pier in the harbor was subsequently built, the plaintiff would be enabled to take, under his deed, not only lot No. 34, as laid down on the plat, but all subsequent accretions by alluvion or dereliction, whatever might be the extent of the new-formed land. This instruction was held erroneous, the court saying: "The true answer to the position assumed, and which governed the trial below, is that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance; that alluvial accretions since the date of the deed belong to the plaintiff, as owner of adjoining land; and that past accretions belong to the then owner. 18 How. 150, 15 L. ed. 320. The same case was again before the court, and it was held that the right which the owner of a water land has to the accretion in front of it depends upon its condition at the date of the deed which conveyed to him a legal title, and cannot be carried back to the date of a title bond previously assigned to him, under which he procured the deed. 1 Black, 209-221, 17 L. ed. 117. In *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818, the defendant became the owner of a block or lot bounded by a street on the McKenzie plat. McKenzie's title subsequently devolved on Banks. Ogden's deed was dated in 1833. In 1844 and 1845 land was formed which extended easterly more than 200 feet from the shore of the lake at the time Ogden's deed was made. At that time the waters of the lake limited Sands street by an oblique line, creating a triangle in front of Ogden's lot within the designated lines of the street. This triangle was less than 33 feet wide at its southern end, and it diminished to a point concurrent with the northerly line of Ogden's lot. The Supreme Court of the United States held that the fact that the land within that triangle belonged to the original proprietor gave to Banks the new land that was formed in 1844 and 1845 by accretion. The map of the premises in question in that case, printed on page 59, 2 Wall., and page 819, 17 L. ed., exhibits a similarity between the premises then in question and the premises involved in this case. It will also be observed that in that case it was held, as our courts hold, that a boundary on a street carries title to the grantee to the middle line of the street. In *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581, it was held that, where the title of a littoral proprietor to land by accretion was involved, while the title of such a proprietor is liable to be lost by erosion or submergence, erosion, to effect that result, must be accomplished by a transportation of the land beyond the owner's boundary, and it may be returned by accretion, in which case the ownership temporarily lost may be regained; and so land lost by submergence may be regained by re-

fiction, unless the submergence has been followed by such a lapse of time as to preclude the identity of the land from being established. If, after a submergence, the water disappears from the land, either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner.

The cases and text-books have so uniformly adopted the principle that the line of ordinary high tide at the time of the conveyance "governs and decides the question, as between vendor and vendee," that further citation is unnecessary. On no other rule can the principle be applied that, as the proprietor of lands is subject to loss by the encroachment of the sea, he is therefore entitled to the gain which may arise from alluvial formations. The rules of construction and appropriation of lands acquired by accretion adopted in the above cases, are applicable to the present suit. As between the association and Howell, the situation of the lot conveyed to him, with respect to the line of ordinary high water, is decisive of the rights of the parties, respectively. Shriver acquired title under Howell by the same description as was contained in the deed to Howell. As against the association, he could not acquire any title or estate or right beyond that which the association by its deed in 1884 conveyed to Howell.

To maintain the title of the defendant, counsel contend that Shriver's right to alluvial deposits is referable to the condition that existed in 1895, when he acquired title under Howell, and not to the time when the association conveyed to Howell. This contention rests upon the assumption that although, as between the association and Howell, the condition of the line of high water was such as that between those parties the association may have remained the riparian owner, yet, by the changes that subsequently occurred, Shriver acquired a new right, and became the riparian owner. The principle that underlies this proposition is that by the submergence of the property of the original riparian owner the title of the latter was destroyed. This position of the defendant's counsel is at variance with two propositions well established by the authorities: First, that, as against any claim that may be made under the Howell title, the right of the association must be determined as of the time when it conveyed to Howell; and, second, that by the submergence the owner of the land does not entirely lose his property in the soil. The only authority cited for the proposition relied on by the defense is *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565. In that case the parties were originally owners of adjoining uplands. By changes in the channel of the river the lot of Welles was transferred to the other side of the river from that on which it originally lay. As was said by the learned judge who delivered the opinion of the court in that case, it involved the application, in circumstances somewhat peculiar, of the principle of accretion and reliction, growing out of changes in the bed of the river. The decision was controlled by

the fact that the river was and continued a natural boundary between the parties, with respect to which the rights of the parties changed with the changes in the bed of the stream. In that respect no criticism is made on the result. It is well settled at common law that where lands of riparian owners are separated by a river,—each being a riparian owner, but on different sides of the stream,—the river is the common boundary, and, if its course be changed by alluvial formations, the owners of such lands will hold to the same boundary, including the accumulated soil. In such cases "*the filum aquæ* is the common mark or boundary, though it borrow great quantities of land, sometimes of one side, sometimes of the other, and give them to the opposite shore." Hale, *De Jure Maris*, pp. 5, 6; *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573; *Nebraska v. Iowa*, 143 U. S. 359, 360, 366, 36 L. ed. 186, 187, 189, 12 Sup. Ct. Rep. 396. An extract from Vattel (*Du Droit d'Alluvion*, § 268), translated and cited with approval by Mr. Justice Brewer in the case last referred to (page 366, 143 U. S., page 189, 36 L. ed., and page 398, 12 Sup. Ct. Rep.) states this doctrine fully; and it will be remembered that the common-law rule was adopted from the civil law. The language of the author is: "As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river, are in nowise changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains. But nature alone produces this change. She destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits." The passages in the opinion in *Welles v. Bailey* that are pressed upon the attention of this court are these: "If a particular tract was entirely cut off from the river by an intervening tract, and that intervening tract should be gradually washed away, until the remoter tract was reached by the river, the latter tract would become riparian, as much as if it had been originally such. . . . If after washing away the intervening lot it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken

from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now approximate, lot." These sentences detached from the body of the opinion, and put aside from the case *sub judice*, if they were intended to express the rule of law governing rights by accretion, are contrary to the general doctrine of the law as declared from the earliest period. In the passage quoted from Lord Hale it is declared with emphasis that if the land of the subject adjoining the same be swallowed up by the sea, and it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his property in the soil though it be for a time part of the sea. The passage from Lord Hale from which this extract is made has been uniformly adopted, I think, without dissent. It must also be borne in mind that the law of alluvion and accretion is founded on the principle of natural justice that he who sustains the burden of losses imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion. It would be difficult to find any ground consistent with justice that would deprive the association of its rights as riparian owner, such as existed when title passed from it to Howell, and transfer to the defendant the property in question, as accretions to his lot, with its boundary on the northwesterly line of Ocean avenue. If the encroachment of the ocean subsequently passed the line of the Howell lot as it was in 1884, and carried part of it away, the owner of that lot can have no equity beyond the restoration to his lot of what he has lost, "according to those quantities and extents that it formerly had."

Gilbert v. Eldridge, decided by the supreme court of Minnesota in 1891, is a case in principle similar to the one now before the court. In that case one Orrin Rice, the owner of a tract of shore land, in 1858 platted it out, designating streets and blocks. At the time of the platting the line of low water crossed block 110. The plaintiff owned block 108, and the defendants block 110, on this plat. Block 108 was southwest of block 110, separated from it by a street, and was wholly above and beyond the shore line. The platting by the owner extended into the shallow water of the Bay of Duluth, beyond the shore line; other lots, blocks, and streets being platted in the water beyond block 110. December 31, 1858, Rice, by warranty deed, conveyed block 110 to one Wilson, to whose rights the defendants succeeded, and block 108 to one Meeker, to whose rights the plaintiff succeeded. In 1873 the city, under legislative authority, established a dock line in the waters of the bay several hundred feet from block 110, and nearly parallel with its water front, and in 1872 caused a ship canal to be dug through another point of land, which resulted in so changing the currents in the waters of the bay that the water gradually encroached upon and washed away the shore. In 1885 this encroachment of the water had 81 L. R. A.

extended so far inland that the shore line at low water ran across block 108, block 110 and the intervening street having become submerged. A process of filling in the submerged land was projected by the defendants so as to again raise the surface of block 110 above the surface of the water. The plaintiff filed a bill to prevent by injunction such attempted and proposed reclamation. He rested his claim to relief on the ground that by the gradual and imperceptible encroachment of the water, and the retrogression of the shore line, his land (block 108) had become riparian estate, and that whatever riparian rights were originally incident to the shore land were now vested in him, as the riparian owner, and that the title of the defendants to block 110, and the riparian rights which may have been incident thereto, had been extinguished. The judgment of the court below was in favor of the defendants, and that judgment was affirmed in the supreme court, with an elaborate opinion, holding that the gradual retirement of the shore line until the plaintiff's block had come to be the water front had been of no effect to vest in him any property rights in respect to such submerged blocks. 47 Minn. 210, 13 L. R. A. 411, 49 N. W. 679. The case cited presents the question passed upon in the Connecticut case in conformity with the law of accretion, without complications arising from changes in a natural boundary, and is in that respect in harmony with the doctrine of the common law and the decisions of the courts of England and of this country.

The defendant also claimed title under his riparian grant. This grant purported to be made by the riparian commissioners pursuant to the act of 1871 (Gen. Stat. p. 2790). The riparian act of 1869 (Pamph. Laws, p. 1017), which was passed upon in *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643, is expressly limited in its operation to the tide-waters of the Hudson river, New York bay, and the Kill von Kull, lying between Enyard's Dock, on the Kill von Kull, and the New York state line, and has no application to the *locus in quo*. *Fitzgerald v. Faunce*, 46 N. J. L. 536, 594. The act of 1871 empowers the riparian commissioners to make grants of the lands under water to the riparian owners only, and a grant by the commissioners under that act to anyone else would be *ultra vires*. *Fitzgerald v. Faunce*, 46 N. J. L. 536, 594; *Polhemus v. Bateman*, 60 N. J. L. 163, 37 Atl. 1015. The subsequent act of March 27, 1874, seems to empower the riparian commissioners to make grants of such lands to any applicant. Gen. Stat. p. 2791. The riparian commissioners have no power to examine into and decide upon the applicant's title to the land. *Brown v. Morris Canal Bkg. Co.* 27 N. J. L. 648, 653. The riparian grant in this case was made by the commissioners under the act of 1871. It recites that: "Whereas, pursuant to an act of the legislature, approved March 21, 1871, entitled 'A Further Supplement to an Act Entitled 'An Act to Ascertain the Rights of the State and of Riparian Owners in the

Lands Lying under the Waters of the Bay of New York and Elsewhere in This State," approved April eleventh, one thousand eight hundred and sixty-four," and other acts and joint resolutions of the legislature of said state, William Shriver," etc., "being the owner of lands fronting on the Atlantic ocean, in Ocean City, in the county of Cape May, and state of New Jersey, which lie above high-water mark and in front of which the lands under water hereinafter described are situated, has applied to the riparian commissioners of said state for a grant of the said lands under water," etc.,—and after describing the lands granted, with words of conveyance, contained an express proviso hereinafter referred to. The purport of this grant unmistakably indicates the purpose of the riparian commissioners to vest the state's rights in these lands in Shriver conditionally on his ownership of the lands to which the grant attached. It expressly provides that, in case the grantee is not the owner of the land adjoining the land under water therein granted, "this instrument and conveyance, so far as it binds the state," etc., "shall be void, as affecting any part or parts of said land which joins land not owned by the said William Shriver." If the state is not bound by this grant in the event of the ownership of the lands being in another, the lands under water comprised in this

grant are still the property of the state, and Shriver acquired no title under the grant. *Polhemus v. Bateman*, 60 N. J. L. 163, 165, 37 Atl. 1015. The case between these parties turns wholly on the condition of the line of ordinary high tide in 1884, the date of the deed to Howell. If at that time the association was the owner in whole or in part of the land on the line of ordinary high water in front of this lot, its title was carried out to the full extent of the land obtained by the accretion, and Shriver did not become the owner of the land referred to in the riparian grant. If, on the other hand, the line of ordinary high tide in 1884, when the association conveyed its title, was on this lot, then by force of the conveyance to Howell he became the riparian owner, and he and his grantee are entitled to the accretions. In that event the plaintiff has no title to the *locus in quo*. The learned judge charged the jury that, if the high-water line before or in 1895 advanced to or on the lot 849, that lot became a riparian lot, and whatever alluvial increase the ocean had in its advance brought to and in front of the lot became the land of the defendant.

This instruction was erroneous, and for this reason the judgment should be reversed.

Magie, Ch., and Dixon and Collins, JJ., dissent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Charles E. EDGERLY

v.

John H. LAWSON *et al.*

(176 Mass. 551.)

1. A transfer of a negotiable note after maturity and without consideration, for the purpose of enabling the transferee to bring an action thereon in the state, will sustain a right of action by him against the maker in the right of the transferrer when the latter is a bona fide holder before maturity for value.
2. An action against those who sign a guaranty of payment on the back of a negotiable promissory note can be maintained only in the name of the one to whom such promise is made, as they are not indorsers, but guarantors, and the guaranty, although thus indorsed, is a non-negotiable chose in action.

(September 8, 1900.)

EXCEPTIONS by defendant to the refusal of the Superior Court for Suffolk County to rule that plaintiff was not entitled to a verdict on the auditor's report in an action brought to recover the amount alleged to be due on a promissory note. *Sustained in part; overruled in part.*

NOTE.—For transfer of note by guaranty, see note to *Dunham v. Peterson* (N. D.) 36 L. R. A. 232; and the later case of *Maddox v. Dunham* (Mo.) 41 L. R. A. 581. 51 L. R. A.

The action was upon the following note:

\$500
15.25 int.
\$515.25

Boston, November 4th, 1893.

January 1st, 1896, after date I promise to pay to the order of Charlotte E. Edgerly five hundred dollars with interest from July 1st, 1895, at the rate of 6% per annum.

John H. Lawson.

On the back of the note was the following:

We hereby guarantee the payment within note.
Redding & Co.

And the note was indorsed in blank by the payee.

Further facts appear in the opinion.

Mr. G. N. Harris, for defendants:

Plaintiff took the note in question after maturity, without value and with notice; therefore *prima facie* all defenses which exist in favor of the defendants as against the original payee are open to them in this action.

Dan. Neg. Inst. § 815a; *Woodman v. Churchill*. 52 Me. 58; *Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242.

Although no equities could be set up against an innocent purchaser of a note be-

fore maturity, without notice, yet subsequent holders from such a purchaser after maturity take it subject to all equities that existed between the original maker and payee.

Negotiable paper overdue carries with it on its face notice of defective title sufficient to put the transferee on inquiry.

Hinckley v. Union P. R. Co. 129 Mass. 60, 37 Am. Rep. 297; *Vermilye v. Adams Exp. Co.* 21 Wall. 138, 22 L. ed. 609; *Thayer v. Crossman*, 1 Met. 416; *Sargent v. Southgate*, 5 Pick. 315, 16 Am. Dec. 409; *Fish v. French*, 15 Gray, 520; *Pine v. Smith*, 11 Gray, 38.

The guaranty on the note in suit was a personal guaranty running to the payee alone, if to anybody, and therefore not of value to the plaintiff in this action.

True v. Fuller, 21 Pick. 140; *Jones v. Dow*, 142 Mass. 130, 7 N. E. 839.

Mr. G. C. Abbott, for plaintiff:

The plaintiff stands in the position of a bona fide holder for value before maturity.

Spofford v. Norton, 126 Mass. 533.

The equities between the original partners cannot be considered in a suit on a promissory note in the hands of a person who stands in the position of bona fide holder for value before maturity.

Ibid.

Lathrop, J., delivered the opinion of the court:

The auditor has found that the payee of the note was a copartner in the firm of Redding & Co., in the business of manufacturing and selling an article known as "Redding's Russia Salve;" that the note declared on was given in part payment for the payee's interest in the firm, and that she at the same time assigned all her interest in the business to the first-named defendant, who signed the note as maker, and that he afterwards assigned said interest to the other defendants without consideration, except the indorsement of the note declared on, and other notes given at the same time, and as part of the same transaction. The auditor further finds that the interest of the payee in the business passed from her to Lawson on the delivery of the notes above referred to and \$6,000 in money, given as a part of the consideration of said transfer. Lawson does not appear to have been a partner in the firm.

1. The defendants first contend that there was no evidence that the person who transferred the note to the plaintiff was a bona fide holder for value. It appears from the auditor's report that he found that this person was a bona fide holder, for value, before maturity. The auditor has not reported the evidence, and it cannot be said that his finding was wrong. So far as the plaintiff is concerned, if it be true, as the defendants contended before the auditor, that the note was transferred to him after maturity, and without consideration, for the purpose of bringing an action in this state, still he can maintain the action in the right of his transferrer, who has been found by the auditor to be a bona fide holder, before matur-

51 L. R. A.

ity, for value. *Spofford v. Norton*, 126 Mass. 533; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176. See also *Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242. So far as the defendant Lawson is concerned, we see no reason why he is not liable.

2. As to the guarantors a more serious question arises. They are sued as indorsers of the note, and it is clear under our decisions that they are not indorsers, but guarantors. It is also clear that a guaranty is here considered a non-negotiable chose in action, although written by a third person upon the back of a negotiable promissory note. *Taylor v. Binney*, 7 Mass. 479; *Upham v. Prince*, 12 Mass. 14; *True v. Fuller*, 21 Pick. 140; *Tuttle v. Bartholomew*, 12 Met. 452; *Belcher v. Smith*, 7 Cush. 482. See also *Baldwin v. Dow*, 130 Mass. 416. To maintain the action against the guarantors at common law, the plaintiff must sue in the name of the person to whom the promise was made, namely, Mrs. Edgerly. We express no opinion upon the question whether Stat. 1897, chap. 402, entitled "An Act Relative to Actions upon Assigned Claims," is applicable to this case, as this question was not raised in the court below or in this court. The statute was passed subsequently to the guaranty, and after the date of the writ. See *Waldron v. Harring*, 28 Mich. 493.

The result is that, as to the defendant Lawson, the exceptions are overruled, and that the exceptions of the other defendants are sustained.

So ordered.

William B. TYLER

v.

JUDGES OF THE COURT OF REGISTRATION.

(175 Mass. 71.)

1. Jurisdiction of a proceeding in rem acquired by virtue of the power of the court over the res, without personal service on claimants within the state or notice by name to those outside of it, is not in violation of constitutional provisions for due process of law.
2. The notice by mail, by publication, and by posting on the land, which Stat. 1898, chap. 562, § 32, requires to be given of a proceeding for registration of title to all persons who are known to make any claim to the land, is sufficient to satisfy the constitutional provision for due process of law.
3. The power of the assistant recorder to register titles, given by Stat. 1898, chap. 562, as amended by Stat. 1899, chap. 131, § 8, under which he makes the registration "in accordance with the rules and instructions of the court," is not a judicial power conferred upon a nonjudicial officer, but is merely ministerial, and the registration is the act of the court.

NOTE.—As to constitutionality of land registration acts, see earlier cases in this series as follows: *People ex rel. Kern v. Chase* (Ill.) 36 L. R. A. 105; *State ex rel. Monnett v. Guilbert* (Ohio) 38 L. R. A. 519; and *People ex rel. Deneen v. Simon* (Ill.) 44 L. R. A. 801.

4. The failure to provide for any notice of transfers, or other dealings subsequent to a registration of title under Stat. 1898, chap. 562, does not make the act invalid, as the legislature has power to fix conditions on which land that has been brought into the registry system shall be held.

(*Loring and Lathrop, JJ., dissent.*)

(January 3, 1900.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of prohibition against the judges of the court of registration to prevent their proceeding upon an application concerning land in which the petitioner claims an interest. *Petition denied.*

The facts are stated in the opinion.

Mr. J. L. Thorndike for petitioner.

Messrs. H. M. Knowlton, Attorney General, and F. T. Hammond for respondents.

Holmes, Ch. J., delivered the opinion of the court:

This is a petition for a writ of prohibition against the judges of the court of registration established by Stat. 1898, chap. 562, and is brought to prevent their proceeding upon an application concerning land in which the petitioner claims an interest. The ground of the petition is that the act establishing the court is unconstitutional. Two reasons are urged against the act, both of which are thought to go to the root of the statute, and to make action under it impossible. The first and most important is that the original registration deprives all persons except the registered owner of any interest in the land, without due process of law. There is no dispute that the object of the system, expressed in § 38, is that the decree of registration "shall bind the land and quiet the title thereto, and "shall be conclusive upon and against all persons," whether named in the proceedings or not, subject to few and immaterial exceptions; and, this being admitted, it is objected that there is no sufficient process against, or notice to, persons having adverse claims, in a proceeding intended to bar their possible rights.

The application for registration is to be in writing, and signed and sworn to. It is to contain an accurate description of the land, to set forth clearly other outstanding estates or interests known to the petitioner, to identify the deed by which he obtained title, to state the name and address of the occupant, if there is one, and also to give the names and addresses, so far as known, of the occupants of all lands adjoining. Section 21. As soon as it is filed, a memorandum containing a copy of the description of the land concerned is to be filed in the registry of deeds. Section 20. The case is immediately referred to an examiner appointed by the judge (§ 12), who makes as full an investigation as he can, and reports to the court (§ 29). If, in the opinion of the examiner, the applicant has a good title, as 51 L. R. A.

alleged, or if the applicant, after an adverse opinion, elects to proceed further, the recorder is to publish a notice, by order of the court, in some newspaper published in the district where any portion of the land lies. This notice is to be addressed, by name, to all persons known to have an adverse interest, and to the adjoining owners and occupants, so far as known, and to all whom it may concern. It is to contain a description of the land, the name of the applicant, and the time and place of the hearing. Section 31. A copy is to be mailed to every person named in the notice whose address is known, and a duly-attested copy is to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days, at least, before the return day. Further notice may be ordered by the court. Section 32.

It will be seen that the notice is required to name all persons known to have an adverse interest, and this, of course, includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner, or in any way found to exist. Taking this into account, we should construe the requirement in § 21, concerning the application, as calling upon the applicant to mention, not merely outstanding interests which he admits, but equally all claims of interest set up, although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the Constitution, either as to persons residing within the state upon whom it is not served, or as to persons residing out of the state and not named.

If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed, certainty against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the supreme court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is impossible in this country. *State ex rel. Atty. Gen. v. Guilbert*, 56 Ohio St. 575, 629, 38 L. R. A. 519, 47 N. E. 551. But we cannot bring ourselves to doubt that the Constitutions of the United States and of Massachusetts, at least, permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world, and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights, are due process of law in that case. *Wheeler v. Jackson*, 137 U. S. 245, 258, 34 L. ed. 659, 664, 11 Sup. Ct. Rep. 76. The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing halfway between statutes of limitations and true judgments in

rem, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the *mise* joined and the lapse of a year and a day (Booth, Real Actions, 101, in margin; Fitzherbert, Abr. *Continual Claim*, pl. 7; Faux, Recoverie, pl. 1, Y. B. 5 Edw. III. 51, pl. 60); and of a fine, with proclamations after the same time, or by a later statute after five years (2 Bl. Com. 354; 2 Inst. 510, 518; Stat. 18 Edw. I. *Modus Levandi Fines*; Stat. 34 Edw. III. chap. 16; Stat. 4 Hen. VII. chap. 24; Stat. 32 Hen. VIII. chap. 36). It would have astonished John Adams to be told that the framers of our Constitution had put an end to the possibility of these ancient institutions. A somewhat similar statutory contrivance of modern days has been held good. *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38. Finally, as was pointed out by the counsel for the petitioners, a proceeding *in rem*, in the proper sense of the words, might give a clear title without other notice than a seizure of the *res* and an exhibition of the warrant to those in charge. 2 Browne, Civil Law, 398. The general requirement of advertisement in admiralty cases is said to be due to rules of court. U. S. Adm. Rule 9; Betts, Adm. (1838) 33, 34, App. 14.

The prohibition in the 14th Amendment of the Constitution of the United States against a state depriving any person of his property without due process of law, and that in the 12th article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice (*Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 277, 15 L. ed. 372, 376); or which may be found in convenience and substantial justice, although the form is new (*Hurtado v. California*, 110 U. S. 516, 528, 531, 28 L. ed. 232, 236, 237, 4 Sup. Ct. Rep. 111, 292; *Holden v. Hardy*, 169 U. S. 366, 388, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383). The prohibitions must be taken largely with a regard to substance, rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado v. California*, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292. Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision of either Constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible were this not so; for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 51 L. R. A.

L. ed. 565, 570; *The Mary*, 9 Cranch, 126, 144, 3 L. ed. 678, 684; *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9,030; *Brown v. Levee Comrs.* 50 Miss. 468, 481; 2 Freem. Judgm. 4th ed. §§ 606, 611. In *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, a judgment of escheat was held conclusive upon persons notified only by advertisement, to all persons interested. It is true that the statute under consideration required the petition to name all known claimants, and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So, a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat, just cited, the conclusive effect of the decree is not put upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*. *Bonnemort v. Gill*, 167 Mass. 338, 340, 45 N. E. 708. See [*Hamilton v. Brown*] 161 U. S. 263, 274, 40 L. ed. 695, 699, 16 Sup. Ct. Rep. 585. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In *Arndt v. Griggs*, 134 U. S. 316, 327, 33 L. ed. 918, 922, 10 Sup. Ct. Rep. 557, 561, it is said to be established that "a state has power, by statute, to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication." In *Hamilton v. Brown*, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585, 592, it was declared to be within the power of a state "to provide for determining and quieting the title to real estate within the limits of the state, and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." I doubt whether the court will not take the further step, when necessary, and declare the power of the states to do the same thing after notice by publication alone. See *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 564, 32 L. ed. 1045, 1048, 9 Sup. Ct. Rep. 603; *Parker v. Overman*, 18 How. 137, 140, 141, 15 L. ed. 318, 319. But in the present case provision is made for notice to all known claimants by the recorder, who is to mail a copy of the published notice to every person named therein whose address is known. Section 32. We shall state in a moment one reason for thinking this form of notice constitutional. See further, *Cook v. Allen*, 2 Mass. 462, 469, 470; *Dascomb v. Davis*, 5 Met. 336, 340; *Brock v. Old Colony R. Co.* 146 Mass. 194, 195, 15 N. E. 555.

But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had

little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory, at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to, or possession of, a tangible thing. *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9,039. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if anyone in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. 2 Freeman, Judgm. 4th ed. § 606 *ad fin*. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified, and made a party defendant, as happens with the ship in the admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result; nothing more.

It is true, as an historical fact, that these symbols are used in admiralty proceedings; and also, again, merely as an historical fact, that proceedings *in rem* have been confined to cases where certain classes of claims, although of very divers sorts, for indemnification for injury, for wages, for salvage, etc., are to be asserted. But a ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact. There is no *a priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice affords no test of the powers of the legislature. The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indicating that the proceeding is against property alone,—that is to say, that it is not to establish an infinite personal liability,—is not of the essence. If in fact the proceeding is of that sort, and is to bar all the world, it is a proceeding *in rem*.

51 L. R. A.

So, as to seizure of the *res*. It is convenient in the case of a vessel, in order to secure its being on hand to abide judgment, although in the case of a suit against a man jurisdiction is regarded as established by service, without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said to be notice to the owner. *Scott v. Shearman*, 2 W. Bl. 977, 979; *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9,030. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, when we come to deal with immovables, there would be no sense whatever in declaring seizure to be a constitutional condition of the power of the legislature to make a proceeding against land a proceeding *in rem*. *Hamilton v. Brown*, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585. The land cannot escape from the jurisdiction, and, except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience.

I do not wish to ignore the fact that seizure, when it means real dispossession, is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference; or rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view. I am free to confess, however, that, with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration.

The quotations which we have made show the intent of the statute to bind the land, and to make the proceedings adverse to all the world, even if it were not stated in § 35, or if the amendment of 1899 did not expressly provide that they should be proceedings *in rem*. Stat. 1899, chap. 131, § 1. Notice is to be posted on the land just as admiralty process is fixed to the mast. Any person claiming an interest may appear and be heard. Section 34.

But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind, but, for the purposes of decision, a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties inter-

ested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, it is not in the power of the legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the necessity of giving such a notice, and to assume that, under this statute, personal rights in property are so involved, and may be so affected, that effectual notice, and an opportunity to be heard, should be given to all claimants who are known, or who by reasonable effort can be ascertained.

It would hardly be denied that the statute takes great precautions to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state, and remaining undiscovered, notice by publication must suffice, of necessity. As to claimants living within the state, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the postoffice, besides publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required. We agree that such an act as this is not to be upheld without anxiety. But the difference in degree between the case at bar and one in which the constitutionality of the act would be unquestionable seems to us too small to warrant a distinction. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done.

We do not think it necessary to refer to the elaborate collection of statutes presented by the attorney general for the purpose of showing that the principle of the present act is old. Although no question is made on that point, we may mention that an appeal is given to the superior court, with the right to claim a jury. In our opinion, the main objection to the act fails. See *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910; *Short v. Caldwell*, 155 Mass. 57, 59, 28 N. E. 1124; *Loring v. Hildreth*, 170 Mass. 328, 40 L. R. A. 127, 49 N. E. 652.

The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and assistant

recorder. It is said that they are given judicial powers after the original registration, although not judicial officers, under the Constitution. The act of registration is the operative act to convey title (§ 50); and by the act of 1898 the assistant recorder does it, unless in doubt (§§ 53, 55, 57, 58, 61-63). It is said, as his decision affects title, it must be judicial. But here, again, it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision. Section 53. But, whatever may be thought of the original act, by amendment even the ordinary business is to be done only "in accordance with the rules and instructions of the court." Stat. 1899, chap. 131, § 8. Under this amendment, registration is the act of the court. The fact that it may be done by the assistant recorder, under general orders, when there is no question, is not different from the power of the clerk to enter judgment, in cases ripe for judgment, under a general order or rule of the superior court. It should be observed that by § 55 the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, etc., is void.

Finally, it is said that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and, when land is brought into the registry system, there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system. *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910. By § 45, the obtaining of a decree of registration, which is a voluntary act, is an agreement, running with the land, that the land shall be and remain registered land, and subject to the provisions of the act. Furthermore, in deciding whether substantial justice is done, it is to be borne in mind that ordinary cases will present no question at all. It is contemplated, as we have said, that, if there is a question to be discerned, it shall be referred to the court, and, of course, that the court will order notice to any party interested. The act shows throughout the intent that no one shall be concluded without having a chance to be heard, and, although some of its methods are new to this commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form.

Petition denied.

Loring, J., dissenting:

I dissent from the opinion of the majority of the court, and think it proper to state the reasons which have brought me to the opposite conclusion.

It will be necessary to add to the statement of the general scope of the act, which is given in the opinion, by setting forth with some particularity those provisions which, in the opinion of the majority of the court, sufficiently secure to those having adverse interests that opportunity to be heard in defense of their rights of property which is guaranteed to them by the constitutional provisions that they shall not be deprived of their property except by due process of law or the law of the land. U. S. Const. Amend. 14, art. 12, Declaration of Rights Mass.

By Stat. 1898, chap. 562, §§ 31 and 32, notice of the application is to be issued by the court, in a form specified in the act, addressed to all known persons who claim an adverse interest, and "to all whom it may concern," and the return day of the notice is to be not less than twenty nor more than sixty days from the date of the notice. This notice is to be served (1) by publication "in some newspaper published in the district where any portion of the land lies" (§ 31); (2) by posting it "in a conspicuous place on each parcel of" the land in question, fourteen days before the return day (§ 32); and (3) by mailing a copy "to every person named therein whose address is known" within one week after publication in the newspaper. The posting of the notice is to be performed by a sheriff or his deputy (§ 32); the publication and mailing, by the recorder of the court (§§ 31, 32); and the return of the former and the affidavit of the latter are made, by § 32, "conclusive proof of such service." It is provided that, by the description in the notice "to all whom it may concern," "all the world are made parties defendant, and shall be concluded by the default and order" (§ 35), which, by the terms of § 36, "shall first be entered against all persons who do not appear and answer" on the return day. Thirty days are allowed for an appeal from a decree in favor of the applicant (§ 14); and on the expiration of that time, by the express provisions of § 38, the decree, confirming and registering the applicant's title, "shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding, at law or in equity, for reversing judgments or decrees," except only in case the decree was procured by the fraud of the applicant, and rights of innocent third persons have not intervened. Section 38.

The peculiarities of the act consist—First, in the fact that it bars or may bar the true owner by a decree in a proceeding had in his absence, of which he did not in fact have notice, and to which he is not named as a party; second, in the fact that the notice to be given to those who are named therein is inappropriate and inadequate to bring home to them knowledge of the proceeding, and

enable them to appear and defend their right; third, in the fact that the return and affidavit of service by the sheriff and the recorder cannot be shown to be either false or incorrect; fourth, in the fact that the decree made in that proceeding, unlike any other judgment or decree known to the law, is final, and not subject to be attacked directly or collaterally, even if made in the absence of the true owner, and without the true owner having in fact received any notice of the proceeding.

The Chief Justice upholds the statute upon the ground that the proceeding is a proceeding *in rem*. If it be such a proceeding, it is true that no person need be named as party respondent, and no notice beyond publication need be given. But some of the other justices who concur in the opinion prefer to uphold the statute upon the ground that the opportunity to appear and be heard afforded by the notice here provided is not so far different from that afforded by personal service, or its equivalent, in an action *in personam*, as to forbid the legislature adopting it. On what ground the majority, who deny that this is a proceeding *in rem*, place their conclusion that those not named as respondents, either in the application or in the notice, are barred, is not explicitly stated.

I will first deal with the question of the notice to be given to known respondents: that is, to those named in the notice issued by the court. It is patent that one having an adverse interest is not sure to receive notice of the proceeding, and to recover that notice in time to be heard. He may not see the notice posted on his own land. The parcel of land may be, for example, woodland, and many thousand acres in extent; or the owner may be properly absent from the county for the fourteen days in question; or he may have given possession of the land to a tenant, and therefore properly leave it unvisited; or he may be a remainderman, and have no immediate right of entry, and certainly no likelihood of seeing a notice posted on the land. Again, his interest in the land may be a right of way over, or of light and air in, the land of his neighbor, or an easement in the nature of an equitable restriction upon the height or position of buildings to be erected and maintained thereupon. In that case, the notice would be posted on his neighbor's land, and there is certainly no likelihood that he would see a notice posted there. One publication in one newspaper in the district where the land lies, to be made "immediately upon the filing of the examiner's opinion or the applicant's election, as the case may be," satisfies the statute, and nothing but the statement of that fact is necessary to show that such service of the notice is not certain to reach all named respondents. The service by mail may be made at any time within seven days after publication in the newspaper. The mail is a good messenger to carry a communication to one whose identity and exact address are known, as is the case where one writes to another with whom he is in regular cor-

respondence; but it is not a good messenger to use in conveying notice to strangers, whose identity and address are not necessarily known, and must be ascertained *pro hac vice*. This is recognized in the act when it provides that the notice is to be mailed, not to all respondents named in the notice, but to "every person named therein whose address is known." Section 32. Had the provisions required the notice to be mailed to everyone named, the practical result would probably have been the same; for the recorder has no means of knowing the identity and proper address of each respondent, and the provision that the affidavit of the recorder in the matter of mailing copies of the notice shall be conclusive takes away from the applicant any temptation to use extraordinary diligence in furnishing to the recorder the exact name and address of those whose interest it will be, if brought in, to defeat the object which he seeks to obtain by bringing his application.

More than that, the mail was originally devised as a means of transmitting messages in business and social life, and not of serving notices of proceedings which may divest one of his property, and it has heretofore been treated as such by the public. A man not in business may reasonably absent himself from the commonwealth in traveling for pleasure, and direct that all communications addressed to him shall be forwarded to him at specified places where he expects to go, but where he later decides that it is not his pleasure to go. It is probably within the experience of every one that many letters so forwarded are never received.

But the decisive objection to the provisions of the act as to notice to named respondents lies deeper than considerations of this nature alone. It does not depend upon the question whether service by mail is as likely to reach the respondent as service at the defendant's last and usual place of abode, as the opinion would seem to assume. Each and every statute of Massachusetts, whether passed in the time of the colony, the province, or the commonwealth, authorizing a judgment on default based on any but personal service, has given to the defendant who did not in fact have notice of the proceedings, and therefore no opportunity to be heard before the judgment was rendered, a right to have the judgment vacated on a writ of review. "Such judgments in this state are treated as valid until reversed, for the reason that the parties have an adequate remedy by review or writ of error." Wells, J., in *Salem v. Eastern R. Co.* 98 Mass. 431, 448, 96 Am. Dec. 650. It is definitely settled, in other connections, that a right of appeal or a right to a review is sufficient to render constitutional a judgment which, but for the right to that appeal or review, would be void, as not securing to the defendant the rights guaranteed to him by the Constitution. *Jones v. Robbins*, 8 Gray, 329; *Holmes v. Hunt*, 122 Mass. 505, 516, 23 Am. Rep. 381; *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438.

The first statute in Massachusetts author-

izing a judgment on default on any but personal service was the colony act of 1644. That act provided that, in case property of the defendant was attached, the notice, or, as it is now termed, the separate summons, might be served upon the defendant by leaving the same "at his house or place of usual abode," with a proviso that, if the defendant was at the time of service out of the jurisdiction, the case should be continued for a term before execution issued; and no execution should then issue until the plaintiff gave security to respond to the defendant, "if he shall reverse the judgment within one year or such further time as the court shall permit." Ancient Charters, p. 50. It is a fact of some interest that this is the origin in this commonwealth of writs of review, and in this connection it is of no little importance that the origin of writs of review was to give to defendants, who, being served under the statute and being absent from the colony at the time of service, did not know of the proceedings, an opportunity to have the judgment made in their absence vacated, if they had a good defense to the original claim. This provision was re-enacted in 1700-1701, without substantial change, and was then extended to writs of dower and scire facias. It was then provided, in the interest of the absent defendant, that "no real estate taken in execution granted upon such first judgment shall be alienated or passed away until after the expiration of the said twelve months, or after a new trial brought within the said space of twelve months, to the intent that restitution thereof may be made in case as aforesaid." 1 Provincial Laws, 447, 448.

In 1726 the provisions of the original act were extended to the service of a *capias* when no attachment was made, and in 1797 to writs of ejectment, error, review, to real actions, and generally to all civil actions "wherein the law does not require a separate summons to be left with the defendant." Stat. 1797, chap. 50, §§ 1-5. The provisions of this act have since been re-enacted, without substantial change, until this day. Rev. Stat. chap. 90, §§ 41, 45, 48, chap. 92, §§ 3, 4, 6, 8, chap. 99, § 17; Gen. Stat. chap. 123, §§ 25, 28, chap. 126, §§ 6-8, 10, chap. 146, § 20; Pub. Stat. chap. 161, §§ 31, 34, chap. 164, §§ 6, 8, 10, chap. 187, § 21. This right of review had been previously extended to judgments rendered by justices of the peace and all inferior courts. Stat. 1791, chap. 17, § 3,—re-enacted in Rev. Stat. chap. 99, § 27; Gen. Stat. chap. 146, § 24; Pub. Stat. chap. 187, § 25.

In 1820 the right to review a judgment was enlarged by giving the court power to issue a writ of review, even if the defendant was within the commonwealth at the time of service, at his last and usual place of abode, provided he did not in fact have notice of the action, and apply for a review within a year after he first heard of it. Stat. 1820, chap. 53; *James v. Townsend*, 104 Mass. 367. This act was re-enacted in Rev. Stat. chap. 92, § 5, chap. 99, §§ 18-20; Gen. Stat. chap. 146, § 21; Pub. Stat. chap.

187, § 22. The Revised Statutes made a further provision in protection of the rights of a defendant in a real action who had not been personally served, and against whom judgment had been rendered on a default in his absence, to wit, that, if the judgment were reversed within the year, the land should be restored. Rev. Stat. chap. 92, § 9.

Without going more particularly into the statutes, it is enough to say that it has always been held in this commonwealth that a judgment rendered on a default is binding on the defendant when service was made upon him personally (*Matthewson v. Moulton*, 135 Mass. 122), but if service was made at his last place of abode, or in any way other than by personal service, and he did not in fact have notice of the proceeding, it is not binding upon him; that, if provision for reopening the judgment is made by review or writ of error, his remedy is to have the judgment vacated by such a proceeding, instituted directly for that purpose. *Hendrick v. Whittemore*, 105 Mass. 23; *Finneran v. Leonard*, 7 Allen, 54, 83 Am. Dec. 665. If, however, the proceeding is not according to common law, so that error does not lie, the judgment may be attacked collaterally, and shown to be void for want of notice, when invoked against the defendant (*Smith v. Rice*, 11 Mass. 514; *Cook v. Darling*, 18 Pick. 393); or if a judgment is rendered in another state against a citizen of this state, or in this state against a citizen of another state, it may be so attacked collaterally when suit is brought on it, because, to compel him to have the judgment vacated by writ of error, in which he must file a bond if he would obtain a stay of execution, is to impose a burden not warranted by the 14th Amendment to the Constitution of the United States (*Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; and on this point generally see the exhaustive opinion of Judge Wells in *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650). This doctrine that a defendant is not bound by a judgment rendered on default in his absence, based on a service other than personal service, is not peculiar to Massachusetts, but is of universal application. There is a difference in some states as to the remedy. In some jurisdictions the judgment will not be vacated if the defendant failed to receive notice through a false return of the sheriff, or an unauthorized appearance was made by an attorney, unless a suit on the sheriff's bond, or a suit against the attorney, fails in fact to give him an adequate remedy. *Walker v. Robbins*, 14 How. 584, 14 L. ed. 552. In Connecticut a bill in equity lies to enjoin the enforcement of a judgment so obtained, though no fraud can be imputed to the plaintiff if the time prescribed by statute for vacating the judgment has expired. *Jeffery v. Fitch*, 46 Conn. 601. In New York it has been held that, even after the time prescribed by statute for vacating such a judgment has expired, the court has inherent power to set it aside, if made in the absence of the defendant (*Vilas v. Platts-*

burgh & M. R. Co. 123 N. Y. 440, 9 L. R. A. 844, 25 N. E. 941); and there are cases in the Supreme Court of the United States and in this commonwealth indicating that judgments may be vacated after the term by exercise of the court's inherent power, independently of statute (*Ex parte Grenshaw*, 15 Pet. 119, 10 L. ed. 682; *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714; *Stickney v. Davis*, 17 Pick. 169). But these cases all agree in this, that the judgment is not binding, certainly in the absence of an adequate remedy against the sheriff or the attorney who wrongfully appeared, and differ only as to what the remedy is. To that effect, see 1 Freeman, Judgm. 4th ed. § 98, where many cases are collected.

It comes, therefore, to this: Whenever service other than personal service has been heretofore allowed, a judgment rendered in the absence of the defendant so served has never been held to be final,—that is, not subject to be directly reviewed or collaterally attacked,—but it has always been held that a defendant is entitled to escape from such a judgment in some way, either by a proceeding instituted directly to vacate it, or by attacking it collaterally, when it is sought to be enforced against him. In other words, it has always been held that he shall have an opportunity to be heard after the judgment on the merits of the original claim, if he did not in fact have an opportunity to be heard before the judgment was rendered.

The state of the common law in this connection at the time when the first settlers came to this country confirms this conclusion. At that time no such thing was known as a judgment against a defendant before he entered an appearance in court, even if he had been personally served with process. *Salem v. Eastern R. Co.* 98 Mass. 431, 451, 96 Am. Dec. 650; *James v. Townsend*, 104 Mass. 367, 372; *Story, J., in Picquet v. Swan*, 5 Mason, 35, 45, Fed. Cas. No. 11,134. At common law, if the defendant failed to obey the summons served on him, whether by personal service or by service at his house, or in real actions by posting notice on his land, the plaintiff's remedy was, where the injury was not accompanied by force, to take out a writ or writs of judgment or pone, followed by writs of distringas, under which the property of the defendant was distrained to compel his appearance in court, and when all his property had been distrained for that purpose the power of the court was exhausted. In those cases where the injury was accompanied by force, the remedy of the plaintiff was to take out a *capias*, under which the defendant might be arrested; and, if he secreted himself so that he could not be taken, a series of writs could be taken out which resulted in his being declared an outlaw, at which point the power of the court was at an end. 3 Bl. Com. 279, 287. It was not until 1725, and by force of Stat. 12 Geo. I. chap. 29, that judgment at law could be taken by default for nonappearance

of the defendant. It is of interest to note that personal service of the writ was required by Stat. 12 Geo. I. chap. 29, to enable the plaintiff to take judgment by default. It appears that at that time courts of equity did enter a decree, taking the bill *pro confesso*; but this was done only if the service of the subpoena had been made on the defendant personally, and had been followed by successive processes of contempt, including sequestration. 3 Bl. Com. 444. It was not until 1732, and by force of Stat. 5 Geo. II. chap. 25, that a decree taking the bill *pro confesso* could be entered, unless the subpoena had been personally served, and then only on proof that the defendant had absconded to avoid service.

The principle that a defendant has the right to be heard on review of a judgment, if he did not have notice of the proceedings before judgment, is nothing more than the application to judgments rendered on a default based on service not personal, of the fundamental doctrine of the common law, which obtains in England as well as in America, that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard. "It is an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is affected by any judicial decision of the question." *Com. v. Cambridge*, 4 Mass. 627. To the same effect see *Wells, J., in Salem v. Eastern R. Co.* 98 Mass. 447, 450, 96 Am. Dec. 650; *Devens, J., in Shores v. Hooper*, 153 Mass. 228, 230, 231, 11 L. R. A. 308, 26 N. E. 846. "In our courts of law, you cannot obtain a judgment against a party without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the act of Parliament expressly made for that purpose, and made because it is considered an invariable maxim of law that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in court, before a judgment shall be pronounced against him." *Bayley, B., in Capel v. Child*, 2 Cromp. & J. 558, 579. See, to the same effect, *Parke, B., in Bonaker v. Evans*, 10 Q. B. 162, 171, 172, where many authorities are cited.

In the light of the well-established general principle that no judgment can be rendered against a man until he has in fact had an opportunity to be heard, and the equally well-established application of that general principle that a defendant has the right to be heard in review of a judgment rendered under a statute authorizing judgment against him to be entered in his absence if he did not in fact have notice of the proceedings before judgment, which principle has obtained since the first statute authorizing service of process at the last and usual place of abode of the defendant, and was a component part of that act, and which has been universally observed since then, the consti-

tutional provisions in question must be construed to guarantee to every citizen the right to be heard before judgment against him becomes irrevocable; and if the judgment on default is based on any service of process, other than personal service on the defendant, provision must be made giving to a defendant, who did not in fact have notice of the proceeding before judgment, an opportunity afterwards to have it reversed, or to attack it collaterally, when it is set up against him. This act does not secure to those named in the application and notice as claiming adverse interests their constitutional right to be heard, and is, in my opinion, for that reason unconstitutional and void.

But, if personal service upon those named as defendants in the application and notice had been required, the act would have been unconstitutional and void, because it undertakes to conclude those having an adverse interest, whether residents or nonresidents, who are alleged not to be known to the applicant or the examiner, without making them parties defendant by name. The act provides that, though they be not named in the application or in the notice, they are made parties defendant by the insertion in the notice of the words, "to all whom it may concern," and their rights are extinguished by their nonappearance in answer to that notice.

It is a principle of our jurisprudence, brought to this country by our ancestors, and recognized here since then, that no person is barred, by judgment or decree in judicial proceedings according to the course of the common law, in which the plaintiff asserts rights of property adverse to his, unless he is named as a party defendant. I have already shown that every defendant named must have notice of the proceeding before he can be finally and irrevocably concluded thereby. The complement of that rule, which, together with it, makes up the full measure of the vested rights of property in this connection guaranteed to each citizen by the Constitution, is the rule now under consideration, that no person is barred by a judgment or decree in a proceeding the effect of which is to strip him of vested rights of property, unless he is named as a defendant. No principle could be introduced more dangerous to vested rights of property than the principle that this rule can be dispensed with in the discretion of the legislature. If this rule is dispensed with, no sufficient incentive is left to the plaintiff to name as parties defendant those who have adverse interests; that is to say, those whose interests, if they are brought in, will lead them to do all in their power to defeat the object which the plaintiff seeks to obtain by bringing his suit. The only possible way of insuring to those having adverse interests an opportunity to be heard is to require the plaintiff to name them as defendants, under the penalty of their not being barred if not so named. If this penalty is removed, and

a defendant is equally bound, whether named or not, there is not only no incentive to name as defendants those who claim an adverse interest, but the law has thereby offered to the plaintiff the greatest temptation not to name an adverse claimant if known, and not to use any diligence whatever to discover whether there are in fact persons who claim an interest adverse to his.

The effect of a judgment on a writ of right and of a fine, mentioned in the opinion, are not instances conflicting with the universality of the proposition that no person not named therein can be barred by a judicial proceeding. In those cases the world was barred, including all claiming an adverse interest, though not named in the proceeding. But that was the effect of the lapse of the year and the day. They were not barred by the judgment apart from the lapse of time. They were barred by the lapse of time after a judgment. In other words, the judgment was sufficient to start the running of time against them, and they are barred by the operation of the principle of the statute of limitations.

The reference made in the opinion of the majority of the court to the statute of limitations makes it necessary to state, in passing, that the registration act cannot be supported on the grounds on which the statute of limitations quiets titles against all the world, or on any grounds deducible therefrom. It is unquestionably within the constitutional power of the legislature to quiet the title to property by a statute of limitations. The principle of such a statute is that one who is dispossessed of his property must assert his ownership thereto by action within a specified time or be barred thereof; that is to say, cease to be such owner. But no statute was ever passed providing that an owner in possession of his property could be dispossessed thereof by any lapse of time, and no principle is deducible from the statute of limitations which can justify such a statute, or a statute providing that, without naming him as a defendant or without giving him notice, a court can, by decree alone, unaided by the subsequent lapse of time, transfer his property to another.

But the main ground on which this provision of the act is sought to be upheld is that of necessity. It is said: "If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world is hardly possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims,—indeed, certainly against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service upon the claimants." It is undoubtedly true that the chief end of a proceeding to clear titles is to get rid of the unknown, and that an unknown claim cannot be dealt with by bringing notice of the proceeding home to the claimant; and it is true that it follows from that that a title cannot be cleared by a judicial proceeding unaided by the lapse of time. But it does not follow that

titles cannot be cleared. The lapse of time has been the means, and the only means, heretofore used under our jurisprudence, to clear titles against unknown claimants. Under our Constitution, it is, in my opinion, the only means available therefor. But it is of importance that it is available, and therefore that the argument of necessity fails. It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken, and the decree setting up the applicant's title remained in force, unmodified, for a specified time, all the world should be barred. If the opinion of the supreme court of Illinois in this connection (*People ex rel. Deneen v. Simon*, 176 Ill. 165, 177, 178, 44 L.R.A.801, 52 N.E.910) is not to be construed as confined to the particular provisions of that act, it cannot be supported. Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the court of registration made during the specified term, while under this act it is beyond the power of a person to protect his property from the effect of a decree not subject to be reopened, and made in his absence, without his knowledge. If he have an estate less than the fee, he can protect himself neither by registering his own title nor by an inspection of the records of the court. He can do nothing but trust to the chance that the applicant and the examiner may exercise sufficient care to discover his claim, will learn his true name and address, and that, if his claim is discovered and the notice is properly addressed and mailed, it will reach him in time to enable him to appear in court before a decree has been rendered in his absence which is beyond the power of any court to change when once it has been made. And, if his original title is by prescription, he must trust to the intelligence and good faith of the applicant alone; for the examiner will not, in his examination, learn of such a title.

But there is an even more decisive answer to the argument of necessity, and that is this: The constitutional provision securing to the owner the right not to be deprived of his property, except by due process of law, speaks to each citizen directly and personally. It is no answer when a person complains that he had no notice of the proceeding in which the decree was made transferring his property to another, to say to him that 99 other persons had notice, and that in 99 cases out of 100 a person would have notice. This provision is not a glittering generality to be explained away in any such manner to a man whose property has been devastated by a decree made in his absence. It is a constitutional guaranty to each citizen, and no citizen can be deprived of the security given by the Constitution to his rights of property for any counterbalancing of the benefits derived by the multi-

tude against the evil suffered by him. It is a constitutional guaranty to each citizen that his property shall not be transferred by the judgment of a court to another without his having had in fact an opportunity to be heard, no matter what the consequences may be. If it means anything short of that it is not a constitutional guaranty; it is but a rule which may mean something or nothing, as the legislature in its discretion may decide. Moreover, this is a constitutional guaranty made to each and every citizen equally and alike. It is no fault of a person residing in the commonwealth, who has an estate in the land covered by the application, that the applicant and the examiner did not know of his claim, if they did not know of it; much less if they allege that they did not know of it, when by the exercise of due care they would have known of it. It is strange, indeed, if a discrimination can be made between two residents within the commonwealth, as to their constitutional right to be heard before an irrevocable judgment is made concluding their rights of property, and that that discrimination should finally depend on the negligence and good faith of their opponent, the applicant, and of the court examiner, and, as has been shown, in case of titles by prescription, on that of the applicant alone. And yet that is the conclusion to which the court has come. By the opinion of the court, the negligence of the applicant in not discovering the claim of a resident to an interest in the land in question precludes him from having the same right to be heard in defense of his rights of property in that land which his neighbor has whose claim was discovered. In the first case, he is not named as a defendant, and that service of process which is required in actions *in personam* need not be made on him; in the latter case, the defendant is not barred unless such service of process as is required by actions *in personam* has been made.

There is no precedent for holding that rights of persons not named as defendants are barred in any proceeding other than a proceeding *in rem*, and, for the reasons which I have given, I am of opinion that the constitutional rights of property, guaranteed to each and every citizen equally and alike, require that that rule should not be abrogated.

To conclude this part of the discussion: I am of opinion that, unless the proceeding under the registration act is to be supported as a proceeding *in rem*, it is without precedent, and is contrary to the rule heretofore universally recognized, without any exception, wherever the common law of England prevails, that no party is barred unless he in fact had an opportunity to be heard. *Com. v. Cambridge*, 4 Mass. 627; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Shores v. Hooper*, 153 Mass. 228, 230, 11 L. R. A. 308, 26 N. E. 846; *Capel v. Child*, 2 Crompt. & J. 558; *Bonaker v. Evans*, 16 Q. B. 162. And I am of opinion that, unless the application is a proceeding *in rem*, a decree under that act, so far as it affects either the rights of absent defendants named and

not personally served, or absent persons not named, is not due process of law.

I come now to the consideration of the constitutionality of the act as a proceeding *in rem*. The act professes to be drawn on the theory that it authorized a proceeding *in rem*, and it is plain that the service of the notice prescribed was taken from that used in proceedings in the probate courts. It is also plain that there was no attempt to secure a compliance with the requirements of an action *in personam*, either with respect to the service to be made upon those named as defendants, or to the necessity of joining as parties defendant all whom the plaintiff wished to have concluded by the decree. Petitions for probate of a will afford no ground for holding that the application under the act is a proceeding *in rem*. Where there is a fund in court for distribution, such as the proceeds of a bankrupt estate or of the property of an insolvent corporation, which is in process of being wound up, a general notice to whom it may concern, served by publication, is sufficient to give the court jurisdiction; and it is sufficient, because in such cases the object of the proceeding is not to divest an owner of a title which he has, but to entitle him to share in the fund by proving his right. Petitions for the probate of a will (*Bonnemort v. Gill*, 167 Mass. 338, 45 N. E. 768) and inquests of office to establish an escheat (*Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585), belong to this class. No rights of property guaranteed by the Constitution have vested in the heir which the probate of the will or the inquest of office divests. The purpose of such proceedings is to ascertain whether such rights shall or shall not vest in the heir. *Hamilton v. Brown*, 161 U. S. 256, 268, 40 L. ed. 691, 697, 16 Sup. Ct. Rep. 585.

More than that, it has never been decided that a decree admitting a will to probate was binding on all the world, or that a statute could be constitutionally passed making it binding on all the world. In *Bonnemort v. Gill*, 167 Mass. 338, 45 N. E. 768, the only point decided was that notice by publication gave the court jurisdiction to proceed with the petition for probate of the will, but it is perfectly well settled that the decree of the probate court in that proceeding can be vacated on application at any time. *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 14. In *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, it was decided that a statute of Texas was not in violation of the 14th Amendment which made the decree of escheat therein provided for binding on all the world after notice similar to that provided for by the registration act, under discussion. This statute did not go as far as the registration act. The statute directed that the land covered by the decree of escheat should be sold, and provided that the proceeds of the sale should be paid to any person who should subsequently prove himself to be the heir. *Paschal's Dig.* art. 3671.

That fact was mentioned in the opinion, but does not seem to have been relied upon. The opinion lays down the broad proposition that the decree of escheat is conclusive on the ground that, "if such proceedings are had after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process, to determine whether the estate has escheated to the public, is due process of law." *Id.*, 161 U. S. 256, 275, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585, 592. So far as that reasoning goes, the case is open to the criticism—First, that the right of succession among private persons, in the ordinary administration of estates, is not finally determined by a decree of the probate court, and such a decree can be vacated at any time (*Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714); and, second, that the right of succession, as between all persons and the state, is not finally determined by an inquest of office. Office found in favor of the King did not result in a judgment binding on all the world. It merely entitled him to the possession of the *res*. It did not determine, as against the world, his, or conclude anybody's, right of property in the *res* (3 Bl. Com. 259, 260); but the true owner could "avoid the possession of the Crown acquired by the finding of such an office" by petition of right disclosing new facts not found by the office, or by his *monstrans de droit*, relying on the facts as found, or by traversing the facts found in favor of the King, on leave obtained from the court of chancery under its common-law jurisdiction and from the petty bag. *Stuart, V. C.*, in *Re Parry*, L. R. 2 Eq. 95, 97; 3 Bl. Com. 258; *Ex parte Webster*, 6 Ves. Jr. 809; *Ex parte Gwydir*, 4 Madd. 281; 16 Vin. Abr. p. 86, pl. 1.

Blackstone's qualification (3 Bl. Com. 260), that an owner has "for the most part" a right to traverse facts, is inaccurate; and it is true, as I have stated, that the owner has the right in every case to traverse the facts found by the inquisition. It appears from an inspection of Sir Henry Finch's Discourse on Law (page 324), which Blackstone cites for the qualification, that if the office was found for the King on a judgment of another court, whereby the owner was attainted of treason, he could not attack that judgment collaterally in a traverse to the inquisition. That in no way qualifies the right of a person to traverse the facts established by office found above. So far, therefore, as the decision in *Hamilton v. Brown* rests on the analogy of a final determination of the right of succession among private persons, or between all persons and the state, it cannot be supported. But the decision was also put on the further ground that, "when a man dies, the legislature is under no constitutional obligation

to leave the title to his property, real or personal, in abeyance for an indefinite period." This statement, in the opinion, taken in connection with the provision of the statute, that the petition to have the escheat established could only be filed "when no letters testamentary or of administration appear to have been granted" in the county where his estate would be administered (*Paschal's Dig. art. 3658; Hamilton v. Brown*, 161 U. S. 265, 40 L. ed. 696, 16 Sup. Ct. Rep. 585), puts the case on the same footing as a fund in court, especially when it was stated, in an earlier part of the opinion, that "the whole object in proceedings for escheat or in proceedings of administration is to ascertain who are entitled to the estate of a deceased person." (*Id.*, 161 U. S. 268, 40 L. ed. 697, 16 Sup. Ct. Rep. 589). When one dies seised of land, and no administration is taken out on his estate, it is plain that his estate is in the same position as a fund in court. The estate must be handed over to somebody. A general notice to all to come in and prove their right is sufficient, especially as the only practical effect is to change the land into money; it being expressly provided that anyone entitled to the land shall be entitled, on application, to the proceeds derived by the state from the sale thereof. Anything short of that might well result in large tracts of land in such a state as Texas remaining vacant, to the detriment of the public welfare. In the petition for escheat in *Hamilton v. Brown*, it is alleged that, on the death of Hamilton, who died seised, "there are no tenants upon said tract of land, and no person is either in actual or constructive possession of said tract of land or any part thereof, nor is there any person claiming the estate in and to said tract of land known to petitioner." *Id.*, 161 U. S. 258, 40 L. ed. 693, 16 Sup. Ct. Rep. 585. There is nothing, therefore, in petitions for probate of a will or to establish an escheat which justifies the application under this act as a proceeding *in rem*.

The analogy of a libel *in rem* in admiralty is the analogy which has been most pressed as justifying this as a proceeding *in rem*, and the general proposition is laid down that, if all the world are barred, the proceeding is a proceeding *in rem*. But the test whether particular proceedings are or are not proceedings *in rem* depends upon whether they "are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such action, the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law, it is liable." *Field, J.*, in *Freeman v. Alderson*, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. To the same effect, see *Miller, J.*, in *The Hine v. Trevor*, 4 Wall. 555, 571, 18 L. ed. 451, 456. That this is the true test of whether a particular proceeding is or is not a proceeding *in rem* is

shown by the admiralty rule as to possessory and petitory libels. If the purpose of the libel is the ascertainment of title or delivery of possession of a ship, or if the libel is filed to obtain security for the return of the ship from a voyage undertaken without the consent of the libellant, being a part owner, a libel *in rem* does not lie. The libellant must make the owner a party, and make service upon him, as in an action *in personam* at law. Benedict, Adm. Pr. § 395; Henry, Adm. Jur. & Proc. § 29. There is therefore no authority to be found in admiralty for a proceeding *in rem*, where the purpose of the proceeding is the ascertainment and establishment of the plaintiff's title in the *res*.

Whether a particular proceeding is or is not a proceeding *in rem* depends upon the character of the right in the *res* sought to be enforced, which is given by rules of substantive law, when the purpose of the proceeding is to enforce a right of property, and not to find an owner for property *in custodia legis*, as in case of a fund in court, the probate of a will, or an escheat for lack of heirs. It does not depend upon the fact that the plaintiff undertakes to enforce an ordinary right of property in the *res* against all the world. The test is not, Are all the world barred? but it is, Is it a proceeding to enforce a liability for which the *res* is liable, irrespective of who owns it,— such a liability that the *res* can be properly impleaded as the respondent who is liable? If it is, then a proceeding *in rem* lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding *in rem*, and the legislature cannot make it so by providing that all the world shall be barred. To say that the test of a proceeding *in rem* is the fact that all the world are barred is to confuse cause and effect.

The only proceeding *in rem* known to the common law was an inquest of office, already referred to in connection with *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, "which is an inquiry made . . . concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels" (3 Bl. Com. 258), such as an attainder for treason, whereby the guilty party's property was forfeited to the King, or, dying without heirs, whereby his lands escheated to the King. It also was the proper remedy to give the King possession of chattels, as in case of wreck, treasure trove, and the like, and forfeitures for offenses, as, for example, the forfeiture of the property of a *felo de se*. Id. 258, 259, L. ed. 693, Sup. Ct. Rep. 585.

Forfeiture of lands was, by the Body of Liberties of 1641, art. 10, declared not to exist in the colony of Massachusetts (*Com. v. Mink*, 123 Mass. 422, 425, 426, 25 Am. Rep. 109), and most of the other prerogatives of the King mentioned by Blackstone never obtained here; but the principle of such inquests had been followed in case of

forfeitures for offenses, and there are several instances where the legislature has declared that personal property should be forfeited if used illegally, and in such cases has properly provided for a proceeding *in rem* against it. Familiar examples of this are to be found in Pub. Stat. chap. 212, and in chap. 100, §§ 30-39, providing that certain personal property used in violation of law, including implements used in gaming and liquor kept for sale in violation of the statute, should be liable to be condemned, and many cases of proceedings *in rem* under those acts are to be found in the Reports. A very instructive opinion in this connection by the present chief justice is to be found in *Com. v. Certain Intoxicating Liquors*, 163 Mass. 42, 30 N. E. 348. See also *Atty. Gen. v. Boston Municipal Ct. Justices*, 103 Mass. 456; *Com. v. Gaming Implements*, 119 Mass. 332.

Where the purpose of the proceeding is neither to find an owner for property *in custodia legis*, nor to enforce a right of such a nature that the *res* itself is properly impleaded as the responsible defendant, but the purpose of the proceeding is to deal with someone's right of property therein, as in case of a possessory or petitory libel in admiralty, the action is not an action *in rem*, but an action *in personam* (Field, J., in *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165, at pages 187, 188, and 190, 119 U. S., and pages 373, 374, 30 L. ed., and page 165, 7 Sup. Ct. Rep.); and all parties to be concluded thereby must be named as parties defendant. In stating that the test, and the only test, as to whether a particular proceeding is or is not a proceeding *in rem*, is this, "Are all the world barred?" the Chief Justice tacitly recognizes that, if this proceeding is upheld as a proceeding *in rem*, it is within the constitutional power of the legislature to provide that any property within the territorial limits of the commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any title therein or lien thereto established, in a proceeding in which no defendant need be named, and no notice need be given except notice by publication. If in this proceeding the legislature can change the constitutional right to be heard by authorizing a proceeding *in rem*, it may authorize a proceeding *in rem* in any case involving property, and upon its doing so all the rest follows. There is no escape from that conclusion. There is nothing peculiar to this proceeding. It is a proceeding which may be maintained by any person, whether in or out of possession of land, to establish the title which he claims thereto.

For the purposes of decision, the choice lies between the view which I have set forth on the one hand, and on the other hand holding the doctrine that it is within the constitutional power of the legislature, by changing the form of the proceeding from an action *in personam* to an action *in rem*, to avoid the necessity of complying with the requirements of an action *in personam* in those cases in which, under the constitu-

tional requirements of due process of law, it has heretofore been necessary to name as parties defendant all persons who are to be concluded by the judgment or decree, and to give to them actual notice of the pending proceeding, and an opportunity to be heard before a judgment, which is final, and is not subject to be reviewed or attacked, can be rendered against them.

I will now consider the authorities and points principally relied on by the attorney general which I have not yet disposed of. The attorney general seems to place his main reliance—First, on the statutes as to partition, and the cases of *Cook v. Allen*, 2 Mass. 470; *Dascomb v. Davis*, 5 Met. 335; and *Foster v. Abbot*, 8 Met. 596, which have arisen in Massachusetts under them; and, second, on the three cases of *Belcher v. Mhoon*, 47 Miss. 613; *Sullivan v. Weaver*, 10 Ohio, 276, and *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773. There is nothing in the statutes as to partition, or in the cases arising under them, to conflict with the conclusion to which I have come.

It will not be necessary to consider the statutes prior to the Revised Statutes. Provincial Laws 1742-43, chap. 24 (3 Provincial Laws, p. 42), Stat. 1783, chap. 41; Stat. 1786, chap. 53. Prior to the Revised Statutes, the act did not undertake to deal with rights of property, either finally or prima facie. It dealt only with the right of possession, without regard to the right of an owner to enforce his right of property in a writ of right. *Dascomb v. Davis*, 5 Met. 335, 340; *Cook v. Allen*, 2 Mass. 470; Report of Commissioners, Rev. Stat. chap. 103, § 30, note. By reason of the abolition in the Revised Statutes of the writ of right, the judgment on a petition for partition became equivalent to a judgment on a writ of entry, and it became necessary to protect the rights of property of those who were parties to the partition proceedings, whether they appeared or not, and the provisions which were enacted in Rev. Stat. chap. 103, §§ 33-47, were drafted by the commissioners for that purpose. It was provided that, if two persons claimed to be entitled to a particular share, the court admitted one of them to act for that share in respect to the partition, and the assignment of land to that share was binding upon the owner thereof, whoever he might be (Id. § 41); but he was not concluded as to the ownership of the share so assigned (Id. §§ 40-42); and, if one claiming to be the owner of a share did not appear in the partition proceedings, he was bound by the assignment of land made to the share claimed by him, but could recover the land so assigned in a suit brought for that purpose (Id. §§ 39, 40); if one who did not appear claimed to be part owner with another of a share, which was assigned to that other, he was bound by the assignment of land to the share, but could recover his part of the land so assigned (§ 43); if one who did not appear claimed to own in severalty any part of the

land divided, he was not bound by the partition proceedings, but could recover his land as if no partition proceedings had been had (Rev. Stat. chap. 103, § 38); if any person to whom land had been assigned was evicted, he could have a partition of the residue of the original land (§ 46); and, finally, if any part owner at the time of the partition was out of the state, he was not bound by the partition made, but could, within three years after final judgment, have a new partition (§§ 34-36), and full right of review by appeal, and a writ of error could be had to any judgment (Rev. Stat. chap. 103, §§ 31, 32; *Foster v. Abbot*, 8 Met. 596, 599). As to the scope of the act, see Commissioners' Report, Rev. Stat. chap. 103, §§ 36-43, notes; Pub. Stat. chap. 178, §§ 35-44. Neither *Belcher v. Mhoon*, 47 Miss. 613, nor *Sullivan v. Weaver*, 10 Ohio, 276, is a case of much original importance, and in each state there are subsequent decisions under which the land registration act under discussion is unconstitutional. *Brown v. Levee Comrs.* 50 Miss. 468; *State ex rel. Atty. Gen. v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551. In *Belcher v. Mhoon*, 47 Miss. 613, the question of the constitutionality of the act was neither raised by counsel nor passed upon by the court. From the obscure report of *Sullivan v. Weaver*, 10 Ohio, 276, it would seem to have been held in that case that a decree in equity founded on process issued against the heirs of a specified decedent was evidence in proving a chain of title. The sole question in the case was whether the plaintiff had made out a prima facie case of title in himself. The constitutional question under discussion was not raised. It was objected in argument that the decree could not be collaterally attacked, and there was no suggestion that the defendant was an heir of the decedent. *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, is an authority for the constitutionality of an act providing that, in an action to quiet title, unknown persons are bound by a notice to all the world, served by publication. But even that decision is no authority for this act. In that case any interested party had a year after judgment to appear and have it vacated. It is expressly stated in the opinion that the statute gave to such unnamed persons "the same right to appear and defend before and after judgment" that was given to named defendants who were served by publication; and it appears by Minn. Gen. Stat. 1894, § 5206, that a defendant brought in by publication could, within one year after judgment, appear and have the judgment vacated if it was wrongly made. For reasons already given, I think that opinion goes too far, though it does not go so far as this act. The doctrine of *Arndt v. Griggs*, 134 U. S. 310, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, and *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124, does not reach the question under discussion. No state is deprived of its power to deal with

property within its limits by the absence of the owner. Consequently it is within the power of a state, in case a suit is brought against the nonresident, in which the plaintiff seeks to affect the estate of the defendant, but not to entitle himself to a personal charge against the defendant, to proceed against his estate, after giving him such notice as the circumstances permit. See Miller, J., in *Huling v. Kaw Valley R. & Improv. Co.*, 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603. But if title to real estate can be established against unknown claimants in a proceeding in which they are not named, and where service is made by publication only, it must be supported on a principle which is different in kind from the doctrine of those cases.

It is true that several statutes have been enacted of recent years which undertake to conclude unknown and unnamed defendants. Stat. 1882, chap. 237; Stat. 1885, chap. 283; Stat. 1889, chap. 442; Stat. 1893, chap. 340; Stat. 1897, chap. 522. The constitutionality of these acts in the connection now under discussion has never been brought before the court. In *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124, the only objection raised was the lack of jurisdiction by reason of the nonresidence of the claimants who appeared. In *Loring v. Hildreth*, 170 Mass. 328, 40 L. R. A. 127, 49 N. E. 652, the only constitutional objection set up was that constructive service cannot reach unborn parties, represented in fact by a guardian *ad litem*. It was conceded in argument that there might be constructive service on unknown persons (page 329, 170 Mass., page 127, 40 L. R. A., and page 652, 49 N. E.), and that was not considered by the court. How far these statutes are void is not now before the court. Whether effect can be given to a decree, under Stat. 1889, chap. 442, and Stat. 1897, chap. 522, when unascertained parties are before the court by a guardian (as in *Loring v. Hildreth*, 170 Mass. 328, 40 L. R. A. 127, 49 N. E. 652), or a decree against unnamed parties, under Stat. 1897, chap. 522, can be supported as being against members of a class sufficiently represented in court, need not now be considered.

The conclusion which I have reached is in the main supported by *Webster v. Reid*, 11 How. 437, 13 L. ed. 701; *State ex rel. Atty. Gen. v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551; *Brown v. Leves Comrs.* 50 Miss. 468; *People ex rel. Dencen v. Simon*, 176 Ill. 165, 44 L. R. A. 801, 52 N. E. 910.

In the words of Lord Coke: "When authority and precedent is wanting, there is need of great consideration, before that anything of novelty shall be established, and to provide that this be not against the law of the land." 12 Coke, 75.

I am authorized to state that Mr. Justice Lathrop concurs in this opinion.

51 L. R. A.

NATIONAL GRANITE BANK

v.
Theodore H. TYNDALE, Admr., etc., of Isabella S. Whicher, Deceased.

(Two cases.)

(176 Mass. 547.)

1. A loan made to a married woman on her credit, although she gives notes therefor which are void because made payable to her husband, who indorses them, will sustain an action at law against her estate upon the common counts for money lent or money had and received.
2. Relief in equity by reason of an estoppel cannot be granted to the holders of the notes of a married woman who had the proceeds, against the legal defense that the notes are void because made payable to her husband, who indorsed them.

(September 6, 1900.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Norfolk County made during the trial of an action brought to recover the amount due on a promissory note which had been signed by defendant's intestate, refusing to admit evidence that the money for which the note was given was in fact loaned to defendant's intestate so that she was primarily liable on the note. *Sustained.*

APPEAL by plaintiff from a decree of the Superior Court for Norfolk County dismissing a bill filed to obtain relief from a defense to a note signed by plaintiff's intestate to the effect that the note was void because given by the maker to her husband. *Affirmed.*

The facts are stated in the opinion.

Mcscrs. Robert M. Morse, William H. Leonard, and Charles H. Hanson, for plaintiff:

The action on the common counts is one to recover money loaned, and not to recover the consideration for the void notes.

It cannot be objected that the obligation which arose from the receipt or retention of value, to return or pay for the same, was overridden because the words of a form of a contract which did not bind the party repudiating it were uttered at the time.

Kencil v. Egleston, 140 Mass. 202, 4 N. E. 573; *Bacon v. Parker*, 137 Mass. 309; *Parker v. Tainter*, 123 Mass. 185; *Dix v. Marcy*, 116 Mass. 416; *White v. Wieland*, 109 Mass. 291; *Kiddier v. Hunt*, 1 Pick. 328, 40 Am. Dec. 183.

If the notes were void, they were not payment of the loan.

Walker v. Mayo, 143 Mass. 42, 8 N. E. 875.

The reason why, in Massachusetts, a note

NOTE.—On the general question of the estoppel of a married woman, see *notes to Galbraith v. Lunsford* (Tenn.) 1 L. R. A. 522; *Speler v. Opfer* (Mich.) 2 L. R. A. on page 347; *Cook v. Walling* (Ind.) 2 L. R. A. 869; *Long v. Crossman* (Ind.) 4 L. R. A. 783; and *Miller v. Shields* (Ind.) 8 L. R. A. 406.

For note on estoppel of married woman by deed or covenant, see *Wadkins v. Watson* (Tex.) 22 L. R. A. 779.

given for a simple-contract debt is presumed to be taken in payment, is that "the party receiving it has the same responsibility for payment that he had before," etc.

But, when the new promise is void, and avoided by the promisor, the creditor does not get the same responsibility for payment that he had before.

O'Connor v. Hurley, 147 Mass. 149, 16 N. E. 764; *Walker v. Mayo*, 143 Mass. 42, 8 N. E. 873; *Curtis v. Hubbard*, 9 Met. 322.

The bill in equity is maintainable on the facts alleged, and for the relief prayed.

Hackettstown Nat. Bank v. Ming, 52 N. J. Eq. 150, 27 Atl. 920.

The retention by the defendant's intestate of the consideration received by her from the complainant constitutes an equitable estoppel against the defense in question.

Randolph, Com. Paper, 2d ed. § 1638; *Wilson v. Wilson*, 86 Md. 638, 39 Atl. 277.

It constitutes an equitable estoppel which a court of equity may enforce by restraining a legal defense.

Randolph, Com. Paper, 2d ed. § 1688.

Mrs. Whicher having herself negotiated the notes to the bank, when they were in effect payable to bearer, she is estopped to deny the capacity of her husband to indorse or contract.

Negotiable Instruments Act, Stat. 1898, chap. 533, § 9, par. 5, §§ 60, 65, par. 4; *Bowery Nat. Bank v. Sniffen*, 54 Hun, 394, 7 N. Y. Supp. 520; *Queens County Bank v. Leavitt*, 56 Hun, 426, 10 N. Y. Supp. 193; *Wisdom v. Shanklin*, 74 Mo. App. 428; *Hawn v. Trainer*, 7 Pa. Dist. R. 235; *Drayton v. Dale*, 2 Barn. & C. 293; Bigelow, Bills & Notes, 2d ed. p. 167; Bigelow, Estoppel, 5th ed. pp. 495-498; *Wolke v. Kuhne*, 109 Ind. 313, 10 N. E. 116; *Robertson v. Allen*, 3 Baxt. 233; *Smith v. Marsack*, 6 C. B. 486.

The transaction was one by the wife, not with her husband, but with the bank, and one, therefore, which she was fully authorized and empowered to make.

Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655; *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288, 1 L. R. A. 816, 36 Fed. Rep. 484; *Wachusett Nat. Bank v. Sioux City Stove Works*, 56 Fed. Rep. 321.

Mr. and Mrs. Whicher had no intention of contracting with each other. And, as an intention to contract is an essential element of every contract, it follows that the notes in suit were not contracts between husband and wife in any event.

Bowery Nat. Bank v. Sniffen, 54 Hun, 394, 7 N. Y. Supp. 520; *Queens County Bank v. Leavitt*, 56 Hun, 426, 10 N. Y. Supp. 193.

The contract, though void at law, is not void in equity merely because in form a contract between husband and wife, the contract in equity being one by the wife, not with her husband, but with the complainant bank.

Pom. Eq. Jur. 1st ed. § 378; *Bernards v. Turp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 756, 3 Sup. Ct. Rep. 252; *Drexel v. Berney*, 51 L. R. A.

122 U. S. 241, 30 L. ed. 1219, 7 Sup. Ct. Rep. 1200.

Under modern statutes the legal unity of husband and wife is but little more than a fiction. Married women have been empowered to hold property, to sue and be sued, and to make contracts, as if they were unmarried. As to third persons they are separate and distinct persons. It is only as between each other that the legal unity remains, and even that is but little more than a fiction, each being expressly authorized to hold property free from the interference of the other.

Harmon v. Old Colony R. Co. 165 Mass. 100, 30 L. R. A. 658, 42 N. E. 505.

Equity never regarded husband and wife as they were regarded at law. The legal unity of husband and wife was conclusive on a court of law. It was never conclusive on a court of equity.

In most of the states property rights as between husband and wife have been left almost entirely to the jurisdiction of courts of equity, where, the courts argue, the legislatures must be deemed to have intended to leave them.

The inherent jurisdiction of equity over such matters is fully established.

2 Story, Eq. Jur. § 1368; *Blake v. Blake*, 64 Me. 177; *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253; *Motley v. Sawyer*, 34 Me. 510; *Hackett v. Mooley*, 65 Vt. 71, 25 Atl. 898; *Purdy v. Purdy*, 67 Vt. 50, 30 Atl. 695; *Spitz's Appeal*, 56 Conn. 184, 14 Atl. 776; *Corr's Appeal*, 62 Conn. 403, 26 Atl. 478; *Gurwood v. Gurwood*, 56 N. J. Eq. 265, 38 Atl. 954; *Wood v. Chetwood*, 44 N. J. Eq. 64, 14 Atl. 21; *Duval v. Duval*, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; *Buttler v. Buttler*, 57 N. J. Eq. 645, 38 Atl. 300, 42 Atl. 755; *Talcott v. Arnold*, 54 N. J. Eq. 570, 35 Atl. 532, Affirmed in 55 N. J. Eq. 519, 37 Atl. 891; *Perkins v. Elliott*, 23 N. J. Eq. 526; *Kenney v. Knight*, 174 Pa. 408, 34 Atl. 585; *Kittel's Estate*, 156 Pa. 445, 26 Atl. 1116; *Wingert v. Gordon*, 66 Md. 106, 6 Atl. 581; *Hendricks v. Isaacs*, 117 N. Y. 411, 6 L. R. A. 559, 22 N. E. 1029; *Savage v. O'Neil*, 44 N. Y. 298; *Woodworth v. Sweet*, 51 N. Y. 8; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Proctor v. Cole*, 104 Ind. 330, 4 N. E. 303; *Worth v. Patton*, 5 Ind. App. 272, 31 N. E. 1130; *Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909; *Leach v. Raine*, 149 Ind. 152, 48 N. E. 858; *Huber v. Huber*, 10 Ohio, 371; *Wood v. Warden*, 20 Ohio, 518; *Wallingsford v. Allen*, 10 Pet. 583, 9 L. ed. 542; *Sykes v. Chadwick*, 18 Wall. 141, 21 L. ed. 824; *Clark v. Hezekiah*, 24 Fed. Rep. 663; *Daniels v. Benedict*, 38 C. C. A. 532, 97 Fed. Rep. 367; *McCormick v. Hammersley*, 1 App. D. C. 313; *Atlantic Nat. Bank v. Tavener*, 130 Mass. 407; *Holmes v. Winchester*, 133 Mass. 140.

Common-law courts, although they regretted it, were compelled, and, in the absence of statute, are still compelled, to hold transfers of property by one directly to the other void.

Firebrass v. Pennant, 2 Wils. 254; *White v. Wager*, 25 N. Y. 328; *Woodruff v. Clark*,

42 N. J. L. 198; *Homan v. Headley*, 58 N. J. L. 485, 34 Atl. 941.

But in equity such transfers have been upheld as creating an equitable estate in the transferee.

Moore v. Page, 111 U. S. 117, 28 L. ed. 373, 4 Sup. Ct. Rep. 388; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908; *Wallingsford v. Allen*, 10 Pet. 583, 9 L. ed. 542; *Chadbourne v. Gilman*, 64 N. H. 353, 10 Atl. 701; *Barrous v. Keene*, 15 R. I. 484, 8 Atl. 713; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386; *Haussman v. Burnham*, 59 Conn. 117, 22 Atl. 1065; *Garwood v. Garwood*, 56 N. J. Eq. 265, 38 Atl. 954; *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. 489; *Siple v. Wass*, 49 N. J. Eq. 403, 24 Atl. 233; *Reagle v. Reagle*, 179 Pa. 89, 36 Atl. 191; *Stockslager v. Mechanics' Loan & Sav. Inst.* 87 Md. 232, 39 Atl. 742; *Wilson v. Wilson*, 86 Md. 638, 39 Atl. 276; *Kerr v. Urie*, 86 Md. 72, 35 L. R. A. 119, 37 Atl. 789; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054; *Merchants' & Laborers' Asso. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008; *Hill v. Meinhard*, 39 Fla. 111, 21 So. 805; *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *McKenzie v. Ohio River R. Co.* 27 W. Va. 311; *Walton v. Parish*, 95 N. C. 259; *Hamaker v. Hamaker*, 85 Ala. 231, 3 So. 611; *Miller v. Miller*, 17 Or. 423, 21 Pac. 938; *Savage v. Savage*, 80 Me. 472, 15 Atl. 43; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Duffy v. White*, 115 Mich. 264, 73 N. W. 363.

Some of the state statutes make transfers of real estate by the wife invalid unless the husband joins in the conveyance, and this is thought to make transfers by the wife directly to the husband invalid.

Johnson v. Jouchert, 124 Ind. 105, 8 L. R. A. 795, 24 N. E. 580; *Luntz v. Greve*, 102 Ind. 173, 20 N. E. 128; *Rico v. Brandenstein*, 98 Cal. 465, 20 L. R. A. 702, 33 Pac. 480; *Graham v. Stuve*, 76 Tex. 533, 13 S. W. 381; *Fulgham v. Pute*, 77 Ga. 454; *Trawick v. Davis*, 85 Ala. 342, 5 So. 83; *Osborne v. Cooper*, 113 Ala. 405, 21 So. 320.

But in these same states transfers by the husband directly to the wife are upheld.

Eneyart v. Kepler, 118 Ind. 34, 20 N. E. 539; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Hamaker v. Hamaker*, 85 Ala. 231, 3 So. 611.

In equity, suits by one against the other have been maintained since the earliest times.

Lombard v. Morse, 165 Mass. 136, 14 L. R. A. 273, 29 N. E. 205; *Frankel v. Frankel*, 173 Mass. 214, 53 N. E. 398; *Fitzgerald v. Fitzgerald*, 165 Mass. 471, 43 N. E. 191.

In equity, for many purposes, husband and wife were regarded as distinct persons, and capable of contracting with each other.

Slanning v. Style, 3 P. Wms. 334; *Cal-mady v. Calmady*, cited in 3 P. Wms. 339; *Moore v. Freeman*, Bunbury, 205; *Arundell v. Phipps*, 10 Ves. Jr. 139; *Murray v. Glasse*, 21 Eng. L. & Eq. Rep. 51; *Sykes v. Chadwick*, 18 Wall. 141, 21 L. ed. 824; *Graves v. Davenport*, 50 Fed. Rep. 881; *Wallingsford v. Allen*, 10 Pet. 583, 9 L. ed. 542; *Daniels* 51 L. R. A.

v. Benedict, 38 C. C. A. 592, 97 Fed. Rep. 367; *Bean v. Patterson*, 122 U. S. 496, 30 L. ed. 1126, 7 Sup. Ct. Rep. 1298; *McCormick v. Hammersley*, 1 App. D. C. 313; *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253; *Pearson v. Pearson*, 60 N. H. 497; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898; *Steadman v. Wilbur*, 7 R. I. 481; *Spitz's Appeal*, 56 Conn. 184, 14 Atl. 776; *Corr's Appeal*, 62 Conn. 403, 26 Atl. 478; *Haussman v. Burnham*, 59 Conn. 117, 22 Atl. 1065; *Talcott v. Arnold*, 54 N. J. Eq. 570, 35 Atl. 532, Affirmed in 55 N. J. Eq. 519, 37 Atl. 891; *Duval v. Duval*, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; *Wood v. Chetwood*, 44 N. J. Eq. 64, 14 Atl. 21; *Gould v. Gould*, 35 N. J. Eq. 37, 562; *National Bank v. Brewster*, 49 N. J. L. 231, 12 Atl. 769; *Alpaugh v. Wilson*, 52 N. J. Eq. 424, 28 Atl. 722; *Nutting v. Uirich*, 169 Pa. 289, 32 Atl. 409; *Kennedy v. Knight*, 174 Pa. 408, 34 Atl. 585; *Re Wilkinson*, 192 Pa. 117, 43 Atl. 466; *Haun v. Trainer*, 7 Pa. Dist. R. 235; *Hawley v. Griffith*, 187 Pa. 306, 41 Atl. 30; *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 37 Atl. 789; *Stockslager v. Mechanics' Loan & Sav. Inst.* 87 Md. 232, 39 Atl. 742; *Hendricks v. Isaacs*, 117 N. Y. 411, 6 L. R. A. 559, 22 N. E. 1029; *Bowery Nat. Bank v. Sniffen*, 54 Hun, 394, 7 N. Y. Supp. 520; *Queens County Bank v. Leavitt*, 56 Hun, 426, 10 N. Y. Supp. 593; *Huber v. Huber*, 10 Ohio, 371; *Smith v. Smith*, 57 Ohio St. 27, 48 N. E. 28; *Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 513; *Roche v. Union Trust Co.* (Ind.) 1 Repr. 551, 52 N. E. 612; *Proctor v. Cole*, 104 Ind. 380, 4 N. E. 303; *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858; *North v. North*, 166 Ill. 179, 46 N. E. 729; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 965; *Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441; *Rosenbaum v. Davis* (Tenn. Ch. App.) 48 S. W. 706; *Feder v. Ervin* (Tenn. Ch. App.) 36 L. R. A. 335; *Hamaker v. Hamaker*, 88 Ala. 431, 6 So. 754; *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783; *Munday v. Collier*, 52 Ark. 126, 12 S. W. 240; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Logan v. Hall*, 19 Iowa, 491; *Meyer Bros. v. Cook*, 85 Ala. 419, 5 So. 147; *Muir v. Miller*, 103 Iowa, 127, 72 N. W. 409; *Kalfus v. Kalfus*, 92 Ky. 542, 18 S. W. 360; *Hoffman v. St. Louis Trust Co.* 68 Mo. App. 177; *Reynolds v. Reynolds*, 65 Mo. App. 415; *Wisdom v. Shanklin*, 74 Mo. App. 428; *Brown v. Brown*, 22 Neb. 703, 36 N. W. 275; *Wadsworthville Poor School v. Bryson*, 34 S. C. 401, 13 S. E. 619; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *Clark v. Clark*, 76 Wis. 300, 45 N. W. 121; *Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W. 369; *Sigler v. Sigler*, 108 Mich. 591, 66 N. W. 489. Messrs. J. P. Prince and S. H. Tyng for defendant.

Morton, J., delivered the opinion of the court:

These two cases were argued together. The first is an action at law, and was before this court on the defendant's exceptions in *National Granite Bank v. Whicher*, 173 Mass. 517, 53 N. E. 1004, and it was there

held that, the maker of the notes being a married woman, and the notes being made payable to the order of her husband, and indorsed by him, no action could be maintained on them against her. It comes before us now on exceptions by the plaintiff to a ruling by the presiding justice that upon the plaintiff's offer of proof an action could not be maintained against the administrator on the common counts for money lent, or for money had and received, and to a ruling that the plaintiff was not entitled to avail itself of the facts set up in the bill in equity in answer to the defense that the notes were void because made payable to the husband of defendant's intestate. The plaintiff offered to show that on December 29, 1891, it lent the defendant's intestate \$15,000, and that at the same time the defendant's intestate gave the plaintiff three promissory notes for \$15,000, payable to the order of her husband, and indorsed by him and by two other parties; that subsequently the defendant's intestate repudiated the notes on the ground that, having been made payable to her husband, and indorsed by him, they were void; and that the plaintiff had expressly refused to make the loan to the other parties, or on their individual credit, and made the loan only to defendant's intestate, and on her credit.

We think that the ruling was erroneous. The offer was to show that the loan was made to defendant's intestate, and on her credit. This was consistent with the form of the note, of which she was the maker, and of which the other parties were, as between them and the bank, the indorsers. *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150. The fact that the note was declared void as to her did not destroy the original transaction, or avoid the debt created by the loan to her. *Walker v. Mayo*, 143 Mass. 42, 8 N. E. 873; *Sutton v. Toomer*, 7 Barn. & C. 416. If the other parties to the note had been comakers with her, and the loan had been made to all of them, and the note had afterwards been avoided by one of them, there would seem to be no doubt that the payee could have maintained an action against all of them for money had and received, or money lent. *Leonard v. First Cong. Soc.* 2 Cush. 462. In such a case, the note having been received on the faith that it was the valid note of all, the payee would be "warranted in treating it as a nullity, and resorting to the original contract." *Leonard v. First Cong. Soc.* 2 Cush. 462. *A fortiori*, ought that to be the case when the liability of the other parties is, as here, collateral, and the action is brought against the maker alone. It is true that the plaintiff could have treated the note as valid as against the other parties, and that, if the plaintiff had sued and recovered against the last indorser, for instance, the husband might have been estopped in an action against him by a subsequent indorser to deny the validity of the note. *Roby v. Phelon*, 118 Mass. 541. But this action is not against the indorsers, and the counts that we are considering are not upon the note.

The only use of the note which the plaintiff can make in relying on those counts is as evidence tending to show the terms on which the loan was made to defendant's intestate. It cannot recover upon the note and the common counts both, and, so far as it relies upon the common counts, it must be taken to rely upon the original contract with the maker of the note, and therefore to have elected to treat the note as a nullity. In such a case the plaintiff would have no ground of recovery against parties whose only liability as between them and the bank is that of indorsers on the note. The plaintiff contends, however, that it is entitled to be relieved in equity against the defense that the notes are void because made payable by the defendant's intestate to her husband. Its contention is, in substance, that the defendant's intestate, having received and kept the proceeds of the notes, is estopped in equity to deny their validity. But a party cannot be relieved in equity, we think, by reason of an estoppel, any more than at law, from the effect of a positive rule of law. It is the rule of law that controls the conduct of parties, not the conduct of parties the rule of law. To hold otherwise would be to permit parties to set aside at their pleasure, with the aid of a court of equity, the rule of the common law which has been declared and recognized by the legislature and by this court that contracts between husband and wife are void. It is true that under some circumstances—as, for instance, in the case of trusts and contracts made in contemplation of marriage—contracts between husband and wife have been enforced in equity. See *Frankel v. Frankel*, 173 Mass. 214, 53 N. E. 398. But in this commonwealth, whatever may be the rule elsewhere, it never has been held that validity could be given to contracts between husband and wife, or in the analogous case of contracts made during minority, by means of the doctrine of equitable estoppel. See *Fowle v. Torrey*, 135 Mass. 87; *Baker v. Stone*, 136 Mass. 405; *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521; *Clark v. Patterson*, 158 Mass. 388, 33 N. E. 589. Moreover, there is no allegation in the bill of any conduct or representation, fraudulent or otherwise, on the part of defendant's intestate, whereby the plaintiff was induced to take the notes and part with its money to her, and thus the very foundation of an estoppel, equitable or otherwise, fails. It is consistent with the allegations in the bill that the plaintiff knew that defendant's intestate was the wife of the payee, and acted in regard to the transaction on its own knowledge. It is manifest that the fact that the notes are void does not of itself entitle the plaintiff to relief. Equity does not undertake to afford relief in all cases where contracts are for any reason void in the form in which they have been entered into.

The result is that in the action at law we think the exceptions should be sustained, and that in the bill in equity the decree sustaining the demurrer and dismissing the bill with costs should be affirmed.

So ordered.

MICHIGAN SUPREME COURT.

Henry J. EIKHOFF, *Plff. in Err.*,
v.

Edward T. GILBERT *et al.*

(.....Mich.....)

1. A circular addressed to voters, stating generally and unqualifiedly that a candidate for re-election to the legislature has championed measures opposed to the moral interests of the community, when this is stated as a fact, and not as a mere opinion or inference drawn from any specified acts, is, when untrue, libelous *per se*, and is not privileged.
2. The question whether one who supported certain measures thereby championed legislation opposed to the moral interests of the community, as an alleged libel charged him with doing, is one for the jury.
3. A circular charging that a candidate for office is a champion of saloons, lawlessness, and vulgar theatres, and then adding that, for reasons considered equally good, voters are asked to vote against a certain other candidate, is a libel upon the latter, if untrue as to him.

(Grant and Moore, JJ., dissent.)

(June 5, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinions.

Mr. William B. Jackson, with **Mr. Edward S. Grece**, for plaintiff in error: *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503, is somewhat analogous to this case. In that case the language imputed to the defendant was regarded as libelous on its face, and the same may be said of the publication in question. If so, no innuendo was necessary to explain its meaning.

Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; *Randall v. Evening News Asso.* 79 Mich. 266, 7 L. R. A. 309, 44 N. W. 783.

Before the eyes of the public, defendants purposely and wilfully published what was not true concerning plaintiff, no matter what their particular or private opinions may be concerning certain great questions upon which many good citizens differ honestly.

In these discussions one should not transcend the bounds of truth, for, in addition to the commission of a private wrong, great public injury might result.

Belknap v. Ball, 83 Mich. 590, 11 L. R. A. 72, 47 N. W. 674.

At common law there are certain offenses known as offenses against the public morals.

1 Bishop, Crim. Law, chap. 36.

The readers of the language of these cir-

culars would naturally assume that the plaintiff, in his legislative doings, "champions measures" which in their character are against the principles and provisions of law.

The language was framed to exploit the ideas of these defendants upon certain great questions upon which there is a vast difference of opinion among the people, but it was so framed as to conceal their real intention and meaning, and thus left the public to judge the very worst.

If the statements are false, they are presumed to be malicious; and good faith will not protect them in their false publication.

Whittemore v. Weiss, 33 Mich. 353; *Bronson v. Bruce*, 59 Mich. 472, 60 Am. Rep. 307, 26 N. W. 671.

To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, is a most pernicious doctrine.

Garn v. Lockard, 108 Mich. 198, 65 N. W. 764; *Owen v. Dewey*, 107 Mich. 73, 65 N. W. 8; *Bronson v. Bruce*, 59 Mich. 474, 60 Am. Rep. 307, 26 N. W. 671.

It was not necessary that there should have been any ill-will or purpose to injure the plaintiff without cause.

Brand v. Hinchman, 68 Mich. 600, 36 N. W. 664; *Bell v. Fernald*, 71 Mich. 267, 38 N. W. 910; *Ten Hopen v. Walker*, 96 Mich. 241, 55 N. W. 657; *Hamilton v. Eno*, 81 N. W. 122.

Whether the publication is a privileged communication is for the jury.

Bacon v. Michigan C. R. Co. 55 Mich. 229, 54 Am. Rep. 372, 21 N. W. 324.

The defense was one of confession and avoidance. The falsity of the charges made against the complainant was, of necessity, admitted, else there would be no basis for seeking to avoid the consequences that would follow by such a defense or claim. The special defense of the truth of the allegation declared upon, as pleaded by the defense, was not established.

Bronson v. Bruce, 59 Mich. 474, 60 Am. Rep. 307, 26 N. W. 671; *Belknap v. Ball*, 83 Mich. 590, 11 L. R. A. 72, 47 N. W. 674; *Owen v. Dewey*, 107 Mich. 70, 65 N. W. 8; *Wheaton v. Beecher*, 66 Mich. 310, 33 N. W. 503; *Randall v. Evening News Asso.* 79 Mich. 266, 7 L. R. A. 309, 44 N. W. 783; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. Rep. 530; *Davis v. Shepstons*, L. R. 11 App. Cas. 187.

The question, What construction would the public put upon the language? is for the jury.

Edwards v. Chandler, 14 Mich. 471, 90 Am. Dec. 249; *Bourrescau v. Detroit Even-*

NOTE.—For earlier cases in this series as to libel of candidates or officials, see *Sillars v. Collier* (Mass.) 6 L. R. A. 680, and *note*; *Randall v. Evening News Asso.* (Mich.) 7 L. R. A. 309; *Belknap v. Ball* (Mich.) 11 L. R. A. 72; 51 L. R. A.

Augusta Evening News v. Radford (Ga.) 20 L. R. A. 533; *Upton v. Hume* (Or.) 21 L. R. A. 493; *Smith v. Utley* (Wis.) 35 L. R. A. 620; *State v. Hoskins* (Iowa) 47 L. R. A. 223.

ing *Journal Co.* 63 Mich. 425, 30 N. W. 376; *McAllister v. Detroit Free Press Co.* 95 Mich. 164, 54 N. W. 710; *Ewing v. Ainger*, 96 Mich. 587, 55 N. W. 996; *Field v. Magee*, 122 Mich. 556, 81 N. W. 354.

Words are now construed by courts, as they always ought to have been, in the popular sense in which the rest of the world naturally understood them.

Wieman v. Mabce, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71; *Brettun v. Anthony*, 103 Mass. 39; *Brown v. Boynton*, 122 Mich. 251, 80 N. W. 1099.

Messrs. Wells, Angell, Boynton, & McMillan for defendants in error.

Hooker, J., delivered the opinion of the court:

The defendants are members of an organization called the "Good Government League," in the city of Detroit, which professes to have for its object the election of worthy men to office, and the promotion of good order and honest administration of city affairs. The plaintiff, having attended one session of the legislature in the capacity of representative, was a candidate for re-election. This action is for libel, alleged to have consisted of three publications over the names of the defendants. One, for convenience called the "White Circular," was addressed to the voters, and contained in parallel columns the names of several candidates whom the electors were advised to vote for or against. The portion applicable to the plaintiff was as follows:

Vote

For	Against
Harry C. Barter for representative, because he represents all that is good in his opponent, and does not represent the objectionable. He is the champion of labor and arbitration.	Henry Elkhoff for representative, because in the last legislature he championed measures opposed to the moral interests of the community.

Another, called the "*Pink Circular*," contained the following:

Read and Reflect before You Vote.

The executive council of the Good Government League has carefully examined the record of each candidate for office. Where opposing candidates are equally bad or equally good, we make no recommendations. The following suggestions are made in the hope that they may aid you in the discharge of your duty as a citizen, and that righteousness may prevail in public as well as in private affairs:

Lou J. Burch is candidate on the Republican ticket for representative. All friends of morality and decency are asked to vote against him for the following reasons: Lou J. Burch is secretary of the Michigan Liquor Dealers' League. He is editor of the official organ of that league. He is a self-avowed candidate for the liquor dealers, and desires to go to the legislature to work

in the interest of the saloon. Lou J. Burch is editor and publisher of a scurrilous sheet, dated Saturday, but always issued Sunday morning. In his paper the ministry is ridiculed, women are maligned, and workers for the cause of righteousness are defamed. Lou J. Burch is the champion of saloon lawlessness and of vulgar theatres. Lou J. Burch has offered insult to every colored man, woman, and child in Detroit. In witness of these facts, read the following statements from his own sheet: "The liquor interests of the city are likely to have something to say in the convention. Lou J. Burch, editor of —, is their candidate." October 29, 1898. "Here and there could be seen the burly forms of chicken-fed preachers, arrayed in long, dark, frock coats, with hair pompadour, and smile urbane as the harvest moon, moving about among the female portion of the flock, thinking what a snap they had. It was a veritable Eden for them, and it was full of ripe, luscious apples, and no snakes. A preacher is never so near his heaven as when in charge of a menless audience or convention." January 22, 1898. Speaking editorially of one of Woodward avenue's most prominent and popular ministers, the sheet says: ". . . He is either crazy, a fool, or both; and that at best he is a weak, narrow-minded bigot, without religion or sense." May 7, 1898. Referring to deaconesses and other Christian workers, Burch's paper says: "The front row of chairs was occupied by as interesting a bunch of short-haired, long-nosed women, of doubtful age, as one would meet in a long search." October 1, 1898. Referring to prominent pastors and church workers who were at police court recently, Burch's paper says they were "as fine a looking lot of spies and sneaks as ever put powder to a safe." October 1, 1898. "And still these awful good and pious old ladies can never see anything wrong with hugging and kissing bees and grab-bag bunco games as they are carried on at the regulation church socials." October 22, 1898. In commenting upon the discharge in the recorder's court of a saloonist, Burch's paper says: "The outcome of all these cases should be the same as this first one, and probably will be. Mathews was defeated by Navin & Sheehan." October 15, 1898. Burch's paper spoke as follows concerning the effort to close the Capitol Square Theater: ". . . Agitating against the Capitol Square Theater with the intention of closing it, but without success, for the simple reason that there is no excuse for such an outrageous procedure." April 2, 1898. After the evidence upon which the theater was closed was in, Burch's paper said: "As the investigation now stands, there can be but one result, the complete vindication of Dr. Campbell." April 9, 1898. "Republican politicians about town are wondering which side of the fence Charlie Joslyn will be found upon in the Pingree and anti-fight this year. Pingree bought Charlie with a \$5,000 per year job two years ago, but there is a rumor that the foxy Charlie is looking

for a raise this year." April 10, 1898. "Should Stay Away—Negroes must Realize that There is a Line. The question of the color line has arisen in Detroit once more. A negro claims that he was discriminated against at Stock's Riverside Park. This statement is denied, however. He had no business there. Negroes must realize the fact that white people will associate with them more or less in business, but will certainly refuse to be on equal terms with them socially. Knowing the objection there is for their company, why does the negro force it? No gentleman would. White men would be forcibly ejected from any place where they made themselves half as obnoxious as do most colored people. It has since transpired that the negro anxious for a case made no complaint to Mr. Stock, but straightway rushed into court. Mr. Stock is a very fair-minded gentleman, and is willing, and always used Detroit citizens liberally, and there is no doubt they will support him against the arrogance of Detroit's colored population." May 28, 1898. "The ladies of the W. C. T. U. have been having sixteen fits each all the week over a showbill in which a man is depicted in the act of choking a woman. If the man in question has a grip on a half dozen or more men-women who have been making fools of themselves here in Detroit for the past year, the picture would be better appreciated by a large majority of the people." October 29, 1898. Burch probably desires the repeal of the minor law. Judge from the following: "To Fathers and Mothers: Fathers and mothers of Michigan, has it ever occurred to you that the doors of the saloon are barred against your minor sons and daughters, while they can enter a drug store with seeming propriety, and sip intoxicating drinks issued from a soda fountain? Which of the two institutions is the more likely to start innocent youth on the downward path? Do you think it fair and just to continually persecute the licensed saloon-keeper, who executes a large bond guaranteeing the proper conduct of his place, and wink at the unlicensed whisky-selling drug-gist? Pause and consider." June 4, 1898. For several weeks Burch's paper has carried the following in display type: "Below are the names of the thirty-nine men who not only voted against this particular bill, but used their influence against the liquor interests during the entire session. Don't wait for the election this fall, but be on hand at the caucuses and conventions, and see to it that these thirty-nine men get just what they gave you,—the dump." September 24, 1898. By your vote do you desire to ask the state to bear the expenses and pay the salary of the saloonkeepers' lobbyist? That your vote may be effective, we ask all who may refuse to vote for Burch to concentrate their votes upon Alex W. Blain. For reasons which we consider equally as good, we ask you to vote against Henry Eikhoff, candidate for representative, and for Harry C. Barter.

51 L. R. A.

There was a third, but it is unimportant. The declaration alleged that the effect and meaning of the pink circular was to charge and impute by inference and intent, upon the plaintiff, all of the wrongful, indecent, immoral, wicked, and scandalous acts charged against said Burch. The court excluded the pink circular as not libelous, and directed a verdict for the defendant upon the other counts.

The question before us is whether the case should have been submitted to the jury upon one or both counts. The first charge is, in substance, that the plaintiff, in his official capacity of representative, championed measures opposed to the moral interests of the community. The undisputed testimony shows that as representative he introduced, and, to some extent, at least, approved and supported, measures calculated to change the liquor laws of the state by permitting sales on legal holidays, and election days after the close of the polls, and by repealing the act prohibiting screens in saloons. The court charged the jury that: "The conclusion of the article, and the views as expressed by the defendants in that article, must, of necessity, under the circumstances of the case, be termed a deduction from his record in the case. It is a question upon which men may differ. It probably will be very difficult to determine with any unanimity as to whether such measures were against the moral interests of the community. It is a question of judgment; in other words, based, in my opinion, upon his record in the legislature. Whether it is for the moral interests of the community is an open question. In my judgment, it was such a criticism upon his acts as might legitimately be made by any voter to the voting population of the state or of the county from which he asked to receive the suffrage of the people. If it were true that those acts were against the moral interests of the community, he would have no case here. If they were false, then the question of qualified privilege, as we say in law, would arise. There are certain things which persons may say under certain circumstances which are called privileged in the law,—qualifiedly privileged,—and it depends upon the occasion as to whether an utterance or publication is privileged. I charge you that in this case this was a privileged occasion. If they had the right to criticise the acts of this man, being a man running for public office, and one who asked to receive the trust and confidence of the people to perform the duties of that public office, they had a right to criticise him; and though it was false, it would not be actionable unless it was published with malice or in bad faith. I do not think in this case there is any evidence of malice outside of the publication itself,—any positive proof,—which, in my judgment, would be required to be shown on the part of the plaintiff. Hence, if the publication was false, it was such a publication as would require justification to be shown,—which would be true if

the occasion was not privileged; it being privileged and false, if they acted in good faith, and without malice, the plaintiff would have no right to recover. I don't think there is any evidence of malice, as I said, or ill will, on the part of the defendants in this case; and on the whole case—on the evidence as it has appeared in this case—I charge you to find for the defendants. The verdict is 'Not guilty,' I think. The clerk will take the verdict." The language of the white circular, unexplained, unequivocally charged the plaintiff with having championed legislation opposed to the moral interests of the community. This charge is an attack upon his moral character, and would be likely to bring him into public contempt and disgrace. It is, therefore, libelous *per se*. The defense made was: First, that the statement was true, and, second, that, if it cannot be said to be true, the proved acts were subject to criticism, and defendant had the right to express his opinion as to their effect,—in other words, that the language was privileged. The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinions upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief. The fault here, if there be one, is that opinions and inferences were not stated as such, but as facts. The defendants sought to justify the statement made, *viz.*, that the plaintiff championed measures opposed to the moral interests of the community, by proving that he supported the two measures stated. To the minds of some, that would be sufficient to establish the truth of the charge. Others would think otherwise. It is manifest, therefore, that we cannot say, as a legal proposition, that the undisputed testimony establishes the truth of the broad charge. Evidently the learned circuit judge took this view. It is evident that the acts proved were sufficient to induce in the minds of some the opinion that plaintiff had supported measures opposed to the moral interests of the community. The judge therefore instructed the jury that such persons were privileged to say so, and directed a verdict for defendants. But, admitting that they were privileged to express their opinions concerning certain acts, was this what was done? Did they not go further, and do more? They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed alike to all classes,—those who should look upon the legislation proved as not opposed to the moral interests of the community, as well as those holding contrary views; and it afforded no one an op-

portunity to judge whether the statement was a proper deduction from the facts upon which it was based or not. If one states that a candidate is a thief without qualification, he communicates a fact pertaining to his fitness; but it is a slander, if untrue, whether it was made in good faith or not, although had he stated the exact facts and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the communication might be privileged. The difficulty in this case is that the defendants have been permitted to limit their statement by proof of their intended meaning, while the writing itself contained no hint of limitation. The case of *Ellis v. Whitehead*, 95 Mich. 115, 54 N. W. 757, is in point. It was there said: "The fourth request should not have been given. It makes the slander depend entirely upon the intention of the defendant, and, in effect, says that vituperation is not slander when provoked, though it transcend the bounds of truth and propriety. It is going sufficiently far to say that a person may without liability call another a thief under circumstances which show he does not mean it. To hold that he could do so in the absence of qualifying circumstances, and shelter himself behind a provocation, real or imaginary, adequate or inadequate, would carry the rule much too far. In actions for defamation it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation; but, if he has in fact done so, he must compensate the party. He may have meant one thing and said another. If so, he is answerable for so inadequately expressing his meaning." "Slander, like other wrongs, is actionable, because injurious; and, while intention may have much to do with the question of damages, it is not necessarily involved in the question of guilt." We are of the opinion that the court erred in saying that the words were privileged. Not being privileged, it should have been left to the jury to say whether the evidence showed that plaintiff's support of these measures was opposed to the moral interests of the community as a matter of fact; in other words, to determine the truth of the charge.

It is hardly necessary to cite authorities in support of the doctrine that a candidate for office has a right of action for aspersions upon his character, and cannot be subjected to unwarranted and untruthful charges. In New York no distinction seems to be made between a public man and a private citizen. *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613, 4 Wend. 113, 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116. A leading case will be found in *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212. See also *Curtis v. Mussey*, 6 Gray, 261; *State v. Schmitt*, 49 N. J. L. 579, 9 Atl. 774; *Hunt v. Bennett*, 19 N. Y. 173; *Pierce v. Ellis*, 6 Ir. C. L. Rep. 55; *Simpson v. Doucns*, 16 L. T. N. S. 391; *Duncombe v. Daniell*, 8 Car. & P. 222. In this last case Lord Denman said: "However large the privilege of electors may be, it is

extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 254; *Bronson v. Bruce*, 59 Mich. 469, 60 Am. Rep. 307, 26 N. W. 671; *Wharton v. Beecher*, 66 Mich. 310, 33 N. W. 503; *Belknap v. Ball*, 83 Mich. 587, 11 L. R. A. 72, 47 N. W. 674; *Wolff v. Smith*, 112 Mich. 360, 70 N. W. 1010; *Austin v. Hyndman*, 119 Mich. 615, 78 N. W. 663; *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276; *Field v. Magee*, 122 Mich. 556, 81 N. W. 354.

The court excluded all proof in relation to the "Pink Circular" upon the ground that it was not libelous. After charging that Burch is a self-avowed candidate for the liquor dealers, and desires to go to the legislature to work in the interest of saloons, that he edits a scurrilous newspaper, that he is the champion of saloon lawlessness and vulgar theaters, and quoting at length from his writings, as already shown, the pink circular concludes as follows, *viz.*: "For reasons which we consider equally as good, we ask you to vote against Henry Eikhoff." The count alleges under innuendoes that the meaning of this circular was that the plaintiff was an indecent and immoral man, and equally as unworthy of support as Burch. We are of the opinion that this comparison with Burch cannot mean less than that the plaintiff was a man as unworthy of support as Burch, for reasons not given, except as they may be implied by the charges made against Burch. Some of the charges against Burch were libelous *per se*; *e. g.*, that he is the champion of saloon lawlessness and vulgar theaters. Thus the pink circular itself furnishes implications, throwing light upon the meaning of the words used about plaintiff, and justifying the claim made, *viz.*, that he was represented to be a man of bad morals, and unworthy of support for that reason. We think this also was libelous *per se*, and should have been admitted, leaving the defendants to prove the truth of the charge.

The judgment is reversed, and a new trial ordered.

Montgomery, Ch. J., and Long, J., concur.

Grant, J., dissenting:

I cannot concur in the opinion of my Brother Hooker. The right of citizens to criticise the character, acts, and record of a candidate for public office is involved. The principles of law governing such cases are not in dispute. They have often been stated in the decisions of this court, and the distinctions between justifiable criticism and charges of criminal and degrading conduct pointed out. *Belknap v. Ball*, 83 Mich. 583, 11 L. R. A. 72, 47 N. W. 674; *Dunneback v. Tribune Printing Co.* 108 Mich. 75, 65 N. W. 583; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 51 L. R. A.

8; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191. The other cases will be found cited in the above, and cover the entire field of discussion upon the question now before us.

1. I think the court correctly ruled out the "Pink Circular." This circular makes grave charges against Burch, and urges the electors to vote for his opponent, Mr. Blain. It then says: "For reasons which we consider equally as good, we ask you to vote against Henry Eikhoff, candidate for representative, and for Henry C. Barter." If the circular had read "for reasons which we consider good," it would not be contended that the words would be libelous. Citizens certainly have the right to declare that they have good reasons for opposing a candidate, though they do not state them, without subjecting themselves to an action of libel or slander. It follows that this article is not libelous *per se*, and cannot be made libelous by innuendoes, unless it can naturally be construed into charging plaintiff with the same or similar acts as charged upon Burch. It does not charge plaintiff with the offenses charged upon Burch. They do not imply that plaintiff is guilty of the same or similar offenses. On the contrary, the plain inference is that the reasons are not the same, but, in the opinion of the writers, "equally as good." The language speaks for itself. There is no occasion for an innuendo to explain it. When we read the other circular, we find that those reasons are his championship of certain measures in the legislature of which he was a member. When we read the evidence, we find it conclusively establishes that these measures provided for the removal of certain restrictions in the present liquor law of the state which have been upon the statute for about twenty years.

2. The "White Circular" reads: "Take this to your voting booth, and, whatever your party preferences may be, remember that you should vote against Henry Eikhoff for representative, because in the last legislature he championed measures opposed to the moral interests of the community." This statement refers to the public record of plaintiff as a member of the legislature. It does not charge him with crime, or criminal or scandalous conduct. It means no more than this: that, in the opinion of the writers, measures were introduced into the legislature which were opposed to the moral interests of the community. These measures were designed to accomplish the removal of some restrictions now placed upon the liquor traffic by providing for the repeal of the provisions of the law for the removal of screens and blinds from saloon fronts, and for closing on certain holidays, and during certain hours on election days. It may be true, as the circuit judge said in directing a verdict: "It would probably be very difficult to determine with any unanimity as to whether such measures were against the moral interests of the community." But the defendants certainly had the

right to condemn them as opposed to the moral interests of the community, and to urge electors to vote against candidates who would support them. The evils of the liquor traffic are matters of common knowledge. How it is regarded by the courts will appear in *Kurtz v. People*, 33 Mich. 279, in an opinion written by Justice Campbell, and concurred in by the entire court; and in the case of *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, in an opinion written by Mr. Justice Field, and concurred in by the entire court. In the former opinion the court uses the following language: "The continuance of lounging and drinking into the late hours of the night is equally known as peculiarly dangerous. Men or boys can escape observation more readily by night than by day. When they have once become engaged in the pleasures and temptations of such resorts, it is but too sadly manifest to all who do not shut their eyes to what is going on around them that, after drinking has once begun by those who are in danger of excess (if there are any that are not), it is apt to be kept up much longer than may have been thought of or intended. 'Midnight revels' would never have become a popular phrase unless they had been a well-known reality. Unless the annals of crime are strangely distorted, the amount of mischief due to the indulgence of late drinking is much beyond its proportion in any other part of the day." In the latter the following language is used: "It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sales should be without restrictions; the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist,—that, when the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business, and waste of property, and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the 51 L. R. A.

keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the state is fully competent to regulate the business,—to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." If the eminent men and jurists then composing those courts may thus characterize the liquor traffic, declare that its evils are matters of common knowledge, and recognize the propriety and necessity of sustaining stringent regulations in the conduct of the business, it certainly is not very far from the truth to say that measures designed to open the saloon at night or on holidays, when men are idle, are opposed to the moral interests of the community. There are those whose lives are otherwise above suspicion, who advocate the wide-open saloon, and who even advocate the licensing of houses of prostitution. The prevailing sentiment, however, among respectable people is against them. If to say of a member of the legislature who supports such measures that he is supporting measures opposed to the moral interests of the community is an attack upon his moral character, it is an attack for which the law provides no remedy; otherwise, citizens and newspapers would be prevented from criticising any act of the legislature, or any proposed measure, as injurious to the moral interests of the community. I submit, however, that such criticisms are not attacks upon a man's moral character. The statement that a man supports measures which may generally be conceded to be against the moral interests of the community is not charging him with immorality. But he assumes the risk of all criticism upon his acts, however severe or unjust it may be. One of the defendants (Mr. Service) testified: "My opinion in regard to the opening of the saloons on holidays is that the tendency would be to an increase of drunkenness, and consequent immorality. In regard to the screen law, I think the taking down of the screens keeps out of the saloon very many young men who would be led by shame not to expose themselves publicly." The people of this state, through their legislature, have for twenty years held that it was for the moral interests of the people to restrict the liquor traffic. The law could not be sustained on any other basis. When, therefore, any member of the legislature introduces or cham-

pions a bill for the removal of any of these restrictions, citizens have a right to condemn his conduct as antagonistic to the moral interests of the community, and to urge that as a reason for preventing his election. Such right is unquestioned. This is all there is to the "White Circular." Had defendants specified the measures referred to, it is not claimed that the article would be libelous. If one publishes of a candidate that he is or has been a gambler, may he not allege and show in his defense specific acts of gambling? or that he has been convicted of crime, may he not in defense allege and prove a record of conviction? or that he is immoral, may he not allege and show specific acts of immorality? I find no authority which holds so technical a rule as to require one to state the facts upon which he makes the charge, even in communications not privileged. In *Samuel v. Bond*, Litt. Sel. Cas. 158, the slander was, "Bond is a thief, he has stolen corn;" plea, "The plaintiff is a thief, and this he [defendant] is ready to verify." Held insufficient. He should have specified the acts upon which he based the charge that he was a thief; citing *Craft v. Boite*, 1 Wms. Saund. 243e, note 6; 2 Chitty, Pl. 503. See also *Wright v. Lindsay*, 20 Ala. 428, where the slander consisted in charging plaintiff with stealing whisky. *Vaughan v. Havens*, 8 Johns. 109; *Newell, Libel & Slander*, 2d ed. pp. 651-664; *Smith v. Richardson*, Willes, 20. "If the charge is made in general terms, the particular facts relied upon as constituting the charge must be set forth specifically." 13 Enc. Pl. & Pr. 82, 83; *Sunman v. Brewin*, 52 Ind. 140. The measures and his support of them were matters of public record upon the journals of the legislature. When one becomes a candidate for public office, his previous official record is before the electors for criticism. There was no misrepresentation of any act of the plaintiff. The article necessarily referred readers to his record. It made no charge outside of that. Parties had the right to criticise his public conduct generally or specially. No case is cited holding that it is libelous to say that one supported measures opposed to the moral interests of the community. Would it have been libelous to publish of a member of Congress who supported the fugitive slave law and other proslavery measures that he supported measures in Congress opposed to the interests of humanity and the moral interests of the country? So long as the criticism is based solely upon his official record, the article is privileged. When the facts are truthfully stated or referred to, criticisms thereof and inferences drawn therefrom are not libelous. Parties upon the hustings, in newspapers, or private speech may freely criticise a candidate's official acts, either generally or specially, without subjecting themselves to an action of libel or slander. The occasion was privileged. The publication was also within the rule of 51 L. R. A.

qualified privilege. In these cases the *onus probandi* is upon the plaintiff to show both falsehood and malice. *Edwards v. Chandler*, 14 Mich. 475, 90 Am. Dec. 249; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Briggs v. Garrett*, 111 Pa. St. 404, 414, 56 Am. Rep. 274, 2 Atl. 513; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237. Baron Parke said: "The occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." *Toogood v. Spring*, 1 Crompt., M. & R. 181. Plaintiff admits he supported these measures. There is no distortion or misstatement of facts. How, then, is he libeled? There is no intrinsic evidence of malice upon the face of the publication. There is no extrinsic evidence. On the contrary, the record shows that the defendants acted in the utmost good faith, and without any malice towards the plaintiff. Only one of the defendants had ever met him. They are honest, reputable, and influential citizens of Detroit. Their purpose, namely, the enlightenment of electors as to the character of a candidate for public office, was laudable. It is certainly the right, if not the duty, of good citizens to enlighten, not only themselves, but their neighbors, as to the qualifications of candidates. In doing this, freedom of speech cannot be confined within narrow limits. I find nothing in this record to show that these defendants exceeded the privilege which must be accorded to every citizen of the state, if honest and reputable men are to be elected to office. Briefly stated, the plaintiff's contention is this: If defendants had set forth in their circular these measures which plaintiff had introduced and championed, and had denounced them as against the moral interests of the community, and denounced him for supporting them, there would have been no libel. But in an action of libel based upon the general statement that he had supported such measures, without specifying them, it is no defense to set out in the plea what those measures were, and prove them, and that he supported them, without submitting to the jury the question whether the measures were in fact opposed to the moral interests of the community. So, in one case the opinion of the defendants prevails as to the character of the measures, while in the other the opinion of the jury prevails. I find no authority for such a rule. I think the judgment should be affirmed.

George A. RENAUD *et al.*

v.

STATE COURT OF MEDIATION AND ARBITRATION.

(.....Mich.....)

1. An election of the judges of a court of conciliation, the creation of which is provided for by Const. art. 6, § 23, is not necessary, since the Constitution does not specify the mode of their selection, and the legislature may therefore provide for their appointment.
2. The court of mediation and arbitration for the amicable adjustment of differences between employers and employees, which is created by Comp. Laws, §§ 559-568, is not outside the grant by Const. art. 6, § 23, of the power to create courts of conciliation, on the ground that it is lacking in the essential powers to compel attendance of the parties and to enforce its decisions.
3. The power to grant a rehearing is not possessed by the state court of mediation and arbitration established by Comp. Laws, §§ 559-568, since the statute contains no grant of such power.
4. Mandamus will issue, under the power of superintending control conferred upon the supreme court by Comp. Laws, § 191, to vacate a void order by the state court of mediation and arbitration granting a rehearing in a cause decided by it.
5. Prohibition to stay further proceedings under a void order for rehearing by a court of mediation and arbitration may be granted by the supreme court of Michigan under its power of superintending control.

(September 18, 1900.)

APPPLICATION for a writ of mandamus to compel the vacation of an order by the state court of mediation and arbitration granting a rehearing in a proceeding which had been determined by it. *Granted.*

The facts are stated in the opinion.

Messrs. Pound & Monaghan, for relators:

The parties voluntarily entered into a written submission to arbitrate certain matters: Being unable to agree on prices of the following work we hereby jointly request an arbitration of the same by your honorable board, agreeing to abide by your decision, prices to remain in force until May 1st, 1900. This contains the essentials of a common-law agreement to arbitrate.

Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186; *Alpena Lumber Co. v. Fletcher*, 48 Mich. 555, 12 N. W. 849; *Fitch v. Constantine Hydraulic Co.* 44 Mich. 74, 6 N. W. 91; *Davis v. Berger*, 54 Mich. 652, 20 N. W. 629; *Clement v. Comstock*, 2 Mich. 359; *Galloway v. Gibson*, 51 Mich. 135, 16 N. W. 310; *Cady v. Walker*, 62 Mich. 157, 28 N.

W. 805; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106; *Backus v. Coyne*, 35 Mich. 5; *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055; *Weggner v. Greenstine*, 114 Mich. 310, 72 N. W. 170; *Phelps v. Wayne Circuit Judge*, 117 Mich. 35, 75 N. W. 94.

This arbitration is binding and enforceable in the courts of law of this state.

Galloway v. Gibson, 51 Mich. 135, 16 N. W. 310; *Gibson v. Burrows*, 41 Mich. 713, 3 N. W. 200.

A writ of prohibition is a matter of right, and a writ of mandamus on a question of jurisdiction is either a matter of right, or it is a subject of such a legal discretion that it is never refused where the facts are as they are in this case, entirely clear, and the grievance is substantial.

Naught should be awarded to the commission as a power unless this court can put its finger upon the law and be able to say: Thus it is written.

Messrs. Bowen, Douglas, & Whiting for respondent.

Moore, J., delivered the opinion of the court:

Pingree & Smith are engaged in the business of manufacturing boots and shoes in the city of Detroit, and have a good many men and women in their employ. Prior to December 16, 1899, differences arose between the employers and employed over the scale of wages. December 16, 1899, an agreement was signed by Pingree & Smith, on the one side, and Timothy O'Connor and Earnest A. Allen, on the other side, representing the employed, reading in its material part as follows: "Being unable to agree on prices of the following work, we hereby jointly request an arbitration of the same by your honorable board, agreeing to abide by your decision. Prices to remain in force until May 1st, 1900." A hearing was had before the court. The taking of testimony was completed March 9, 1900, and the case was argued by the counsel for the respective parties. On March 31st the court made a decision in writing, and filed the same in the office of the county clerk of Wayne county April 19, 1900. Pingree & Smith were dissatisfied with the decision of the court, and on April 6th moved for a rehearing of the case. June 23, 1900, the court granted a motion for a rehearing. The relators ask for a writ of prohibition or a writ of mandamus, or other appropriate writ, to prevent the respondent from rehearing the controversy. It is the claim of the relators that when the court rendered its decision it exhausted its powers, and had no authority to grant a rehearing. Three questions are involved in this proceeding: First, the existence of the court of mediation and arbitration; second, its power to grant a rehearing after it has once decided a controversy submitted to it; third, Have the relators sought a proper remedy?

The existence of the court is attacked by the attorneys who argue the case and sub-

NOTE.—In a large number of states there are now provisions of some sort for boards or tribunals of some kind for determining labor disputes, but the above decision as to the character of a court for this purpose is well-nigh a matter of first impression, though a somewhat similar case from Louisiana is referred to in the opinion.

mit briefs in the interest of Pingree & Smith upon constitutional grounds. We cannot state their position more clearly than by quoting from brief of counsel: "The act under which this court of mediation and arbitration was organized is unconstitutional. By § 1 of article 6 of the Constitution, the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities. By § 23 of article 6, the legislature may establish courts of conciliation, with such powers and duties as shall be prescribed by law. The general scheme of the Constitution, as far as it relates to judicial officers, is for their election, and not for their appointment, as shown by article 12, which provides for impeachments and removals from office. Section 4 of that article provides that no judicial officer shall exercise his office, after an impeachment is directed, until he is acquitted; and § 5 of that article provides that the governor may make a provisional appointment to fill a vacancy occasioned by the suspension of an officer, until he shall be acquitted, or until after the election and qualification of his successor. *Chandler v. Nash*, 5 Mich. 409. Section 23, art. 6, of the Constitution provides for the establishment of courts of conciliation; and by 'courts,' here, as well as elsewhere in the Constitution, is meant a permanent organization for the administration of justice, and not a special tribunal provided for by law, that is occasionally called into existence by particular exigencies, and that ceases to exist with such exigency. *Streeter v. Paton*, 7 Mich. 341; *Shurbun v. Hooper*, 40 Mich. 503; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611. If the administration of justice embraces the enforcement of the orders or decrees of courts, the court of mediation and arbitration, being deficient in authority given by the legislature to do this, is not such a court as is meant by § 23 of article 6; for, by the act of its creation, it can do nothing but render a decision on subjects submitted to it in a particular way, and file its decision with the county clerk. The Constitution provides for the formation of a court of conciliation, while the act provides for the establishment of courts of mediation and arbitration, which are not courts of conciliation. Under the act there is no authority given to the judges or members of the court to compel the appearance of either party, nor is there any method of composing the differences or questions in dispute by turning over the parties to a court with authority to enforce its decrees. From the terms of the act, it is clear that whoever drafted it had in mind the definition given above of 'arbitration,' which, as that definition says, usually implies a tribunal without power to compel attendance."

It is true that as to the members of the supreme court, the circuit judges, judges of probate, and justices of the peace, the Constitution provides that they shall be elect-

ed; but we think it is not open to question that, if the Constitution did not require these judicial officers to be elected, but authorized the legislature to establish these courts and prescribe their powers and duties, it would be entirely competent for the legislature to do so. This is just what is done by § 23, art. 6, of the Constitution. The act does not fail because the legislature, in creating the court, did not provide its members should be elected. We are, then, confronted with the question, Is the court of mediation and arbitration a court of conciliation? When the constitutional convention met which framed our present Constitution, in 1850, courts of conciliation had been in practical operation in Norway for more than fifty years. They had accomplished most excellent results in the way of harmonizing differences between parties who were otherwise likely to resort to litigation. The purpose of these courts was to create an inexpensive and speedy tribunal, before whom parties between whom differences had arisen in civil cases must go before resorting to the courts of law for relief. The parties were required to appear personally and without counsel, and state their differences, and present such proofs as they could in support of their respective claims. It was the duty of the court to advise with the parties, and, if possible, to bring about an amicable settlement of their differences, and have them depart as friends, and not enemies. If an amicable settlement was agreed upon, a judgment was entered which would have the same effect as a judgment in any court. As these courts were first constituted, if the parties did not agree upon an amicable settlement they were left to their remedy in the courts of law; but, as we shall see later, further powers were afterwards conferred upon them.

Interesting descriptions of courts of conciliation are to be found in 68 *Atlantic Monthly*, 402, and 72 *Atlantic Monthly*, 671. Courts of a like character had also been in operation with most satisfactory results in France and Sweden, and possibly in some other countries of Europe. It is possible that, because of the results attained by these inexpensive and speedy tribunals, the framers of the Constitution were led to incorporate in it § 23, art. 6, which reads: "The legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law." This language is simple and clear, and would seem to give the legislature abundant authority to create courts of conciliation, and to clothe them with as little or as great power as to the legislature seemed proper. At an address made at Michigan's semicentennial celebration, Justice Campbell called attention to this constitutional provision. He had no doubt of the authority of the legislature to create these courts, and expressed regret that the legislature had not brought them into existence. In 1889 an act was passed by the legislature entitled "An Act to Provide for the Amicable Adjustment of Griev-

ances and Disputes that may Arise between Employers and Employees and to Authorize the Creation of a State Court of Mediation and Arbitration." The act is a brief one, containing but nine sections, and is very general in its provisions. Comp. Laws, §§ 559-568. It is in marked contrast with the edicts or statutes calling these courts into existence in some of the countries of the old world. The Norwegian law of 1824 relating to courts of conciliation is a carefully drawn statute, of eighty-seven sections. It has been amended at various times. In 1869 the functions of this tribunal were considerably enlarged. These courts were primarily instituted for the purpose of being peacemakers in civil causes, and had no authority to enter judgment, except by the consent of the parties. As a rule, resort must be had to them in civil cases before the aid of the law courts can be invoked. By the later amendments, in case the parties do not agree to an amicable settlement after listening to the advice of the court, the court is authorized, by the consent of the parties, to arbitrate the differences between them, and, in cases involving small amounts, may adjudicate the controversy at the request of either party. In the decision of this case we are not aided by precedents. The Constitution of the state of Louisiana makes it the duty of the general assembly "to pass such laws as may be proper and necessary to decide differences by arbitration." Const. art. 165. A law was passed calling into existence a board of arbitration, conferring upon it powers of a very similar character to those with which the court of mediation and arbitration is clothed. The action of this board was invoked in a matter of difference arising between the employees of a railroad company and their employer. The railroad company sought to have the board of arbitration enjoined from proceeding with the hearing. This the court refused to do. In disposing of the case, it used the following language: "It is in place here to state that the board is not vested with judicial functions. It sits as a court of conciliation, with the authority to formulate a decision and to have it recorded." *New Orleans City & L. R. Co. v. State Bd. of Arbitration*, 47 La. Ann. 879, 17 So. 418. It is to be regretted that the law passed by the legislature is not a more perfect one, but we think it very clear that the power conferred upon the respondent, if exercised, is calculated to bring about conciliations between those employers and employed between whom differences have arisen, and that the law was enacted, as suggested by its title, to provide for the amicable adjustment of grievances and disputes that may arise between employers and employed. The act does not apply to all classes of cases, and the aid of this tribunal is not a prerequisite before bringing an action in a court of law, as is required in Norway and in some other countries, but the provisions of the act are intended to

bring about amicable adjustments of differences. We are not concerned with the extent of the power conferred by the legislature upon this court, nor with the effect of its decisions. Those are questions we reserve until they are properly before us. The act does not undertake to confer power or impose duties in relation to all classes of civil cases, but such power as it does confer is within the constitutional right of the legislature.

We now come to the second question: Has the court a right to grant a rehearing after it has once rendered its decision? From what has already been said, it is apparent that the purpose to be served by the establishment of this court is to have a speedy and inexpensive disposition of the differences submitted to it. It was not the purpose of the legislature to create what we ordinarily understand by a court of law. The Constitution provides that these courts shall have such powers and duties as shall be prescribed by law. The law which called this court into existence is the limit of its power. The act nowhere authorizes the court to grant a rehearing. When its decision has been rendered and filed, it has exhausted its power in a given case. Some question is raised by counsel as to the effect of the decision rendered by the court, and the method of its enforcement; but we do not regard that question as properly before us in this proceeding, and do not pass upon it.

We now come to the final question: Have the relators sought a proper remedy? We have already stated that the court had no authority to act further in the proceeding. The statute does not provide for an appeal from the action of the court of mediation and arbitration. It has been repeatedly held that, unless the statute expressly or by plain implication provides for an appeal, none can be taken. See *Sullivan v. Haug*, 82 Mich., at page 555, 10 L. R. A. 265, 46 N. W. 797, and the many cases there cited. Section 191, Comp. Laws, provides when the supreme court shall have general superintending control over all inferior courts, and for the issuance of various writs,—among them, writs of prohibition and writs of mandamus. Section 9977, Comp. Laws, provides when writs of prohibition shall issue. This section of the statute was construed in *Maclean v. Speed*, 52 Mich. 257, 18 N. W. 396. In that case a mandamus was ordered to vacate a restraining order improperly made, and a writ of prohibition was ordered to stay further proceedings in a case where the court attempted to exercise jurisdiction improperly. See also 2 Green, Pr. p. 827, and the cases there cited.

The writ of mandamus will be granted, to vacate the order granting a rehearing; and the writ of prohibition, staying any further proceedings in the cause by the respondent.

The other Justices concur.

PEOPLE of the State of Michigan
v.

Arthur F. MARSH, Impleaded, etc., *Plff. in Err.*

(.....Mich.....)

1. A pardon granted after conviction and pending a hearing in the supreme court, to which the case was removed by the defendant by bill of exceptions before sentence, is valid under Const. art. 5, § 11, providing that the governor may grant pardons after conviction, since the defendant admits his guilt, and waives the bill of exceptions by his petition for, and acceptance of, the pardon, and asking to have the record remanded to the trial court on the strength thereof.
2. Failure to make application for a pardon in the first instance to the Michigan board of pardons does not make a pardon granted by the governor void.
3. The condition attached to the granting of a pardon, that the convicted person shall pay to the county a specified sum for its reimbursement for the expense incurred for the prosecution, is not unlawful so as to render the pardon invalid.

(December 19, 1900.)

APPPLICATION by plaintiff in error for a return to the Trial Court of a case in which he had been convicted of aiding the quartermaster general in the crime of fraud and embezzlement in office, and an order restraining the Trial Court from entering sentence on the conviction and requiring a discharge of the sureties in view of a pardon which had been obtained since the case was removed to the Supreme Court. *Granted.*

The facts are stated in the opinion.

Messrs. John J. Speed and F. A. Baker for plaintiff in error, in support of the motion.

Messrs. Arthur J. Tuttle, Horace M. Oren, and Edward Cahill, for defendant in error:

There is one sense in which the word "conviction," when used to designate a particular stage of criminal prosecution, is the confession of the accused in open court or the verdict of guilty returned against him by the jury. It was in this sense that the word was used by Mr. Justice Gray in *Conn. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699.

People v. Adams, 95 Mich. 543, 55 N. W. 461.

But in *Olifford v. Heller*, 63 N. J. L. 105, 42 Atl. 155, it is held that conviction under a similar constitutional provision must include sentence.

It is equally true that the word "conviction" is used in criminal cases in the sense of final judgment, or sentence after verdict.

NOTE.—For legislative power to grant pardons before conviction, see *note* to *Singleton v. State* (Fla.) 34 L. R. A. on page 252.

For an earlier case in this series on the right of a governor to grant a pardon during pendency of proceedings, see *Territory v. Richardson* (Okla.) 49 L. R. A. 440.
51 L. R. A.

It is used in this sense in the United States court and in some states in case of pleas of former conviction.

2 Wharton, Crim. Law, § 435; *United States v. Herbert*, 5 Cranch, C. C. 87, Fed. Cas. No. 15,354; *Com. v. Fraher*, 126 Mass. 265.

It is used in that sense in treating of prosecutions of persons for second offenses.

2 Wharton, Crim. Law, § 935.

It is used in the same sense in speaking of the disqualification or discrediting of a witness on account of conviction of crime.

1 Greenl. Ev. 375.

In order to give full effect to all the language, it must be given such an interpretation as will give the words effect when used in connection with the words "reprieves and commutations" as well as "pardons." If this be done the word "conviction" must be held to mean something more than a verdict of guilty or a plea of guilty, because, if it means only that, then the words "reprieves" and "commutations" could have no meaning, it being impossible to either reprieve or commute until after sentence.

If a person be pardoned upon condition which he neglects to perform, the pardon is void, and he may be remanded to suffer his original sentence, or, in case the pardon is granted before sentence, it must follow that he may be remanded to the custody of the court to receive sentence.

State ex rel. O'Connor v. Wolfer, 53 Minn. 135, 19 L. R. A. 783, 54 N. W. 1005.

Instead, therefore, of remanding the record to the circuit court with instructions directing any judgment or sentence upon the conviction of said respondent, the record, if remanded, should be with instructions to the circuit court to see to it that the conditions prescribed in the pardon are performed, and that in default of such performance the respondent be brought before the court for sentence.

Moore, J., delivered the opinion of the court:

April 5, 1900, the respondent was convicted in the circuit court for the county of Ingham of the crime of being an accessory and of aiding and abetting William L. White, quartermaster general of this state, in the crime of fraud and embezzlement in said office. Before sentence, but after conviction in the circuit court, the respondent brought his case into this court by a bill of exceptions. While the case was still pending in this court, the governor issued a pardon to the respondent, the material part of which, so far as this discussion is concerned, reads as follows: "Now, therefore, know ye that I, Hazen S. Pingree, governor as aforesaid, by virtue of the power and authority in me vested, do hereby pardon the said Arthur F. Marsh of and from the offense whereof he was convicted as aforesaid. On condition, however, that said Arthur F. Marsh pay into the treasury of Ingham county, in the state of Michigan, for the purpose of reimbursing the said county of Ingham for the expense incurred in his

prosecution, the sum of one thousand dollars on the first day of January, A. D. 1901; one thousand dollars on the first day of January, A. D. 1902; one thousand dollars on the first day of January, A. D. 1903; one thousand dollars on the first day of January, A. D. 1904, and one thousand dollars on the first day of January, A. D. 1905,—a total sum of five thousand dollars. And provided, further, that, should said county of Ingham for any reason decline to receive said sums of money to be so paid, the same shall be paid into the state treasury of the state of Michigan. This pardon is to take immediate effect." After this pardon was issued, the respondent called the attention of the court to its issuance, and filed a certified copy of it with the court. He asks the court for an order remitting the record to the circuit court for the county of Ingham, with directions to that court to refrain from entering any judgment or sentence upon the conviction, and to discharge the respondent and his sureties upon any recognizance he may have given. The people, through the attorney general and the prosecuting attorney for Ingham county, oppose this action for the following reasons: (1) The said pardon is void for the reason that it does not indicate and set forth that the application therefor was referred to, investigated or passed upon or a recommendation made thereon by, the advisory board in the matter of pardons. (2) Said pardon is void for the reason that, under the Constitution and laws of this state, the governor of the state has no authority to grant a conditional pardon prior to the pronouncement of sentence, where the condition imposed is not a condition precedent to the taking effect of the pardon. (3) Said pardon is void because the conditions embodied therein are not enforceable.

Section 11, art. 5, of the Constitution of the state provides the governor "may grant reprieves, commutations, and pardons after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law, relative to the manner of applying for pardons." The important question in this case is, Has there been a conviction of the respondent, within the meaning of the Constitution, so that executive clemency may be invoked? It is urged that, before the governor can exercise the pardoning power, there must be a sentence of court as well as a conviction. A like question was involved in the case of *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699. In that case the respondent was indicted for cheating by false pretenses. He was tried and convicted. He removed his case to the superior court by entering therein a bill of exceptions. While the case was still pending, he was pardoned by the governor. He then came to the superior court, and pleaded his pardon, and asked to be discharged. The attorney for the commonwealth contended, as is contended here, that the governor cannot pardon until conviction 51 L. R. A.

is established by the judgment of the court upon the verdict of guilty. The opinion in the case is written by Justice Gray. It is a very learned and exhaustive discussion of the question involved. A reference to that opinion will answer the purpose of this discussion better than an attempt to restate the law. He cites many instances where the pardoning power has been invoked after conviction, and while the case was pending in the court of review. In the course of the discussion he uses this language: "It was argued for the commonwealth that the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that after pleading the pardon he might still prosecute his exceptions, and, if they should be sustained, have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional). If he does not plead the pardon at the first opportunity, he waives all benefit of the pardon; if he does so plead it, he waives all other grounds of defense. *Staunford*, P. C. 150; *J. Kelyng*, 25; 4 Bl. Com. 402; *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640. The pleading of the pardon in the superior court would therefore be *inso facto* a waiver of his exceptions. A still more conclusive answer to this objection is that at the time of the adoption of the Constitution, and for many years afterwards, no bill of exceptions was permitted by law. It was first given to the rulings of a justice of this court by Stat. 1804, chap. 105, § 5, and to the rulings of the court of common pleas by Stat. 1820, chap. 79, § 5. The providing by the legislature of a new form of presenting questions of law to the court does not make the verdict of a jury, so long as it stands, less than a 'conviction,' and cannot abridge the prerogative of the executive under the Constitution. *Ex parte Garland*, 4 Wall. 333, 380, 18 L. ed. 366, 371." The case of *Manlove v. State*, 153 Ind. 80, 53 N. E. 385, is in point upon this feature of the case, as well as upon another, which will appear later. Manlove was convicted of seduction, and sentenced to a reformatory. He appealed the case to the supreme court. The attorney general moved to dismiss the appeal because the respondent had married the complaining witness, and had accepted the pardon of the governor. The respondent opposed this motion, and insisted he was entitled to the opinion of the court of review, because that part of the judgment of the court below which assessed a fine and costs against him remained in force. The court held that the fine and costs were part of the judgment which was based upon a verdict of guilty. The court then adds: "The assignments of error challenge the correctness of the judgment as an entirety. On a new trial appellant might interpose his pardon and his marriage. *State v. Otis*, 135 Ind. 207, 21 L. R. A. 733, 34 N. E. 954. It would be beyond the power of the state to

force him to meet the information on its merits. The substantial element of the controversy has been eliminated. . . . The question of appellant's liability to fine and costs cannot be reached except by overturning the judgment as a whole. He may not so attack the judgment, because, by asking and accepting executive clemency, he said, in effect, that he was rightly convicted. He may not admit guilt to escape imprisonment, and at the same time protest innocence to avoid payment of fine and costs."

Applying the principles of law stated in these cases to the case before us, what is the result? When Mr. Marsh petitioned the governor for a pardon, and it was issued to him, and he brought it into this court, he, in effect, said he was guilty of the offense charged, that the conviction of the court below ought to stand, and that he waived the bill of exceptions filed by him in this court. This situation practically disposes of the case in this court.

The counsel, however, have raised the question of the validity of the pardon, they have argued it fully upon both sides, and desire us to pass upon it. If not decided now, as the question may arise later we will express our views therein without attempting to enter upon an elaborate discussion. We do not deem it necessary to decide whether the legislature possesses the power to require all petitions for pardon to be presented and acted upon by the advisory board

of pardons before the governor can exercise executive clemency. It is sufficient for the purposes of this case that no such requirement is made by the statute. See *Re Pardoning Power*, 85 Me. 547, 27 Atl. 463. The constitution provides the governor may grant pardons upon such conditions, and with such restrictions and limitations, as he may think proper, etc. It is possible to conceive of a condition that might void the pardon because it was unlawful, but it is not unlawful to make it one of the conditions of the pardon that the convicted person shall pay to the commonwealth a sum that will in part, at least, reimburse it for the expenses incurred in bringing about his conviction. When the convicted person accepts the pardon, he accepts it subject to its conditions and limitations. *Flavell's Case*, 8 Watts & S. 197; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Re Wells*, 18 How. 307, 15 L. ed. 421; *Ex parte Marks*, 64 Cal. 29, 28 Pac. 109; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385. See *People v. Moore*, 62 Mich. 503, 29 N. W. 80, and cases there cited. We have no doubt the pardon is valid, and has become operative, subject to be defeated by a breach of the conditions contained therein.

The appeal is dismissed, and the cause is remanded to the circuit court for the county of Ingham.

The other Justices concur.

GEORGIA SUPREME COURT.

J. D. PAGE, *Plff. in Err.*,
v.

CITIZENS' BANKING COMPANY *et al.*

(111 Ga. 73.)

*1. A partnership is liable as such in an action for malicious prosecution, when the same was instituted in furtherance of the partnership's interests, and by direct authority of its members.

*Headnotes by CONN, J.

NOTE.—*Liability of partnership for torts.*

I. *Introductory.*

II. *Torts of partnership as an entity.*

III. *Torts of individual member.*

a. *Wilful and malicious torts.*

1. *When other members liable.*

2. *When other members not liable.*

b. *Trespass and trover.*

1. *Trespass.*

2. *Trover.*

c. *Negligence.*

1. *When other members liable.*

2. *When other members not liable.*

d. *Fraud.*

1. *General.*

2. *In purchase of property.*

3. *In sale of property.*

4. *As to trust funds.*

(a) *When other members liable.*

(b) *When other members not liable.*

5. *For individual debt or benefit.*

6. *Estoppel.*

2. A partnership, the individual members thereof, and a person not a member may be joined as defendants in an action for a malicious prosecution, if it was instituted as the result of a confederation and conspiracy among them to begin and carry it on.

3. The petition in such an action may appropriately set forth facts showing that the institution of the prosecution was in furtherance of the partnership's interests, and setting forth the transactions out of which the prosecution arose.

III.—continued.

e. *Approval of other members—firm accepting benefit.*

f. *Other torts.*

1. *When other members liable.*

2. *When other members not liable.*

IV. *Engaging in unlawful business.*

V. *Liability, joint and several.*

VI. *Conclusion.*

I. *Introductory.*

The principal case, *PAGE v. CITIZENS' BANKING CO.*, contains two propositions which, if not now, would until recently, have been considered novel: (1) That an action can be commenced and maintained against a partnership by a common or firm name; and (2) that actual or express malice, such as is essential to sustain a cause of action for malicious prosecution, may be imputed to a partnership as an entity.

In Alabama (Civil Code, § 40), California (Code Civ. Pro. § 388), Georgia (Code, §§ 2637, 5009), Idaho (Rev. Stat. § 4112), Iowa (Code, chap. 3, § 3468), Minnesota (Stat. 1894, chap.

4. It is "carrying on" a prosecution to cause a warrant to be issued, having the defendant therein arrested and his goods seized, having him brought before a committing magistrate, procuring continuance of the preliminary hearing, and requiring him to give bond for his appearance before the committing magistrate, notwithstanding the prosecution was finally abandoned in the committing court.
5. Abandoning the prosecution before the committing magistrate, and procuring him to grant an order dismissing the warrant and discharging the accused, on the ground that the prosecutor had no evidence whatever to offer against him, amounts to a termination of the prosecution, when no further action thereon is taken.
6. A partnership may be sued as such in an action for a malicious arrest, when the process under which the arrest was made was sued out in the interest of the

partnership, and under the direction of the persons composing the same.

7. An imprisonment resulting from an arrest under a valid warrant will not give a right of action for false imprisonment.
8. In dealing with demurrers or other objections to pleadings, the judge should first dispose of demurrers to petitions; and where, as a result, a petition is dismissed, it is not proper practice at the same term of the court to deal with demurrers to an answer to such petition.
9. The counts in the petition for malicious prosecution and malicious arrest set forth causes of action, and were not subject to the demurrers filed thereto. The count for false imprisonment did not set forth a cause of action. Direction is given that the case be reinstated as to the two counts first mentioned.

(June 6, 1900.)

66, § 5177), Mississippi (Anno. Code, § 675), Montana (Code 3, § 390), Nebraska (Comp. Stat. 5614), Nevada (Gen. Stat. § 3619), Ohio (Bates's Anno. Stat. § 5011), Utah (Rev. Stat. chap. 6, § 2927), and Wyoming (Rev. Stat. chap. 3, § 3485), it is provided by statute that partners, or a partnership or firm, may be sued by their or its common name.

In Louisiana there are two kinds of partnerships, *viz.*, commercial partnerships and ordinary partnerships. A citation to commence an action against a commercial partnership is addressed to the firm, and served on one of the partners, or at the store or counting-house of the firm on a clerk or agent. La. Code Pr. 1894, § 198. *Montague v. Well*, 30 La. Ann. 50.

The citation to commence an action against an ordinary partnership must be addressed to the individual members, and each partner must be cited. *Le Blanc v. Marsoudet*, 25 La. Ann. 464.

In Wisconsin (Stat. 1898, chap. 118, § 2612), where the names of the several members of the partnership are unknown to the plaintiff, all proceedings may be in the partnership name until the names of the several partners are ascertained, when the process, pleadings, etc., shall be amended by an order directing the insertion of such names.

In Connecticut it is provided that in mesne process by or against a copartnership it shall not be necessary to insert the names of the partners, provided the partnership name is stated; and the plaintiff shall have the right, within the first three days of the court to which the process is returnable, to amend it, without costs, by inserting the names of the partners; and writs returnable before a justice of the peace may be amended in the same manner, at any time before the pleadings are closed. But no attachment in any civil action against a copartnership, of the private estate of any of its members, shall be valid, unless his name shall be set forth in the process, at the time of the attachment. Conn. Stat. chap. 69, § 895.

The fact that it was found necessary to provide by statute for the maintenance of an action against partners by the common name under which they transact business would indicate that without such provision such an action would not lie.

In *Arbuckle v. Taylor*, 3 Dow, 160, the action was for malicious prosecution and wrongful imprisonment at common law, and under Stat. 1701, chap. 6, against the partnership as such and as individuals, with others; the summons stating Hugh Arbuckle, pursuer, insists in an action of wrongous imprisonment, damages, etc. 51 L. R. A.

against Messrs. John Taylor and Sons merchants, in Queen's-ferry; and John Taylor, Patrick Taylor, and William Taylor, all merchants there, the individual partners of one firm. It was held that neither the company nor the individual partners, other than the one who procured the issuing of the warrant for the arrest of the plaintiff, could be dealt with as prosecutors merely because the property charged to have been stolen belonged to the firm. No objection appears to have been made by the defendant firm, that the action could not be maintained against it as such. Nor does there appear to have been any suggestion from the court on that subject; unless it is to be found in the following language of Lord Eldon, who delivered the opinion in the House of Lords: The court (below) gave Arbuckle an opportunity of making out this sort of case; that this was a proceeding on the part of the partnership; that William Taylor acted under their direction; that all the expense and trouble the pursuer was at was in consequence of the conduct of the partnership; and that it was in truth their prosecution,—that is, a prosecution of the company. It appears to me at least, upon looking into the evidence, that there is no possibility of maintaining these facts, and the consequence is that William Taylor must be looked upon as the only prosecutor. The interlocutor, therefore, in as far as it assuaged all the other persons of the name of Taylor, appears to me to be clearly indisputable.

In a recent case (*Fox v. Blue-Grass Grocery Co.* (Ky.) 60 S. W. 414, 61 S. W. 265) it was decided that an action could not be maintained against an unincorporated partnership.

If all the partners join in one trespass or tort they may all be sued for the injury, not because they are partners, but because the right of action arises from their personal misconduct. In general, says Collyer, Partn. § 457, acts or omissions in the course of the partnership, trade, or business, in violation of law, will only implicate those who are guilty of them. And in Parsons, Partn. § 140, the rule is succinctly stated in this way: If the firm is merely the occasion for a partner's tort, but not the agency in its commission, the copartners are not liable.

For criminal and penal liability of copartner, see note to *Williams v. Hendricks* (Ala.) 41 L. R. A. 650.

From the decisions, both in England and the United States, as well as from the statements of the elementary writers, it would seem that the liability of a partnership for a wilful or malicious tort is akin to that of a corporation; authorities as to the liability or nonliability

ERROR to the Superior Court for Dodge County to review a judgment in favor of defendants in an action brought to recover damages for malicious arrest and prosecution. *Reversed.*

The facts are stated in the opinion.

Messrs. De Lacy & Bishop for plaintiff in error.

Messrs. Roberts & Milner and *W. M. Clements* for defendants in error.

Cobb, J., delivered the opinion of the court:

Page brought suit against Ashburn, Peacock, Edwards, Lietch, Williams, Rogers, and the Citizens' Banking Company of Eastman, which was alleged to be a partnership composed of the five persons first above named. The petition contained three counts,—one for malicious prosecution, one for ma-

licious arrest, and one for false imprisonment. The facts alleged in each of the counts were, in substance, as follows: Rogers was the sheriff of the county, and as such had levied a mortgage execution in favor of the Citizens' Banking Company, against petitioner, upon a certain stock of goods which was in the possession of the sheriff under the levy at the former place of business of petitioner. Lietch and Rogers united in making an affidavit that "thirty-one suits of men's clothing have recently been taken from the storehouse lately occupied by J. D. Page, and held in the custody of J. C. Rogers, sheriff of Dodge county, Georgia, under levy of a mortgage, *fi. fa.*, and now occupied by W. H. Clements, and the same has been taken by criminal means and carried away, and that they believe, and have probable cause to be-

of one being frequently cited and indorsed or disapproved as to that of the other. Because of this it has been deemed expedient to incorporate in this note some of the cases treating of the liability of a corporation aggregate, for a tort of this nature.

It is also intended to include, in addition to the cases showing when and under what circumstances a partnership is liable, as such, for a wrong, those treating of the liability of the firm, and the other partners, for the tortious acts of the individual members of it.

II. *Torts of partnership as an entity.*

In an action brought to recover damages for the destruction of personal property belonging to the plaintiff by fire alleged to have been kindled by the defendants in their own woods, and by them negligently permitted to spread to the lands of the plaintiff, the summons was issued against, and served on, the three defendants, who were described as trading "as M. D. McCrummen & Co." The complaint contained no allegation of the partnership. The issues were: (1) Did the defendants set fire to certain woods, as alleged in the complaint? (2) Did the defendants negligently permit said fire to spread to, and burn, the property of the plaintiff, as alleged in the complaint? The defendants, after the evidence was in, requested the court to instruct the jury that, the defendants having been sued as a partnership, the jury cannot return a verdict against the individual members of the firm, or either of them, and the instruction was given. In connection with that instruction the defendants made exception to another instruction of the court, which was in these words: If you find from the evidence that Duncan McCrummen set out the fire, which the defendants afterwards negligently permitted to spread to the property of the plaintiff and burn it, and at the time of setting out the fire the defendants M. D. McCrummen and Malcolm McCrummen knew that the fire was being set out, and caused or procured it to be set out, they should answer the first and second issues in favor of the plaintiff, although you should further find from the evidence that they did not set out the fire while acting within the scope of the partnership business. The supreme court held that whether the first instruction was correct or not, it was not before it for determination, for it was given at the defendants' request, and the plaintiff filed no exception. The court held, further, that there was no inconsistency between the instructions. That the one was that, because the partnership had been sued, no judgment could be had

against the individual members. The other was that, if one of the partners did the negligent act, and the other two knew that the fire was being set out, and caused or procured it to be set out, the first and second issues should be answered affirmatively, although the fire was not set out as an act within the scope of the partnership business. The court used this language: "That was a correct charge." But the court held, further, that because the trial court refused to instruct the jury "that there is no sufficient evidence that the plaintiff's property was destroyed by any act or negligence of the defendants, or either of them, while acting within the scope of the partnership business," the judgment must be reversed, as, after a careful examination by the court, they were unable to find a line of the evidence going to show that the land on which the fire originated was used in any way whatever for partnership purposes, or was in the least connected with the business of the firm, which was simply one for the sale of general merchandise. *Barrett v. McCrummen* (N. C.) 38 S. E. 286.

The question naturally arises, What would have been the judgment of the supreme court if the trial judge, at the close of the second instruction, which the supreme court pronounced a correct charge, had added the instruction, for refusing which, the reversal was ordered, namely, that there was no evidence that the defendants were acting within the scope of the partnership business. It would have been perfectly consistent to so charge, after the instruction that if one partner set out the fire, and the remaining partners caused or procured it to be set out, they should find for the plaintiff, although the fire was not set out as an act within the scope of the partnership business: as it is not easy to perceive how, if such a charge had been made, the verdict or judgment could have been different.

An action for a libel may be maintained against a partnership where the wrong was done by all the partners, or by one in the prosecution of the partnership business. Under the provisions of Ala. Code, § 2904, such an action may be prosecuted against a partnership by its firm name, without mentioning the name of individual partners. In holding that an action for libel would lie against the partnership as such, the court said: "In *Jordan v. Alabama G. S. R. Co.* 75 Ala. 85, 49 Am. Rep. 800, we held that a corporation might be simply liable for damages for a malicious prosecution, which is analogous in principle to an action for libel, fraud, or other like tort." The court said, further: "An action against a partnership by an

lieve, that the said property is now concealed in the dwelling and premises occupied by J. D. Page, located on College street, in the town of Eastman." On this affidavit a warrant was issued, directing that the house and premises of Page be searched, and, if the property described in the affidavit be found therein, he be arrested, and, together with the property so found, brought before some judicial officer, to be dealt with as the law directs. It was distinctly alleged in the petition that when Lietch and Rogers made this affidavit they were acting for themselves, as well as for the Citizens' Banking Company, and with the approval and by the direction of each member of that partnership. The warrant issued on this affidavit was placed in the hands of the town marshal and county bailiff, and the house and premises of petitioner

were thoroughly searched. None of the property described in the affidavit was found therein, but the officer seized three pieces of dress flannel and two suits of children's clothes, and arrested petitioner. Subsequent to the arrest, the bailiff, with other persons, returned and made another search of the premises, but found none of the property described in the affidavit. Petitioner was taken before a justice of the peace, when Lietch, Edwards, and Williams, acting for themselves and for the other members of the firm, appeared to prosecute plaintiff, with an attorney who was employed by the Citizens' Banking Company, as a partnership, and each and all of the members of the same. In pursuance of that employment such attorney did represent the prosecution against plaintiff from its inception to its termination. Petitioner asked that he be released

individual or firm name, such as is authorized by our statute, is very analogous to an action against a corporation or stock company. And we doubt whether there is any liability for a tort which can be fastened on a corporation which may not, under proper evidence, be also fixed on a partnership." *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 3 So. 800; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528.

Partners are liable for the wilful, fraudulent, and malicious acts of their firm when done within the scope of the partnership or in the prosecution of the business thereof. It was so held in an action for libel against a newspaper owned and published by a firm. The trial court had been requested by the defendants in that case to rule that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice. The court refused to give this ruling. Upon exceptions thereto the supreme court held that in the statute providing that "in every prosecution, and in every civil action for writing or for publishing a libel, the defendant may, upon the trial, give in evidence the truth of the matter contained in the publication charged as libelous, and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved," undoubtedly by using the term "malicious intention" an actual malicious intention is meant, which the defendants in their request properly enough denominate "express malice." The malice which it has been said the law ordinarily implies in actions of slander or libel from the uttering or publishing of false, defamatory words is in one sense a fiction invented to satisfy the forms of pleading. The words "express malice" have been used in contradistinction to the malice which it was said the law implies to mean actual malice, or malice in fact, which is the same thing as malicious intent. The correctness of the ruling asked for must be determined by the rules of law applicable to civil actions in which the specific actual intention or purpose must be shown to exist in order to maintain the action. But it has been established on much consideration, as one of the general principles of the law of agency, that the principal is liable severally in damages for the torts of his agents done for his benefit in the prosecution of his business within the scope of the agent's employment; and this rule has been extended to wilful trespasses, fraudulent misrepresentations, malicious prosecutions, and libels. *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. In this case the court said further: "The greatest difficulty has been in extending this liability to corporations aggregate."

51 L. R. A.

Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468, was an action of tort against a savings bank for malicious prosecution. In the opinion Mr. Justice Lord says: "By the great weight of modern authority a corporation may be liable, even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation;" and many authorities are cited.

For additional authorities when the action is for libel, see *Aldrich v. Press Printing Co.* 9 Minn. 133, Gil. 123, 86 Am. Dec. 84; *Maynard v. Fireman's Fund Ins. Co.* 47 Cal. 207; *Johnson v. St. Louis Dispatch Co.* 2 Mo. App. 565; *Rex v. London*, 8 How. St. Tr. 1039, cited in note to *Whitfield v. South-Eastern R. Co.* El. Bl. & El. 122.

In the case of *Green v. London General Omnibus Co.* 6 Jur. N. S. 228, 7 C. B. N. S. 290, 29 L. J. C. P. N. S. 13, 1 L. T. N. S. 95, 8 Week. Rep. 88, Chief Justice Erie says: "The doctrine relied on, that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial."

In *Edwards v. Midland R. Co.* (1880) L. R. 6 Q. B. Div. 287, 50 L. J. Q. B. N. S. 281, 43 L. T. N. S. 694, 29 Week. Rep. 609, 45 J. P. 374, which was an action against the railroad company for the prosecution of the plaintiff by a detective in its employ, Fry, J., upon a verdict for the plaintiff, reserved two questions for further consideration: (1) Whether an action for malicious prosecution will lie against a corporation; (2) whether the employment of police was an act within the scope of the company's incorporation. It was held that the action would lie.

In *Stevens v. Midland Counties R. Co.* (1854) 10 Exch. 352, 2 C. L. Rep. 1300, 23 L. J. Exch. N. S. 328, 18 Jur. 932, the plaintiff had a verdict which the court of exchequer set aside. *Alderson, B.*, said: "It seems to me that an action of this kind does not lie against a corporation aggregate; for, in order to support the action, it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind." As to whether such an action could be maintained *Platt and Martin BB.*, declined to express an opinion.

In *Abrah v. North Eastern R. Co.* (1886) L. R. 11 App. Cas. 247, 55 L. J. Q. B. N. S. 457, 55 L. T. N. S. 63, 50 J. P. 659, the judgment of the House of Lords was delivered by Lord Bramwell, and, although the question of whether an action for malicious prosecution would lie against a corporation was not argued, he devoted a considerable portion of his opinion to that subject, saying, *inter alia*: "A corporation

from custody on the ground that the affidavit upon which the warrant was issued was defective and void, and failed to charge any offense against him, and that for that reason his arrest and detention were unlawful. Lietch, Edwards, and Williams objected to the release of petitioner, and the magistrate refused to order his discharge. Hethen asked for an immediate investigation or preliminary trial, but the parties just referred to objected to this, and upon their application the hearing was continued to the next day. To avoid being placed in jail, petitioner offered to give a bond for his appearance; but the magistrate held that a bond must be given to appear and answer for the offense of larceny, and petitioner gave the bond to appear for a preliminary hearing on the next day for the offense of larceny. At the time fixed for the preliminary trial, Rogers,

Lietch, Edwards, and Williams, acting for themselves and with the approval of Ashburn and Peacock, the other members of the partnership, again appeared with their attorney before the magistrate for the purpose of prosecuting petitioner; and on their motion the case was again continued until the following day, over the objection of petitioner, who was present and demanding a hearing. At the time fixed in this last order of postponement, petitioner appeared with his counsel before the magistrate, and thereupon the prosecution, by their attorney, asked leave of the court to withdraw the warrant, and to restore to petitioner the articles which had been seized by the officer who searched his house; the attorney representing the prosecution stating that it was impossible to make out a case. An order was then granted discharging petitioner

is incapable of malice or of motive. I say, therefore, that no action lies, even if one assume the strongest case, namely, that of the very shareholders directing, the very directors ordering it, because it is impossible that a corporation can have either malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive." Lord Bramwell proceeded further to distinguish between the malice which is the essential ingredient of an action for malicious prosecution and the malice which the law imputes to the author of slander or libel in order to support the action, saying, in regard to the latter: "That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual and real malice is necessary."

An action lies against a corporation aggregate for a libel without proof of express malice: the allegation of malice (if such an allegation is necessary) may be proved by showing that the publication took place by order of the defendants. *Sembs* that express malice may be imputed to, and proved against, such a corporation. *Whitfield v. South-Eastern R. Co.* (1859) 4 Jur. N. S. 688, El. Bl. & El. 122, 27 L. J. Q. B. N. S. 229.

A corporation may be held liable in damages for libel. Corporations are liable for agents' actions when done within the scope of their employment; and, like natural persons, may be punished by exemplary damages. *Johnson v. St. Louis Dispatch Co.* 2 Mo. App. 585; *Citing Gillett v. Missouri Valley R. Co.* 55 Mo. 315, 17 Am. Rep. 653; *Malecek v. Tower Grove & L. R. Co.* 57 Mo. 17; and stating that *Childs v. Bank of Missouri*, 17 Mo. 213, in so far as it decides that a corporation cannot be so punished for damages, has been overruled.

To the same effect, *Aldrich v. Press Printing Co.* 9 Minn. 183, Gil. 123, 86 Am. Dec. 84.

The rule for holding both the partnership and the corporation liable for the wilful, and even malicious, acts of a member of the firm, or an officer or servant of the latter, seems to be the same, and both seem to be founded upon the doctrine of agency; and the fact that the member of the firm, or the officer or agent of a corporation, is acting within the scope, or in the prosecution, of the business or interests of either.

Plaintiff was proprietor of an omnibus line; defendant, a corporation, was proprietor of a rival line running the same route. A driver of

one of the defendant's omnibuses passed one of the plaintiff's omnibuses while the driver thereof was stopping to take up passengers. Thereafter the driver of the plaintiff's vehicle attempted to pass that of the defendant, when the defendant's driver recklessly and intentionally, for the purpose of obstructing the free passage of the omnibus of the plaintiff, and because he wanted to get before it, ran into the same, by means of which it was overturned and injured. In the trial in the exchequer *Martin, B.*, instructed the jury that if the act of the defendant's driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was, nevertheless, an act done by him in the course of his service; and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus,—the defendant was responsible, and a judgment for the plaintiff was affirmed by the exchequer chamber. *Limpus v. London General Omnibus Co.* 1 Hurlst. & C. 528.

Plaintiff, proprietor of a stage-coach line, declared against the defendants, a corporation, that the defendants wrongfully, vexatiously, and maliciously placed and drove in the public streets omnibuses and carriages just before and just behind the omnibuses of the plaintiff while the same with the plaintiff's horses drawing the same were plying for passengers for hire in the public streets, and with which the plaintiff was then carrying on his business, in such manner as to hinder and prevent, frighten and deter, great numbers of persons from entering plaintiff's omnibuses and becoming passengers therein for hire, as they otherwise might and would have done, etc., and further, that the defendants wrongfully, vexatiously, and maliciously drove and placed in the public streets certain other carriages and omnibuses upon and against the omnibuses and horses of the plaintiff, and upon and against the servants of the plaintiff then conducting the same, while the plaintiff's horses were harnessed to the same, and the plaintiff's servants conducting the same were plying and waiting for passengers for hire in the public streets, and with which the plaintiff was then carrying on his business as aforesaid, in such a manner as thereby to damage, bruise, and injure the said omnibuses and horses of the plaintiff, and to prevent the doors of the said omnibuses from being opened, and to obstruct and block up the access of passengers into the said omnibuses of the plaintiff, and to hinder and disable the said servants of the plaintiff from freely and fully performing their duties to

from custody, and restoring to him the articles which had been seized. It was distinctly alleged that while Rogers and Lietch, the persons upon whose affidavit the warrant was issued, were the nominal prosecutors of petitioner, Ashburn, Edwards, Williams, and Peacock, and the Citizens' Banking Company, as a partnership, were all jointly and severally the prosecutors in the case. Petitioner alleges that he was innocent of any offense, and that he did not take and carry away any of the articles named in the affidavit, nor were any of them concealed in his dwelling or about his premises, and that the prosecutors had no probable cause whatever to believe that the same were so concealed; that the articles seized by the officer constituted no part of the property mentioned in the affidavit, but were the property of petitioner and his wife and children, and had

never been in the possession or custody of Rogers. Petitioner was in actual custody of the arresting officers for several hours, and was in their constructive custody for forty-three hours, before he was released. It is alleged that the prosecution was maliciously instituted and carried on without probable cause; the prosecutors having no ground whatever for the proceeding, other than their desire to injure petitioner. As matter of aggravation and as evidence of malice, it is alleged that the defendants circulated disparaging and damaging reports about petitioner, charging that large quantities of goods stolen from the custody of the sheriff had been found by the officers in the house of petitioner, that he had a secret key to the store in which such goods were located, and that he had taken such goods. To this petition the defendants filed demurrers, both

the plaintiff in the conduct and management of the said omnibuses of the plaintiff, and whereby they were so hindered and disabled as aforesaid accordingly. He further declared that the defendants, contriving and intending as aforesaid also wrongfully, vexatiously, and maliciously in the said public streets, etc., thrust and pushed themselves and caused their servants to and they did thrust, push, and place themselves, between the said omnibuses of the plaintiff while plying and waiting for passengers as aforesaid in the way of the plaintiff's said business and divers persons who were desirous to enter and get into and on the same as passengers for hire, so as thereby to obstruct the entrance and access of such passengers into and upon the said omnibuses of the plaintiff, and to hinder, deter, and prevent them from entering the same or becoming passengers therein. He further declared that the defendants also contriving and intending as aforesaid at the several times aforesaid wrongfully, vexatiously, and maliciously insulted, hissed, and assaulted, beat and ill treated, plaintiff's servants in the said public streets, etc., while they were employed in driving, conducting, and managing the said omnibuses in the way of the plaintiff's said business, and were plying and waiting for passengers therewith in the said public streets, etc. There was a demurrer to this declaration, and it was objected that a corporate body having no soul cannot be guilty of a malicious intent any more than it can be guilty of treason or felony. Citing *Sutton's Hospital*, 5 Coke, 22. *Whitfield v. South-Eastern R. Co.* 4 Jur. N. S. 688, El. Bl. & El. 122, 27 L. J. Q. B. N. S. 229. The court held, citing *Yarborough v. Bank of England*, 16 East, 6, and *Whitfield v. South-Eastern R. Co.* that the action would lie. That an action for a wrong does lie against a corporation where the thing done was within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. That court also held that there was an additional reason for the decision, *viz.*, the inconvenience to the public that would arise if it were to be held that these companies incorporated for the purpose of trade had a restricted limitation put upon their liabilities by reason of such incorporation, and were exempt from responsibility because they intentionally wronged the public. That it is extremely important where such companies admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have em-

ployed, and who may be entirely incapable of giving the recompense which the law may award. Judgment on the demurrer was for the plaintiff. *Green v. London General Omnibus Co.* (1860) 6 Jur. (N. S.) 228, 7 C. B. N. S. 290, 29 L. J. C. P. N. S. 13, 1 L. T. N. S. 95, 8 Week. Rep. 88.

The cases which militate against the doctrine laid down in the principal case, *PAGE v. CITIZENS' BANKING CO.*, do so on the ground taken by the counsel for the defendant in the above case, *viz.*, that a partnership, although an entity, is not capable of committing malicious or intentional wrong. The true doctrine on this particular branch of the law is as clearly applicable to a partnership as to a corporation, and it is for that reason that the above case is taken so fully.

An action for malicious prosecution will lie against a corporation. *Jordan v. Alabama G. S. R. Co.* 74 Ala. 65, 49 Am. Rep. 800. In this case the court said: "There are not wanting authorities affirming that, as a corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law, to which the law cannot impart *animus*, passion, or moral quality, which is incapable of the commission of an offense deriving criminality from an evil intent, or consisting in a violation of social duty, it cannot be subjected to a civil action of which an essential distinguishing element is malice, or a mischievous purpose or motive. It is the aim and duty of courts to apply principles of the common law with such modifications as are necessary to adapt them to the changed necessity, varied social conditions, and diversified business and interests of the community. Perhaps there is not in the history of the common law more distinctive evidence of its modification, of the rejection of its narrow technicalities, than in the adaptation of the legal relation of corporations to a just liability for the acts, omissions, or engagements of the governing body, or its agents, or servants, employed in the transaction of corporate business. The ancient rule that they could speak and act only through the common seal is obsolete; and now they are bound by the like implications and inferences which bind natural persons."

A partnership being a legal entity (see principal case, *PAGE v. CITIZENS' BANKING CO.*, and cases there cited), the same course of reasoning would subject it as such to an action predicated on malice.

The weight of authority in the United States (and probably in England) seems to be in favor of the doctrine that an action will lie against a corporation for a malicious prosecution insti-

general and special. The court sustained the demurrers and dismissed the petition, and this ruling is assigned as error. The plaintiff, during the progress of the hearing of the demurrers, offered an amendment to his petition, which merely set forth with greater particularity than the original petition the facts showing the connection of the Citizens' Banking Company with the mortgage execution which had been levied upon the property of petitioner, and prayed that, if it should be held that the suit could not be maintained against the Citizens' Banking Company as a partnership, the case might be held in court as a suit against Rogers and the individual members of that partnership. The court refused to allow this amendment, and this ruling is also assigned as error.

1. Is a partnership ever liable as such in

tuted and carried on by its agents. *Morton v. Metropolitan L. Ins. Co.* 34 Hun, 366, Affirmed in 103 N. Y. 645; *Wheless v. Second Nat. Bank*, 1 Baxt. 460, 25 Am. Rep. 783; *Williams v. Planters' Ins. Co.* 57 Miss. 769, 34 Am. Rep. 494; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 34, 8 S. E. 923; *Vance v. Erie R. Co.* 32 N. J. L. 384, 90 Am. Dec. 665.

The case of *Boogher v. Life Asso. of America*, 75 Mo. 319, 42 Am. Rep. 413, also sustains the doctrine that such an action may be maintained against a corporation, but in that case there was no question but that the prosecution was the act of the corporation, it having been authorized by the board of directors. This case overrules *Gillett v. Missouri Valley R. Co.* 55 Mo. 315, 17 Am. Rep. 653, in which it was decided that a railroad corporation was not liable in such an action instituted by one of its officers, as such an act was *ultra vires*.

In *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286, the general proposition was asserted that a corporation is liable *civiltiter* for torts committed by its servants or agents precisely as a natural person; and it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation instituting the agency or authorizing the act.

Of course, strictly speaking, these may not be authoritative for the principle which is the subject of this note. Nevertheless, the liability in the one case is based upon the responsibility which the law imposes upon the corporation for the wrongful, and even the malicious, acts of its officers, agents, and servants, and, in the other, upon the like responsibility upon the partnership, and each member thereof, for the wrongful acts of any one of the members within the scope of the partnership business. And the reason for such imposition is identical in each instance, namely, that, as the corporation can only act and move through its officers who are its agents, and its liability arises from that fact, so the liability of a partnership for a wrong is based upon the doctrine of agency: each partner being held to be the agent of the firm as a whole, and of every other of the individual partners.

The president of a corporation (who was also one of the principal stockholders, and had the control and management of the business of the company as general and managing agent), en- 51 L. R. A.

an action for a malicious prosecution? If so, under what circumstances can such an action be maintained? One partner may be rendered liable for the acts of his copartner. Whether or not he is so liable is to be determined by the application of the rules governing the relation of principal and agent; and generally the partnership is liable for the act of one of the partners, if it would have been liable had the same act been committed by an agent intrusted by the firm with the management of its business. 17 Am. & Eng. Enc. Law (1st ed.) 1066. If a tort be committed by one partner while engaged in a transaction within the scope of the partnership business, and such tort be committed in furtherance of the interests of the partnership it will be liable. But it will not be liable for a tort committed by one partner in a transaction outside of the part-

gaged in running a line of steamboats, directed the captain of one of the boats of the corporation to run into and sink the boat of a rival line, and the captain did wilfully and intentionally run into and injure plaintiff's boat; after which the president expressed his approval of the captain's act by saying: "Damn him! I wish he had sunk him." It was held that the corporation was not liable for the injury. *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 315.

This case has never been positively overruled. On the contrary, it has been frequently cited, both in its own and other states, with apparent approval in support of the doctrine that a master is not liable for the malicious, wilful, or intentional act of his servant. It was made at a time when corporations aggregate were few in number, and the necessities of the times did not demand a change in the old rule, based upon the theory that such an entity had no mind or soul, and therefore could not be guilty of malice or wilful intent. But, as will be apparent from an examination of the cases last cited, as the times have changed, and the increase of population and business has given rise to the existence of vast numbers of these corporations,—nearly every business concern of great moment in the country having been transformed into or primarily organized as such,—courts have found it necessary to change the rule; and there is little doubt that if circumstances were to arise exactly identical with the facts in *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 315, the court of appeals of New York would without hesitancy promptly overrule it; and if cited it would be disapproved in every other state.

The plea of *ultra vires* in the case of a corporation would seem to be as good ground of defense as a like plea in the case of a partnership—that the partnership was not organized for the purpose of committing torts, or that actions implying fraud and malice were not within the scope of their legitimate business. *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 8 So. 800.

III. Torts of individual member.

a. Wilful and malicious torts.

1. When other members liable.

Where the complaint in an action for malicious prosecution against the members of a partnership alleged that the defendants, after a note made by the plaintiffs fell due, falsely and fraudulently represented that they were the

nership business, where he acts from his own private malice or ill-will unless the act which constituted the tort was authorized by the members of the partnership, or subsequently ratified by them; the act itself having been done in their behalf and interest. *Meechem, Partn.* §§ 204, 205; *T. Parsons, Partn.* 4th ed. §§ 100, 102, 105; 1 *Bates, Partn.* § 461; 1 *Lindley, Partn.* §§ 149, 150; 1 *Jaggard, Torts*, § 99; *Barbour, Partn.* 2d ed. p. 350, chap. 2, § 13. The authorities just cited establish simply that, as a partnership is an aggregation of individuals, where each one is the authorized agent of the others to perform any act within the scope of the partnership enterprise, if one of them, in the prosecution of the business of the partnership, be guilty of a wilful wrong towards another, the other partners will be liable, and that, if one partner is guilty of an

act outside of the partnership business which causes any injury, the other partners will not be liable unless it appear that such act was expressly authorized by them, or, after the same had been performed in their behalf and interest, they had either expressly ratified the same, or knowingly received the fruits of the wrongful act. Applying these principles to the present case, the petition set forth a cause of action as against the individuals who compose the partnership known as the Citizens' Banking Company, and the plaintiff has a right to maintain the action, so far as the count for malicious prosecution is concerned, against the individuals composing that partnership. But the suit is not only against the individuals, but it is against the partnership itself, and a judgment is sought against the partnership itself, as well as against the individ-

owners of the note, and had purchased the same for a valuable consideration before maturity, and brought suit thereon in their own names against the plaintiffs, and recovered judgment by default, that the plaintiffs had a good and valid defense against the note, which defendants knew when they brought their suit, but the plaintiffs were deceived by the representations of the defendants, and supposed that they were the bona fide owners of the note for value before maturity, and did not know any better until after the judgment had been obtained; that the defendants sued out an execution on the judgment, and the same was by their direction levied on the plaintiffs' stock of goods, which was detained from them five months,—one of the defendants answered, and denied that he had made any representations, or had any connection whatever with, or participation either in the action or in the proceedings after the judgment was obtained, and any knowledge thereof during the pendency of the same, and denied that his partner had any other authority from him to bring the action in their joint names. The plaintiff had a verdict, which was sustained on the ground that partners are liable *in solido* for the tort of one if that tort was committed by him as a partner and in the course of the partnership, whether they all had knowledge of it or not. *McIlroy v. Adams*, 32 Ark. 315.

In *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073, it was held that where words injurious to a person in his business, false and malicious and therefore actionable *per se*, were spoken of the plaintiff and his business by one of two partners, all the members of the firm were liable in an action of slander or libel. Where the defendants are partners in business, each of the partners is an agent of the partnership as an entity; and if, in the course of that business, one of them injures the business of another by slander, the partnership is liable therefor just as it might be for any other tort by any other agent.

In an action against the defendants, charging a conspiracy to have certain of the plaintiffs' rags which they had imported declared infected so that they might be disinfected under a process used by the defendants as a copartnership, and the rags were taken possession of by the defendants, who were an individual, and the members of the firm, and were by the firm partially subjected to a pretended process of disinfection, and who refused to deliver the rags to the plaintiffs until their charges were paid, which the plaintiffs were compelled to pay to get possession of the rags,—it was held that the 51 L. R. A.

firm and the members thereof were liable in the action, and that a verdict might be rendered against them. The jury did not render any verdict as to the individual defendant, either for or against him. It was held that this was no irregularity of which the defendants and members of the firm could complain. *Lockwood v. Bartlett*, 27 N. Y. S. R. 93, 7 N. Y. Supp. 481.

A member of a copartnership, being in a city in another state from where the firm was located, made certain statements in regard to a person, and afterwards learned that process was issued for him in a slander suit. He returned to his home before process was served upon him. Thereafter the business of the firm required the attendance of one of the members in the city in which the occurrence first mentioned took place. The partner who had made the statement was requested by his partner to go and attend to the business. He objected on the ground that he was liable to arrest in the slander action. Whereupon his partner told him to go any way, and if arrested, "We would have to fight it." He did so, was arrested in a slander action, retained the plaintiff as his attorney to defend it, and after two trials was successful. The firm paid all his expenses incurred in the defense of the action except the plaintiff's bill for services, etc. In an action by the plaintiff against the members of the firm to recover for the services thus performed, the member who was not a party to the slander action defended on the ground that neither he nor the firm was liable for the slanders of the other partner. The plaintiff recovered, and the judgment was affirmed. *Conley v. Wood*, 73 Mich. 203, 41 N. W. 259. The judgment in this case was presumably upon the theory that the employment of plaintiff under the circumstances was an employment by the firm. But the question suggests itself, whether it is not inferentially held that, by adoption, approval, or ratification of the partner who was not guilty of the wrong, he would be made liable for it.

2. When other members not liable.

In an action against two defendants for malicious prosecution of the plaintiff it appeared that the defendants were partners, and the money for the alleged stealing of which the plaintiff was prosecuted was said to have been the money of the firm. The plaintiff in error had no personal knowledge of the circumstances under which the money was taken, nor did it appear that he had any direct personal agency in causing the arrest. The affidavit upon which the warrant was issued was made by the other

ual members who compose it. It is well settled that a corporation is liable for torts committed by its agents, such as assault and battery, libel, malicious prosecution, and the like. *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986; *1 Lawson, Rights, Rem. & Pr.* § 367; *Newell, Malicious Prosecution*, § 102; *Columbus & P. R. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411; *Georgia & R. Bkg. Co. v. Richmond*, 98 Ga. 493, 25 S. E. 565.

Whether a partnership can be sued as such, and held liable for a tort in the commission of which all of the members united for the purpose of furthering the interests of the partnership, or whether in such a case the individuals only are liable to be sued, either jointly or severally, is a question which is for the first time presented to this court for decision. Can a partnership it-

self be regarded as being so separate and distinct from the individual members of the same that it may be treated as the wrongdoer, and a judgment rendered against it which would bind partnership assets in the same manner that a judgment rendered against it on a contract would bind such assets? A corporation is a person, and therefore it is clear that the decisions uniformly holding that it may be rendered liable for a tort committed by its agent are undoubtedly sound. "Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person, having powers and functions exercisable by one of the partners severally, or all of them jointly." *Drucker v. Wellhouse*, 82 Ga. 129, 2 L. R. A. 328, 8 S. E. 40. In the opinion in the case just cited, Mr. Chief Justice Bleckley says: "A firm adds nothing

partner, and he directed the officer in its execution. The declaration averred that he acted with the advice and consent, and at the instigation, of the defendant, Gilbert (the plaintiff in error). Where a partner advises an arrest, although he may not have directly caused it, he is equally responsible with his partner who does, and this need not be directly proved. If circumstances are proved justifying such an inference, the jury would have a right to draw it; but mere knowledge and consent that his partner should have the arrest made will not make him liable. Such an act, even if done with his knowledge and consent, was not within the scope of the partnership. A mere passive assent that his partner might take such steps as he thought proper for the recovery of the money, or for the punishment of the person supposed to have taken it, would not render him liable; it would be merely a consent that the partner might incur such personal liabilities as, from his knowledge of the facts, he should think just and expedient. One person cannot be made liable in damages because he knows that another person is about to commit an unlawful act, even though he fails to protest against it, and therefore in the ordinary use of language may be said to have consented to it. Something further is necessary to make him liable, namely, that his consent should be of so active and positive a character as to amount to advice and cooperation. *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412.

Though a partnership is responsible for the wrongful act of one of its members, committed in the course and for the purpose of transacting the partnership business, the wilful tort of one partner, when not so committed, is not imputable to the firm. A prosecution for larceny for goods stolen from the firm is not within the scope of a mercantile partnership. From this principle results the settled rule that one partner cannot be made liable for the arrest or prosecution of a person by a copartner on a charge of larceny of partnership property, unless he advises, directs, or participates therein, and then only in his individual capacity. Mere knowledge of the prosecution and mere passiveness are not sufficient to render him liable. *Marks v. Hastings*, 101 Ala. 165, 13 So. 297; *Gilbert v. Emmons*, 42 Ill. 147, 89 Am. Dec. 412.

In reversing a judgment for the plaintiff in an action for false imprisonment the court of appeals of Maryland said: "One of several partners cannot drag the firm or his copartners into a trespass by giving authority for the doing of an unlawful act in the name of the firm of which he is a member; for one partner has no

power to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners. *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089.

Partners are, in respect to the business in which they are engaged, agents for each other, and therefore one partner may be liable for the tortious acts of another done in the usual course of business of the firm; but all the members of the partnership are not liable to be punished with vindictive damages for the wanton acts of one partner, although done in prosecution of the business of the firm. *Titcomb v. James*, 57 Ill. App. 296.

In *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93, plaintiff was inveigled from his own state into that where the partnership was located and doing business, and the member of the firm composed of the defendants, who resided there, procured his arrest on a ne exeat, from which he was thereafter discharged. The other member of the firm resided in another state and knew nothing of the arrest or the proceedings taken therefor. On learning of it, he disapproved of it, and insisted on the discontinuance of an appeal from an order discharging plaintiff from arrest. In an action by the plaintiff against both members of the firm for malicious prosecution seeking to charge them as a partnership, and the absent partner as liable for the wrong done by the other, it was held that the action would not lie against the partner who took no act or part in the proceedings, the reason being that it was not claimed that he ordered, advised, or directed the arrest, or that he even knew of the appearance until after the proceedings in the ne exeat case had been dismissed; and that, even if he had approved the arrest after it had been done, he would only be liable for the real injuries sustained, and not for vindictive damages; citing the rule on this subject laid down in *Collyer*, Partn. § 457, and in 1 *Lindley*, Partn. chap. 1, § 4; also citing and approving *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412.

If one member of a partnership goes upon another's land, and there wrongfully cuts trees, this fastens upon the other partner a common-law liability to the owner of the trees for damages sustained as the consequential and natural result of the tort, if the act be within the scope and business of the partnership; but where such act is done wilfully by one partner, the other is not liable for a penalty imposed by a statute for cutting trees on another's land without the owner's consent, as the partner who knowingly commits such tort is the actual trespasser, and

to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world. Still the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issue for or against it. Code, §§ 1899, 3576 [Civil Code, §§ 2638, 5346]. Attachment may issue against it as nonresident (*Chambers v. Sloan*, 19 Ga. 84; *De Leon v. Heller*, 77 Ga. 740), or as absconding (*Hines v. Kimball*, 47 Ga. 587). It may be served with process. *Peel v. Bryson*, 72 Ga. 332. It may be taxed. *Savannah v. Hines*, 53 Ga. 616; and see many provisions in the session laws imposing taxes. It may be insolvent. Code, § 1918 [Civil Code, § 2660]; *Bennett v. Woolfolk*, 15 Ga. 213; *Daniel v. Townsend*, 21 Ga. 155; *Pullen v. Whitfield*, 55 Ga. 174;

Anderson v. Pollard, 62 Ga. 51. It may assign its property to pay its creditors, but whether by general law a single partner can make for it a general assignment seems open to question. *Burrill, Assignm.* §§ 67 *et seq.*; *Story, Partn.* §§ 101, 310; *T. Parsons, Partn.* 3d ed. pp. 165, 166, 400. As to restrictions on limited partnerships in the matter of assignments, see Code, §§ 1939, 1940 [Civil Code, §§ 2681, 2682]. According to *T. Parsons, Partn.* 3d ed. p. 449, there is a 'general tendency of the law at this day to complete its recognition of a partnership as a body of itself, with its own means appointed to its own debts.' In view of this tendency, which is everywhere traceable, and no less in our own local system than elsewhere, we may safely hold that, though a firm or partnership is impersonal or nonpersonal, it is, for some purposes, in contemplation of law, a

the only one against whom the statute gives the penalty; and this, although it was done in the prosecution of the partnership business, provided the other partner had no knowledge of the tortious act until after it had been consummated. *Williams v. Hendricks*, 115 Ala. 277, 11 L. R. A. 650, 22 So. 439.

Two partners were agents of the owner of a dwelling house, and had rented it for her to the plaintiff; and one of them, without the knowledge of the other, had wrongfully disposed the plaintiff. In an action against the owner and the members of the partnership it was held that the partner who knew nothing of the alleged trespass was not liable for the acts of the other; that one partner has no right to involve another unless in the ordinary course of their business; nor, for instance, in a trespass, except in the case where the trespass is in the nature of a taking which is available to the partnership; and in such case, to render one partner liable who did not join in the commission of the trespass, he must afterwards have concurred in and received the benefit of it. *Grund v. Van Vleck*, 69 Ill. 478.

b. Trespass and trover.

1. Trespass.

The defendants, who were partners, seized some cotton on the plaintiff's wagon in charge of his servant, and put it in their warehouse, claiming that they had a lien upon it by virtue of a trust deed which gave them such lien on all the cotton raised in a certain territory. It appeared that they had made a mistake, and that this cotton was not raised on that territory. Plaintiff, on being informed of the fact, started in search of the cotton, and rode nearly all night, the weather being very cold. He owed the defendants nothing, and, as before stated, the defendants had no lien or claim on the cotton. It was held that the facts of the case warranted the jury in the infliction of punitive damages, and, although the illegal seizure was made by one of the defendants, a member of the firm, and the other defendant, the copartner, personally took no part in the illegal act, yet he was equally liable at the suit of the owner. *Robinson v. Goings*, 68 Miss. 500.

A partner, even if he never interfered personally in the management of the affairs of the firm, and had no knowledge of the act constituting the injury, is responsible for a trespass committed by his copartner in a matter connected with the business of the firm. *Brewing v. Berryman* (1875) 15 N. B. 515 (chimney of tenant pulled down).

Where one of the defendants, who were part-

ners, directed an officer having an execution issued upon a void judgment to levy upon property upon which the plaintiff had a valid chattel mortgage, it was held that both defendants were liable, although one did not participate in the direction to the officer to take the property. That the partner who did give directions for seizing the property should be presumed, in the absence of evidence to the contrary, to have been acting in conjunction with the other defendant in a common enterprise of collecting their joint debt by a seizure of the property. Although the commission of a trespass was not within the scope of the partnership enterprise, the collection of the joint debt was a part of that business. The direction to levy the execution upon a particular subject was an incident to the obtaining payment of the debt by a legal process, and when one of the partners was found acting in that undertaking the presumption is that he had the countenance and assistance of the other partner. *Chambers v. Clearwater*, 1 Keyes, 310, 1 Abb. App. Dec. 341.

The general rule is that notice to one partner is notice to all, and that the tort of one partner committed in the transaction of the ordinary business of the firm is the tort of all. The defendants were held as a partnership for a quantity of staves made out of timber unlawfully cut upon the plaintiff's land, which were purchased by the defendants and afterwards sold by them. It was admitted that the plaintiff was entitled to a judgment for the value of the standing timber, and the sole controversy was as to the right of the plaintiff to recover the value of the staves while in the hands of the defendants. There was evidence on the part of the plaintiff that one of the defendants had notice of the trespass, and not only that, but that he actually directed the party who did the cutting to go on and commit the trespass. The jury found in favor of the plaintiff, and it was, of course, held that they found in favor of the truth of the evidence given by the plaintiff's witnesses, and that their verdict was conclusive upon that point. The court charged the jury: "So, if you find that the defendant Paschaides directed the cutting of this timber, then you should give the plaintiff damages according to the value of the timber as it was in staves at Neillsville at the time when the defendants disposed of them and sold them." This direction was held to be clearly right. The evidence was quite sufficient to show notice and bad faith on the part of one of the partners, and such notice and bad faith must, under the law, be imputed to his partner. He cannot reap the benefit of the transaction,

quasi person, having powers and functions exercisable by one of the partners separately, or all of them jointly. That it may be a debtor or a creditor, within the meaning of modern statutory enactments, we have no question." In that case it was held that an insolvent firm might make an assignment as an insolvent debtor, though the partners themselves, as individuals, might be solvent. See also *Green v. Willingham*, 100 Ga. 224, 28 S. E. 42.

If a partnership may be considered as an entity, so as to be subjected to a suit as such in the cases referred to in the decision from which the above quotation is made, we do not see why, upon principle, a partnership might not be treated as an entity, and suable as such by one who had been the subject of a wrong committed by the concurrent action of all the members of the partnership in the

prosecution of a transaction instituted and carried on for the purpose of punishing one who was charged with despoiling the partnership of its property, as well as for the purpose of recovering property which was owned by the partnership. Such is the case made by that count in the petition which seeks damages for the malicious prosecution which it is distinctly alleged was instituted and carried on by the direct authority of each and every member of the partnership acting both in their individual capacities and as members of the firm. It has been held that, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are in fact privy to the malicious prosecution. *Arbuckle v. Taylor*, 3 Dow, 160, cited in *Newell, Malicious Prosecution*, § 103. It would seem to follow from

and yet excuse himself from liability on the ground that he had no notice. If there was any fraud or bad faith it was the fraud and bad faith of the partnership, as well as of the individual partner. This statute prescribes a rule of assessing damages in certain cases. If the partner is not liable for the acts or knowledge of his copartner under this act, it would very soon become a very feeble instrument for effecting the purpose for which it was enacted. *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703.

The defendants under an attachment and subsequent execution against a debtor who had previously made an assignment for the benefit of his creditors issued an execution, and with their knowledge and tacit approval, but without special direction on their part, the sheriff levied upon and sold certain of the assigned property. In an action by the assignee against all the members of the firm who were plaintiffs in the attachment proceedings for the wrongful taking of property which passed by the assignment, it was held that, the property having been taken for a debt of the partnership, and the receipts of its sale having been used for the benefit of the partnership, all of the defendants as members thereof were liable for the wrongful taking. *Brainerd v. Dunning*, 30 N. Y. 211.

If a partnership is a lawful one, and a member of the firm commit a wilful trespass by going on the lands of another, and there cutting trees, and the firm receives the benefit of the trespass, the other partner is liable for the tort. *United States v. Baxter*, 46 Fed. Rep. 850.

Two sheriff's officers were partners in the execution of writs delivered to them by the sheriff, and one of them, assisted by their bailiffs and servants, had made an illegal entry into the plaintiff's premises for the purpose of levying an execution, and after it was shown that the defendants, one of said partners, had offered to delay the levy of the writ for a few days provided the plaintiff would give him \$20, which the plaintiff's attorney refused to do. It further appeared that after the partner who made the entry had done so the plaintiff tendered to him, under protest, the amount demanded, which he declined to accept or to withdraw without the assent of his partner, and the partner declined to assent except upon a payment to him of a bonus of \$20, and thereafter he received the amount tendered him under protest, and did withdraw the officers. It was objected that this partner was not liable for the illegal entry of his partner because he was not present when it was made. A verdict having been had for the plaintiff, and a rule nisi for a new

trial having been obtained, it was discharged. *Brunswick v. Slowman*, 8 C. B. 317, 7 Dowl. & L. 251.

Where three persons composing a firm went into the rebel lines for the purpose of making money by affording supplies, such as pork, etc., for the rebel army, and one of them in the name of the firm and for the firm, upon the written order of a rebel major general, took the works of the plaintiff and the beef and pork therein, and served the same to the rebel forces until they were dispossessed by the federals, and on the approach of the army of the United States the rebel general ordered the establishment of the plaintiff to be destroyed by fire with a large quantity of pork which the said firm by the partner present had placed therein so that it might not fall into the hands of the Union army, in an action brought against the members of the firm for the value of the establishment and rents from the time of the forcible possession, and damages for displacing the plaintiff in his business, it was held that the other member of the firm, although not present and taking no part and having no knowledge of the trespass, was yet liable for it. *Lucas v. Bruce* (Ky.) 4 Am. L. Reg. N. S. 95.

2. Trover.

In commercial dealings within the scope of the partnership the acts of one partner are presumed to be for the benefit and in the interest of all the partners, whether present or absent, and bind the firm. A pilot ran cribs to Eau Claire, and delivered them to M., who attached them as the property of S. & L. on an alleged indebtedness of the latter to him, when the cribs were sold to M. on an execution upon a judgment in the attachment suit, and were by him sold to P., one of the firm (the defendants), who were engaged in the manufacture and sale of lumber, and were paid for by draft handed to M. by the bookkeeper of the firm, and such cribs were then run down the river in connection with lumber of defendants as part of the same raft and with a steamer belonging partly to them, and were disposed of with their lumber to the advantage and profit of the firm. It was held that such purchase and sale of the plaintiff's lumber must be treated, not as the individual transaction of the member of their firm who personally made the purchase, but as a partnership transaction; and that the defendants were jointly liable for the conversion. *Fletcher v. Ingram*, 46 Wis. 101, 50 N. W. 424.

Plaintiff sent to one of the defendants, a commission merchant, a quantity of wheat and grass seed to hold in store and sell when or

this ruling that, if all of the members united in instituting and carrying on the prosecution, the firm would be answerable, and such are the allegations in the present case. In nearly all of the cases where it is sought to hold the partnership liable for a tort, upon examination of the facts it will be found that the suit was not against the partnership as such, but was against one or more members thereof, sued severally or jointly, as the case may be. See *Durant v. Rogers*, 87 Ill. 508; *Roscnkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93; *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215; *United States v. Thomasson*, 4 Biss. 99, Fed. Cas. No. 16,478. In some of the cases just cited it was ruled that under the facts of the case the partnership was liable, and in others that it was not. Attention is called to them for the purpose, as above in-

dictated, of showing that they are not authority either way on the proposition as to whether a partnership can be sued as such for a tort. In *Schwabacker v. Riddle*, 84 Ill. 517, it was held: "Partners are liable *in solido* for the tort of one, if it were committed by him as a partner and in the course of the business of the partnership." A ruling in almost identical language was made in *McIlroy v. Adams*, 32 Ark. 315. Upon examination of these cases it will be found that the suit in each instance was against the individuals, and not against the partnership. In *Re Ketchum*, 1 Fed. Rep. 815, it was held that a firm was liable if one of its members converted to the use of the firm the property of another, and that it was immaterial whether the other members of the firm were ignorant of the wrong, or innocent of any wrongful intent. There was in that

dered and account for the proceeds beyond commissions. Before he made any order for sale the other defendant informed plaintiff that he had bought into the business, and that the next statement would be from the firm instead of from the individual first named. He also told him at different times subsequently that the firm was holding the wheat, and said to the plaintiff that he thought wheat would be lower, and he would advise him to sell were it not that the defendants held it, and therefore plaintiffs might think them interested in having it sold. After the formation of the partnership all the correspondence with plaintiff about the property was conducted by and in the name of the firm and upon the assumption that the firm had it in its possession, and was holding it in store for plaintiff under the same instructions and obligations as it had previously been held. Thereafter the grass seed was sold and an account rendered to the plaintiff, accompanied by a statement from the firm showing the state of the account between them at that time. In this statement plaintiff was debited with the balance of the account with the individual, and credited with the amount of the net proceeds realized from the sale of the grass seed, and it also showed a balance then existing in favor of the company against the plaintiff. About the same time the firm sent plaintiff another statement to show what charge had been incurred for storage and insurance on account of the wheat. Thereafter plaintiff ordered the firm to sell his wheat, which was the first order or authority he ever gave for its sale or disposition. The next day the partner of the original commission merchant wrote plaintiff that the partnership had been dissolved the day before, that his partner was worth nothing, and that he had just learned that the wheat had been sold by his partner some time before. The plaintiff's testimony tended to show that he withheld the order for sale longer than he otherwise would because of his personal acquaintance with the person who had become a partner of the commission merchant, and the confidence it inspired in the responsibility of the firm, that, as he supposed, had voluntarily taken charge of the consigned property under the original arrangement between him and the commission merchant. It was held, in an action against the defendants, the members of the firm, for a conversion of the wheat as copartners, that they were both estopped from denying the truth of the facts thus falsely represented upon the faith of which the plaintiff had acted, and were both liable for the conversion. *Coleman v. Pearce*, 28 Minn. 123, 1 N. W. 846. 51 L. R. A.

Where the members of a partnership, together with the justice of the peace and constable, were sued in trover for taking personal property, and it appeared that the application by one of the partners to the justice was not sufficient to give him jurisdiction of replevin proceedings under which the taking was claimed to have been made, it was held that all the members of the partnership, the property being claimed to belong to it, were liable for the wrongful taking. *McClure v. Hill*, 36 Ark. 268.

Plaintiff delivered goods to a factor for sale, and they afterwards came into the possession of a copartnership of which the factor was a partner, and were sold and the proceeds received by the partnership. It was claimed that they were sold by the factor to the partnership of which he was a member, and that the money received was the property of the partnership. The court held that the deliverance of the stoves to the factor to sell did not change the property; they were still the goods of the plaintiff; that the factor could not sell the stoves to himself, and for the same reason he could not make a valid sale of them to the firm of which he was a member, which would be to himself and another; that the plaintiff was entitled to recover the avails of the sales of the partnership. *Martin v. Moulton*, 8 N. H. 504.

For the purpose of obtaining credit with a firm, a person was in the habit of depositing notes drawn by different persons with the firm, under an agreement that when goods to the amount of the notes were delivered to the firm the notes were to be surrendered. The person had deposited a quantity of goods with the defendant, and on the day of his assignment his assignees sent to demand the notes. One of the members of the firm was also a member of another firm which had a legal claim against the assignor for more than the amount of the notes, and upon the demand being made upon him he claimed to apply the notes to satisfy the indebtedness to his other firm, and refused to deliver them up. It was held that the firm as such, and both members of it, were all liable in trover for the conversion of the note. *Nisbet v. Patton*, 4 Rawle, 120, 26 Am. Dec. 122.

Where property is taken upon a void judgment an action of trover will lie for its conversion, against the judgment creditors. And where the property was received by the firm, one of whom declined to do anything about it, and the other refused to give it up, both members of the firm are liable. Whatever one partner does in the collection of a firm debt is presumptively done with the other's consent. *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657.

case, however, no ruling as to how a suit for such wrongful conversion should be brought,—whether against the partnership as such, or against the individuals composing the same. The only cases to which our attention has been called in which the partnership as such was sued for a tort are the cases of *Marcks v. Hastings*, 101 Ala. 165, 13 So. 297, and *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. In the former it was held, "A partner is not liable for a malicious prosecution instituted by his copartner on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and then only in his individual capacity." In the latter case it was held that under the facts of that case the firm was not liable, but the judge who wrote the opinion recognized that there were cases in which it might be held liable for the torts of

its members. See page 410, 84 Md., and page 1093, 35 Atl. While the prosecution of a person for a criminal offense might not be within the scope of a mercantile partnership, even though such offense consisted of a larceny of the partnership property, as was held in the Alabama Case, *supra*, still it would seem that any proceeding authorized by law for the purpose of reclaiming property of the partnership which had been stolen would be within the scope of the partnership business, and each partner would be authorized to use such remedies as the law gave for that purpose; and if these remedies were pursued maliciously and without probable cause, and a prosecution for a public offense resulted therefrom, the partnership as such would be liable in an action of malicious prosecution. But, be this as it may, it is not necessary for us to decide this question

Where, upon an execution in favor of the members of a partnership against a third person, a levy is made by the direction of one of the partners upon the property of the plaintiff, the latter may maintain an action against the partnership and the members thereof, under the rule that partners are liable *in solido* for the tort of one, if the tort is committed by him as the partner and in the course of the partnership business. *Loomis v. Barker*, 69 Ill. 360; *Bane v. Detrick*, 52 Ill. 20.

Where a constable deputized in the service of an execution in favor of a firm levies upon property of a third person with the assent of one of two partners as to what he is doing, his act binds them both, and, being wrongful, the firm and each member thereof is liable to the party injured for the amount. What either partner does in the collection of a partnership debt is presumptively done with the sanction of the other. *Vanderburgh v. Bassett*, 4 Minn. 242, Gil. 171.

In this case the other judgment creditor was absent in another state. On the question as to his liability, it was held that the matter related to the business of the partnership, and that the other partner, though absent from the state, would be presumed to have given the remaining partner full power to transact all business pertaining to the partnership, and was therefore liable for any conversion of property by him.

Goods of the plaintiff were wrongfully seized upon an attachment in a suit in favor of a firm, which suit was instituted by one of the members for the collection of a debt due the firm. The only evidence of authority for, or sanction of, the seizure by the other partner was the institution of the suit by the one first mentioned, and the direction given by him to the sheriff to levy the attachment on the property in question. The right of one partner in a mercantile firm without consulting his copartners to sue in the name of all the copartners for a debt due the firm, either in an ordinary action or one in attachment, cannot be questioned, and it is a logical conclusion, well established by the authorities, that all the copartners are liable to anyone whose goods have been wrongfully seized under such attachment by the direction of the partner instituting the suit. *Kuhn v. Weil*, 73 Mo. 213.

If the wrongful delivery of goods to a third person while in the custody of a partnership is an act done within the scope of a partnership business, though made by a single member of the firm without the knowledge or consent of the other members of the firm, it renders all of the copartners, or the firm, liable in trover 51 L. R. A.

for a conversion of the goods. Each partner being an agent of the firm, it is liable for his torts committed within the scope of his agency, although ignorant of his acts. *Hobbs v. Chicago Packing & Provision Co.* 98 Ga. 576, 58 Am. Rep. 320, 25 S. E. 584.

A member of a firm was a deputy collector of internal revenue of the United States, and had given a bond to the collector for the faithful discharge of duty and the accounting of moneys received by him. He converted government moneys received by him to the use of the firm with the knowledge and concurrence of his copartner. The firm becoming insolvent, he and his copartner executed their joint obligation to indemnify the defendants as sureties on his official bond. The bond contained a warrant of attorney for the confession of judgment annexed. Judgment was confessed upon the bond and execution issued, under which the partnership goods were levied upon and sold. Plaintiffs were contract creditors of the firm. It was held that the money used which was in the hands of the partner who was deputy collector, was in his hands as the mere agent of the collector of internal revenue, whose money it was. It was a trust fund, and, having been used by him in the business of the firm with the knowledge and concurrence of his partner, the firm was liable for his wrongful conversion of it to that purpose, and the sureties on the official bond were entitled to equitable subrogation to all the rights of the persons entitled to the trust funds, against the firm and the members thereof, for the misappropriation of the deputy collector. *Wharton v. Clements*, 3 Del. Ch. 209.

A person was a member of a firm in Cincinnati, and also of another firm in the city of New York. He became possessed of bonds issued by the plaintiff's company which were void in his hands and in the hands of his firm under the statute of Ohio, he being a director of the company, and had purchased them for less than their par value, which was prohibited by that statute. Subsequently the Ohio firm, being indebted to the New York firm on account of stock purchased and advances made, sent to it the bonds to be held as collateral security for the payment of such debt. In an action by the railroad company against the members of the New York firm to recover damages for wrongful conversion of the bonds, it was held that, as their partner in Cincinnati had actual knowledge of the defective title of the Cincinnati firm to the bonds, his partners in the New York firm were chargeable with constructive knowledge thereof, and acquired no better title to

in the present case; for the allegations of the petition are clear and distinct that every act that was done by the partner who sued out the search warrant was authorized and directed by each and every other member of the firm, acting in behalf of the partnership. Treating the partnership as a legal entity and as a quasi person, as we are not only authorized, but bound, to do, following the decision in *Drucker v. Wellhouse*, 82 Ga. 120, 2 L. R. A. 328, 8 S. E. 40, we have no hesitancy in holding that under the allegations of the petition an action for malicious prosecution was maintainable against the Citizens' Banking Company as a partnership, and that the plaintiff is entitled, under his allegations, to recover a judgment which will bind partnership assets.

While the decision in the case of *Ozborn v. Woolcorth*, 106 Ga. 459, 32 S. E. 581, is

the bonds than their pledgeor had. *Marietta & C. R. Co. v. Mowry*, 28 Hun, 79.

A guardian sent money of her ward to a person to invest. He invested it in a bond, and afterward formed a partnership with the other defendant and carried the bond into the firm as an asset there; and it was used as collateral security for the firm in a bank from which they were borrowing. He did not communicate to his partner that he had no title to it. It was held that his knowledge bound the firm of which he was a partner, and the firm was liable to the plaintiff as guardian for the conversion of it. *Cunningham v. Woodbridge*, 76 Ga. 302.

The treasurer of a city was a member of a firm. With the full knowledge and consent of his partners he deposited the money of the city in a bank to the credit of the firm, and not separate from their other money in the bank. He also mixed the money of the city with the money of the firm in the cash drawer at their mill. It was held that the firm was liable for a conversion of the money. *Pundmann v. Schoenich*, 144 Mo. 149, 45 S. W. 1112; *Witcher v. Brewer*, 49 Ala. 119.

A person employed one member of a firm of stockbrokers as his agent and attorney to attend to some parts of his business, and intrusted to him individually, for safe keeping, large amounts of stocks and securities which he kept in a tin box of which he retained the key, the box being deposited in a safe of the office of the firm to which both the partners had access. The same person also kept a deposit account with a bank, and the same partner individually acted as his attorney in drawing out moneys from this account upon checks signed by him in the name of the owner. This part of the business was done by him for the owner under a power of attorney executed before the formation of the firm. The partner, thus constituted attorney, without the knowledge of his principal, from time to time drew checks in the name of the latter against this bank account, and deposited said checks to the credit of the firm in the same bank where the firm also kept their bank account. These transactions were wholly without the knowledge of his partner. He also, without the knowledge or consent of the owner or of his partner, sold and disposed of some of the stocks and securities in his possession, and deposited the proceeds, paid them into the bank account of the firm, and used others of these stocks and securities by hypothecating them with the bank with which the firm did business, and where the account of the party for whom he was acting was kept as aforesaid. The firm afterwards failed 51 L. R. A.

apparently in conflict with what is now ruled, upon a close examination of that case it will be found that it was, upon its facts, correctly decided; and, when it is thus confined, it is not only not in conflict with the present ruling, but it is, rather, in line therewith. In that case it was sought to hold a partnership liable for slanderous words uttered by one of the partners, upon two grounds: First, because the words were uttered in a transaction within the scope of the partnership business; and, second, that the other partner, after the slanderous words were uttered, had ratified the same. It was properly held that the partnership was not liable upon either ground. If a corporation is not liable for a slander uttered by its agent, although in a transaction within the scope of his agency, unless the corporation directed the speaking of the very words com-

and went into bankruptcy. It was held that the value of the stocks thus sold by the individual member of the firm, and the amount of the checks that he had drawn to the order of the firm, and which all went to the firm's account and benefit, were provable as claims against the partnership estate in bankruptcy; that the firm as such was liable for the conversion of both the stocks and the money, notwithstanding the other partner had no knowledge of the acts constituting such conversion. A further reason is given in this case that the firm was liable because the partnership had the benefit of the wrongful act of the individual partner. *Re Ketchum*, 1 Fed. Rep. 815.

Plaintiff, being in possession of a stock of goods, on account of domestic and other troubles left the same in possession of a third person, and went away and did not return. One of the defendants, members of a partnership who had dealings with the plaintiff, came to his store, took possession of the goods under a claim that plaintiff owed the partnership, sold some of them at retail "as though he belonged there," and finally sold the balance to the third person whom plaintiff had left in charge, and took his notes. He reported all his doings to his partner. It was held that the partners were liable in an action of trover, and might be sued in such an action, although there was no joint conversion in fact; that a joint conversion may be implied in law by the consent of a partner to the acts of his copartner. *Bane v. Detrick*, 52 Ill. 19.

Where it appeared that certain oxen were replevied from the barn of a member of a partnership of which the defendant was also a member, and the defendant testified that all he did in relation to the taking of the oxen was as a member of the partnership which owned the oxen, and that he and the member mentioned took the oxen and drove them a certain distance when he got out and the other member drove them into his barn, it was held that replevin is an action of tort; that in tort as a general rule the action may be brought against one or all of the tortfeasors. Replevin must be brought against a person having possession of the property replevied. The possession of the servant is the possession of the master. The action may be maintained against the owner when in possession of the servant. A servant or depositor has no such property as will support this action, his possession being that of the master or bailor. If one of several partners acts he is considered in this instance as the servant of the rest. The tort is looked upon as the joint or several tort of all the

plained of as was held in *Behre v. National Cash Register Co.* 100 Ga. 213, 27 S. E. 986, it would seem, upon principle, that a partnership would not be liable for a slander uttered by one of its agents, even though that agent be a member of the firm, unless all the partners directed the speaking of the very words complained of. The action was therefore not maintainable upon the first ground. While one may render himself liable by ratifying the tort of another, such liability arises only where the original act was done in the interest, and intended to further some purpose, of the person who ratifies the act of the wrongdoer, as in a case where property of which the ratifier is the owner is seized, and thus passes into the possession of the real owner, or where one, in behalf of another, without authority seizes property in which the other has no interest,

and the person in whose interest the seizure was made receives the property thus seized. See *Cooley, Torts*, 2d ed. p. 146. It is hard to conceive how this principle can apply to a slander. Uttering without authority a slander in the interest of another, and approving or ratifying such slander for the reason it was so uttered, or because of a benefit supposed to arise from the wrongful act, are transactions which, if at all possible, are beyond legal comprehension. Even if a slander can, in contemplation of law, be uttered, without authority, in the interest of another, or if a benefit can be received from a slander uttered in one's behalf, such interest or benefit would generally, if not in every case, be so remote that a legal investigation should not be entered into for the purpose of connecting the interest or benefit with the slander. The headnote and the language of

partners, and they may either be proceeded against in a body or one may be sued alone. *Howe v. Shaw*, 56 Me. 201.

The contention of the defendant was that he personally did not have actual possession; and that, as replevin must be brought against the person having possession of the property replevied, the action could not be maintained against him. This, to be sure, was an action of replevin, but trover and replevin in the detinet arise from the same state of facts.

c. Negligence.

1. When other members liable.

Where a slave belonging to the plaintiff was, by a contract of hiring, to work on the boat of the defendant and another, who were partners, while she was plying as packet between Mobile and New Orleans, and the defendant, in violation of such contract, abandoned such line and was engaged in the navigation of other waters, in consequence of which, or while engaged in this last-named navigation, the slave was drowned, it was held that the copartner of the defendant was equally liable with him for the consequences of the act, and, being so liable, was an incompetent witness for him, when sued alone, to recover damages for the tort. *Myers v. Gilbert*, 18 Ala. 467.

Where a horse is borrowed by one partner to be used in and about the partnership business, and lost by his negligence or wrongful act, the owner may maintain an action against the partnership for the loss or conversion. *Witcher v. Brewer*, 49 Ala. 119.

The defendants were the owners of a coal mine, and plaintiff was employed as a collier therein. The shaft, by reason of not being sufficiently lined, was in an unsafe condition. At the trial it was proved that one of the defendants was manager of the mine, and that it was worked under his personal superintendence, and that the plaintiff was not aware of the state of the shaft. The plaintiff was injured by a stone falling from the side of the shaft on his head, and brought this action for the injury. A verdict for the plaintiff was sustained. *Crompton, J.*, upon the doctrine of *Ashworth v. Stanwix*, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85, 3 El. & El. 701, that if one defendant was liable for personal negligence, his partner, the other defendant, was liable also. *Mellors v. Shaw*, 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845.

The principle that a servant sustaining an injury from the negligence of a fellow servant while engaged in the common employment cannot

not recover in an action against the common master does not exempt from liability to action a master who himself takes part in the servant's work, and by so doing injures the servant through negligence.

If the master is a member of the partnership by which the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence. *Ashworth v. Stanwix*, 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85.

Defendants were proprietors of a stage coach. Their coach, driven by one of the partners, through his negligence injured the plaintiff. It was held that case would lie against all of the defendants, and the other two were liable for their partner's negligence. The only objection that seems to have been made was to the form of the action. *Moreton v. Harden*, 4 Barn. & C. 223, 6 Dowl. & R. 275.

Defendants were sued by the plaintiffs as partners in a stage-coach line and as common carriers, on their undertaking to carry for the plaintiffs a package of bank notes, which was lost by one of the defendants, the partner who had charge of the coach, and to whom the package was delivered. It was held that, by virtue of their being partners, all the defendants were liable as common carriers, and that the action is technically founded on tort, although arising out of the contract. *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 183.

Two defendants were engaged in running a line of stage coaches from Barre through Holden to Worcester and back. One of them furnished horses, coaches, and all that was necessary to run the line from Worcester to Holden, taking as his share the fares for passengers received over that portion of the line, and the other did the same over the other line from Holden to Barre. They hired a man to drive all the way from Barre to Worcester for a certain sum per month and perquisites. A package of money was delivered by the plaintiff to this driver at Barre to carry to Worcester, and there deliver it. The driver absconded without delivering it. It was held that, for the purposes of this action, the defendants were to be considered partners over the whole line, and were liable to the plaintiff for the amount of the money. *Cobb v. Abbot*, 14 Pick. 289.

Defendants were stevedores and copartners. Plaintiff was injured either by the negligence of one of them, or by servants employed by the

Presiding Justice Lumpkin in the opinion in *Osborn v. Woolworth* must be taken in the light of the questions then under consideration, and there was nothing in that case to call for a ruling on the question whether a partnership would be liable for a tort committed by one of its members under the direction and express authority of all the members.

2. As it was distinctly alleged in the petition that the partnership, the individual members thereof, and Rogers, the sheriff, confederated and conspired together for the purpose of injuring the plaintiff in instituting and carrying on the prosecution which was the foundation of the action, there was no merit in a demurrer that there was a misjoinder of parties defendant. *Cheney v. Powell*, 88 Ga. 629, 634, 15 S. E. 750.

3. It was not only proper, but in the pres-

ent case it was necessary, so far as the liability of the partnership was concerned, that the plaintiff should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests; and it was therefore proper that the plaintiff should allege exactly in what way the partnership was involved in the matter which was the foundation of the prosecution. Those portions of the original petition relating to the manner in which the partnership was interested in the prosecution were not subject to the special demurrers filed to the same, and the amendment which was rejected should have been allowed in so far as it related to this matter.

4. Before a criminal prosecution will give rise to a cause of action in favor of the person prosecuted, against the prosecutor, it must not only appear that the prosecution

firm while under the superintendence of one partner in unloading a vessel which the firm had contracted to unload. The other defendant was not present when the accident happened. The court charged the jury that if they were satisfied that the defendants were copartners in business, and as such were jointly engaged in discharging the vessel, they were both liable in this action for the injury sustained by the plaintiff through the negligence of one of them, though one of the defendants was not present and took no part in the act which caused the injury. The plaintiff had a verdict, and exceptions to the instruction were overruled. *Linton v. Hurley*, 14 Gray, 191.

A journeyman blacksmith was engaged in welding iron in the shop of the defendants, who were partners as business blacksmiths, when one of them standing near the plaintiff suddenly and without warning threw what is called "cherry welding compound" a mixture of borax and iron filings upon the surface of the iron, whereby a sputtering flux was formed, and one of the liquid particles flew into the plaintiff's eye and so injured it that he lost the sight. It was held that a verdict in favor of the plaintiff would not be disturbed, and that an exception to the ruling that the copartners of the member of the firm could be held liable for his negligent or careless act was not well taken. *McCarragher v. Gaskell*, 42 Hun, 451.

Plaintiff's leg having been broken, he employed a firm of physicians and surgeons composed of the defendant and another to care for and treat him professionally. The other partner did treat him skillfully and well. The defendant also attended the plaintiff, and performed his duties negligently and unskillfully, causing the injuries complained of. In an action for damages occasioned by such injuries, against the defendant alone, the court sustained a demurrer to the complaint on the ground of defect of parties defendant. In affirming the order sustaining the demurrer the supreme court held that the principle running through all the cases is that where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion, or furnished the opportunity, for committing the tort. Where the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract either by malfeasance or nonfeasance, it is, in substance, whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be

sued. It was held, also, that, according to this test, it was clear that this was an action on the contract. The gist and gravamen is the breach of the terms, which, whether express or implied, were that these physicians and surgeons would treat the plaintiff with ordinary professional skill and care. It would have been impossible for the plaintiff to state his cause of action without alleging that the contract for the liability of defendant arose solely out of it, and not out of some general common-law duty independent of contract. *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632.

Where two or more physicians are practising their profession in partnership, reasonable care, diligence, and skill on the part of each in the performance of their duties is guaranteed by each and all of them; and if either fails to exercise such reasonable care, diligence, and skill in the management of a case intrusted to his care and resulting in damages all will be responsible. *Hyne v. Erwin*, 23 S. C. 226, 55 Am. Rep. 15.

Several railroad corporations associated for common purposes forming what might be termed a partnership of corporations, the association being unincorporated. Their common business was a running and traffic arrangement with each other, and having a sort of arrangement under a lease or contract with another railroad company owning tracks by which the trains and cars of the association were permitted to pass over such tracks. Defendant was a member of such association. Plaintiff's intestate was an employee thereof as a switchman stationed at the tracks before mentioned. While plaintiff's intestate was engaged in transferring a train of cars from the tracks and yard of the defendant's line across a portion of the tracks before mentioned, one of the cars leaped from the track throwing him to the ground, and the cars following passed over him, killing him. It was held that the several railroad corporations forming the association were jointly liable to the plaintiff for the death of her intestate, and also severally; and, this being so, this action could be maintained against the defendant corporation alone, and a judgment in favor of the plaintiff was affirmed. *Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412.

A sloop was navigated under a verbal agreement between the managing owner and the captain on condition that the owner should have one third of the net profits, the accounts of which were to be rendered to him by the captain from time to time. The captain was at liberty to go to any port, and take or refuse any cargo

was without probable cause, and that damage ensued therefrom, but it must also appear that the prosecution was maliciously carried on. In *Swift v. Witchard*, 103 Ga. 193, 29 S. E. 762, it was held that, before a criminal prosecution will be actionable, there must at least have been an arrest and an inquiry before a committing court. The Code declares that an inquiry before a committing court or justice of the peace amounts to a prosecution. Civil Code, § 3849. Where a search warrant is issued, and under authority of the same the premises of the person named therein are searched, and goods seized which are not described in the affidavit, and the person named therein is arrested and carried before a justice of the peace, and, after the prosecutor is allowed a reasonable time to secure evidence, he fails to do so, and in open court

announces that the prosecution cannot make out a case of larceny or receiving stolen goods against the person arrested, and asks that an order be entered discharging the accused from custody, and restoring to him the property which had been wrongfully seized, a prosecution has been "carried on," within the meaning of the statute, and, if the same is malicious and without probable cause, will give the person prosecuted a right of action against those who instituted and carried it on. Especially would this be true where the hearing was continued from day to day, and pending the same the accused was compelled, in order to obtain his liberty, to give a bond for his appearance before the magistrate to answer the charge of larceny.

5. The Code provides that the prosecution must be ended before the right of action accrues. Civil Code, § 3850. When the at-

he chose, and was also to hire and pay the crew and supply the stores, the managing owner having no control over the vessel. While discharging the cargo under a charter made by the captain for and on behalf of the owner, the vessel, through the negligence of the captain, broke loose from her moorings, and damaged the wharf of the plaintiff. It was held that both were responsible to the public for the negligence of the captain, and therefore both were liable in an action by the plaintiff. *Steel v. Lester*, L. R. 3 C. P. Div. 121, 47 L. J. C. P. N. S. 43, 37 L. T. N. S. 642, 26 Week. Rep. 212.

The act of negligence of one firm in respect to its own business will not bind another firm simply because a member of the former is also one of the latter. *Cobb v. Illinois C. R. Co.* 38 Iowa, 601.

2. When other members not liable.

Where two persons were joint owners of a ship, and one worked the ship, defraying all the expenses and taking the entire management, and took two thirds of the gross earnings; the other did nothing, and took the remaining one third of the gross earnings,—it was held that the result of these facts was that the former hired the share of the latter in the ship, and was not the partner or agent of the latter so as to render the latter liable in an action for damages caused by negligence of the former. *Burnard v. Aaron*, 31 L. J. C. P. N. S. 334.

d. Fraud.

1. General.

By the association of partnership each member of the firm holds out his associate to be worthy of confidence in their copartnership dealings, and the firm and each member thereof is liable in an action of fraud for the damages resulting from a false representation by an individual partner as to the solvency and confidential responsibility of a third person by means of which an innocent party is induced to accept the note of such third person in payment of goods purchased for the firm. *Hawkins v. Appleby*, 2 Sandf. 421.

In *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380, Selden, J., in delivering the prevailing opinion, stated the following exception to a well-known rule and axiom: The rule that the principal is never bound by the act of his agent, unless he has in reality authorized it, or has, by his declarations or conduct, given to the agent the semblance of authority for its performance; and that the act must in all cases

be brought within the actual or apparent powers of the agent,—does not apply where the act of the agent, so far as the party dealing with him has any means of discovering, is within the power, but where, by reason of some fact known to the agent and concealed or misrepresented by him it in reality exceeds his power.

It is, no doubt, strictly true that a man can no more enlarge, than he can create, a power, by any representation which he can make. But the answer is that, in the case supposed, and others of that class, the fact represented forms no part of the power itself. The precise extent of the power admits of no doubt. It is known to all the parties concerned. But there is a fact *dehors* the power, well known to the agent but misrepresented by him, which prevents his having a right to act. Who, in justice, should be responsible for this fraud of the agent? Where one of two innocent parties must suffer from the fraud or misconduct of a third, he who has reposed a trust and confidence in the fraudulent agent ought to bear the loss. *Hern v. Nichols*, 1 Salk. 289.

One of the members of a firm engaged in the business of receiving and storing grain for compensation issued in the name of the firm certain store-house receipts representing that the firm had received in storage on account of the person to whom and in whose name they were issued grain to the gross value of \$8,000. Plaintiffs loaned to such person upon the receipts and upon the credit of the grain \$4,865, and took a transfer and assignment of the receipts; and thereafter demanded the grain from the defendant, who refused to deliver it. As a matter of fact there never was any such grain in the store-house of the defendant, and the firm had never received it. The prayer for judgment in the complaint was that the grain be delivered to the plaintiff, and for damages for refusal to deliver, or for judgment for the value of the grain and for damages, or for such other and further judgment, etc. The plaintiff had a verdict at the circuit for the amount of the advances, with interest. Upon appeal, the general term of the supreme court ordered a new trial, and, on an appeal from that order, the court of appeals reversed the same, and ordered final judgment for the plaintiff upon the verdict. Three judges dissented upon the ground that neither replevin in the detinet, nor trover, could be maintained as to property which never had an existence. *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380.

One of the members of a firm of commission merchants had been selling goods of the plaintiffs. The plaintiffs had been in the habit of

torneys representing the prosecution announced in open court that they had no evidence to offer against the accused, and procured an order dismissing the warrant and discharging the accused from custody, and no further action was ever taken thereon, the prosecution was at an end, within the meaning of the law. See, in this connection, *Woodruff v. Woodruff*, 22 Ga. 237; *Horn v. Sims*, 92 Ga. 421, 17 S. E. 670. The ruling in *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 666, does not conflict with this. It was there held that, though one arrested upon a criminal warrant be discharged, the prosecution would not be at an end, if the prosecutor with due diligence follows up and carries on the prosecution in a court having jurisdiction to try the case upon its merits; this, in effect, being a continuation of the original prosecution. In the present case

no further action was taken by the prosecutors after the warrant was dismissed by the magistrate.

6. If a partnership is liable to be sued as such for a malicious prosecution, it will also be liable to be sued in the same manner, under similar circumstances, for a malicious arrest, as the two causes of action are of a kindred nature. Causes of action for malicious prosecution, malicious arrest, and false imprisonment, all sounding in tort, may be joined in the same action, when the plaintiff and defendants in each cause of action thus joined are identical. Civil Code, § 4944.

7. The warrant upon which the accused was arrested was neither defective nor void. The affidavit complied with the law, which declares that a search warrant should not issue except upon probable cause, supported

loaning their notes to the firm in the transaction of their business with each other, and of remitting the money. The defendants took care of these notes, taking up the same at maturity out of the proceeds of the property consigned and with money remitted by the plaintiffs, and in such transactions the plaintiffs were credited with the notes, with the proceeds of property, and with money remitted, and were charged with amounts paid to take up the notes. In 1875 the plaintiffs, at the request of the defendants, furnished them four promissory notes aggregating something over \$1,700, and payable on different days in February of that year, at the office of the defendants in the city of New York, to the order of plaintiffs, and indorsed by them. Thereafter one of the defendants represented to plaintiffs that his firm had not used, and could not use, its notes because they were made payable at their office, and requested plaintiffs to lend them four other notes of the same amount payable at a national bank in New York, to be used in place of the notes dated in February. There was evidence tending to prove that the plaintiffs, relying on the representation that the February notes had not been used, issued and delivered to the defendants four other promissory notes dated on different days in March, payable four months after date to their own order at the Metropolitan National Bank in New York. At the time the defendants requested to be furnished with the last-described notes they had in fact discounted, and put in circulation, the February notes, which the plaintiffs, as makers and indorsers, were compelled to pay to the holders. When the individual partner applied for the March notes, the defendants knew that they were insolvent, but that fact was not known to the plaintiffs. The plaintiffs were compelled to pay on the account of the March notes the principal and interest, the amount of the same for which they obtained judgment in the court below. Thereafter the defendants were discharged in bankruptcy. The bankrupt law provided that there should be excepted from the operation of the discharge any debt created by the "fraud or embezzlement of a bankrupt." It was held that the fraud of the individual partner, coupled with the knowledge of the members of the firm that they were insolvent when the March notes were used, constituted such fraud on the part of the partnership and all its members as to bar it and them within the provision of the exception referred to, and that the discharge was inoperative as against the plaintiffs, and the judgment of the court of appeals was affirmed. *Strang v. Bradner*, 114 U. S. 555, 29 51 L. R. A.

L. ed. 248, 5 Sup. Ct. Rep. 1038, Affirming *Bradner v. Strang*, 89 N. Y. 299.

One of the members of a firm had obtained from the plaintiffs a release of their claim on payment of 33¢ cents on a dollar. In an action to recover the balance this release was pleaded in bar. The proof showed that the release was obtained by means of representations on the part of the defendant that the affairs of the partnership were in bad condition, and that that was all that they could possibly pay. The plaintiff, having alleged that the release was obtained by fraud and misrepresentation, offered to prove by a sister of the other partner that he, being informed of the alleged settlement by the defendant with the plaintiffs at 33 cents on the dollar, which information he had received during the continuance of the partnership, said to the witness that the firm had at the time of the alleged settlement funds sufficient to have paid the debt due to the plaintiffs in full, which funds were at the time of the settlement in the hands of the defendant as liquidating partner; the defendant not being present at the time when the other partner made said declarations. The court refused to admit the declarations, and did not admit the same to go to the jury, to which refusal and nonadmission of said evidence the plaintiffs excepted and appealed. The court held that, according to the established and acknowledged doctrine of the common law, an innocent partner is constructively responsible for the fraudulent acts of his copartner when those acts are committed within the range and scope of the partnership transactions; that the fraud alleged to have been practised in this case by the appellee as the means of procuring the release was connected with the partnership transaction and employed by him as a false pretense to obtain a paper in the execution of which the firm was interested; that it was strictly within the scope of his authority; that the declarations of the other partner to show the untruth of the defendant's representations were admissible in evidence; and that the court below erred in rejecting them; and the judgment was reversed. *Doremus v. McCormick*, 7 Gill, 49.

The plaintiff was intimately acquainted with the senior partner of a firm, and consulted him as to her money matters, and, through him, employed his firm to invest her moneys. By a marriage settlement this senior partner and another were made trustees, and certain bonds and other property deposited with him in trust to pay the income to the plaintiff, independent of her intended husband, etc. The senior partner fell into pecuniary difficulties, and applied

by oath, particularly describing the place or places to be searched, and the person or persons to be seized. Penal Code, §§ 1243 *et seq.* Such being the case, the imprisonment resulting from an arrest under a warrant thus issued was not a false imprisonment. In *Joiner v. Ocean S. S. Co.* 86 Ga. 238, 12 S. E. 361, it was held that "where a warrant is regular and properly sued out, and the prisoner has been properly and legally arrested under it, the imprisonment cannot be false." In the opinion Mr. Justice Blandford says: "Where the arrest is by valid process, regularly sued out, action for malicious prosecution is the only remedy;" citing *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128; *Riley v. Johnston*, 13 Ga. 260; *Sewell v. State*, 61 Ga. 496. "It is a rule of law in this connection, which admits of no exception, that, where there is an arrest on

a valid warrant,—one neither void nor voidable,—it is not a false imprisonment, and no liability is incurred by any person whosoever, whether immediately or only remotely connected therewith. And the rule applies, no matter how corrupt or unfounded or mistaken the motives which induced the issuance or execution of the warrant may have been." 12 Am. & Eng. Enc. Law, 2d ed. pp. 739, 740, and cases there cited. The ruling in 86 Ga., *supra*, does not in any manner conflict with the decision in *Thorpe v. Wray*, 68 Ga. 359. While the headnote in the latter case says that the unlawful detention of another, though under a warrant, will give a right of action if done in bad faith, an examination of the facts of the case and the opinion will show that the decision was placed upon the distinct ground that the warrant was void. Even in a case where the warrant is defec-

the trust securities to his own use, and afterwards became bankrupt, and after a dissolution of the partnership, plaintiff filed a bill against the three solvent partners to make them responsible for the loss which occurred. Considerable of the securities were purchased out of the trust moneys through the firm, and a sum of 4,800 consols and £2,500 was alleged to have been left by the plaintiff to the firm. It was held that the transaction being in the regular line of the business of the firm, composed of the defendants and the insolvent senior partner, to wit, that of stockbrokers, the partnership, and each of the defendants as a member thereof, were liable for the funds and securities thus misappropriated. *De Ribeyre v. Barkley*, 23 Beav. 107.

Plaintiff employed a partnership to buy wine and to resell the same as opportunity might offer. One of the partners represented to the plaintiff that wines were actually purchased and sold, and from time to time rendered, in the name of the partnership, accounts of such sales, and paid the proceeds thereof to the plaintiff. The partner who assumed to have made this purchase wrote to the plaintiff that he had an opportunity of purchasing, and desired plaintiff to remit the money to pay the price of wines and duties thereon. The plaintiff did so, and the partner represented that he made the purchase, and afterwards in the name of the firm transmitted an account to the plaintiff, showing a purchase of three pipes at £65 per pipe, and sale of the same at £84 per pipe, and paid the proceeds of the pretended sale to the plaintiff. There were several other transactions similar to this, each transaction forming the subject of a separate account, and all purchases were described as being made at a certain specified rate per pipe. The plaintiff supposed the transactions bona fide. The other partner knew that the plaintiff had employed his partner to buy and sell wines on commission, but did not know that the transactions were fictitious. The whole transaction was a fiction, the partner who claimed to do so not having purchased any wine. The plaintiff had advanced £128,000, and had received on account of the supposed resale of part of the wines and the profits thereof, £130,000.

It was decided that the plaintiff could recover from the partnership as such and the other member individually, first, the £128,000 actually advanced by him, and, second, the amount which would be due according to the accounts of the several transactions furnished to plaintiff, as if they had been true accounts thereof. 51 L. R. A.

for the profits which they showed to have been made. *Happ v. Latham*, 2 Barn. & Ald. 793.

Plaintiff and F. were in possession of £17,061, 12s. 4d., in capital stock of navy 5 per cent annuities as trustees under a will. The defendants and F. carried on the business of bankers under the firm name of M. & Co. They instructed their broker to sell as much of the stock as would produce £16,000. Previous to this there had been lodged at the Bank of England, where this stock was standing to the credit of the plaintiffs and F. as trustee, a letter of attorney, purporting to be executed by the plaintiffs and F., to sell all or any part of £16,000, part of said annuities, which letter of attorney was executed by F., but the execution thereof by the plaintiffs was forged by F. The broker sold the stock for the net amount of £16,000, and caused transfers on the books of the Bank of England of part of the annuities to the amount of £7,000. Thereafter the plaintiffs and F. ceased to have credit in the books of the bank for that amount. The defendant S. attended at the bank and signed the demand to act indorsed on the power of attorney, and then executed two several instruments of transfer of the amount mentioned. Thereafter the residue of the annuities was in like manner transferred to the purchasers, the instrument of transfer having been executed by G., and the annuities were thereupon carried to the credit of the transferees on the books of the bank, and the plaintiffs and F. ceased to have credit for the same. The consideration money of the annuities was received by the broker and paid by him into the banking house where the firm, composed of the defendants and F., had an account to the credit of M. & Co., according to the usual practice. F. was permitted by his partners to conduct the greater part of the business of the house without their interference, and drew upon the account at the last-named bank, as he thought fit, without the knowledge and in fraud of his partners, more than the amount of the sum so paid in. Lord Tenterden, delivering the opinion of the court, said: "The ground of their (plaintiffs') demands is the actual receipt of money produced by the transfer and sale of their annuities. The sale was not a felonious act, neither was the transfer nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made. If public policy had required that the felonious inducement should prevent a claim of money afterwards received, as it would do if an action were brought against the felon for

tive or void, the imprisonment thereunder would not give rise to an action for false imprisonment, if the party suing out the warrant acted in good faith, and the officer executing the same acted in like manner. Civil Code, § 3852. The court below committed no error in sustaining the demurrer to the petition, so far as the count which claimed damages for false imprisonment was concerned.

8. Error is assigned in the bill of exceptions upon the refusal of the court to strike the answer of the defendants. No ruling will be now made on the question as to whether the answer set up a sufficient defense to the action. If the court below passed upon this question at all, it was in an irregular way. It must have passed on the question either before considering the demurrers to the petition, which would have been irregular, or it must have heard demurrers to the answer after the petition was dismissed, which would have been without authority. When the petition was dismissed the whole case went out, and there was nothing left to answer. In either view the

question is not properly before this court for decision. The proper practice where there are demurrers filed to both the petition and the answer is to first consider the demurrer to the petition. If this is sustained, the demurrer to the answer need not be considered. Direction will be given that all questions relating to the sufficiency of the answer be left open until another hearing.

9. The court erred in sustaining the demurrers so far as the counts for malicious prosecution and malicious arrest were concerned. These counts were not subject to any of the objections set up in the demurrers thereto, either general or special. There was no error in sustaining the demurrers to the count for false imprisonment. Direction will be given that the case be reinstated as to the counts for malicious prosecution and malicious arrest, and that the count for false imprisonment stand as stricken.

Judgment reversed, with directions.

All the Justices concur, except **Fish, J.**, absent on account of sickness.

the money received by a transfer obtained by his felony in lieu of a prosecution for the felony, a defense of another kind would be given. But that is not the present case, and, not being so, we think the plaintiff may entirely pass by the felony, and rely on the transfer and receipt of the money, and the defendants cannot protect themselves against the demand for the money which they have received by showing this felony on the part of one of the members of their house." *Stone v. Marsh*, 6 Barn. & C. 551, *Ryan & M.* 364.

In *Marsh v. Keating*, 1 Bing. N. C. 198, 1 Scott, 5, 2 Clark & F. 250, the facts were found in a special verdict, and a judgment entered up in said court and in the court of errors for the plaintiff for the purpose of the same being carried by a writ of error before the House of Lords. In the latter it was decided, affirming and approving *Stone v. Marsh*, 6 Barn. & C. 551, *Ryan & M.* 364, that a stockholder whose stock has been sold without his knowledge under a forged power of attorney may sustain an action for money had and received against the parties who hold the proceeds of the sale, they being the partners or the representatives of the partners of the person who forged the power of attorney. In this case the plaintiffs in error, the defendants below, were the same defendants as in the case of *Stone v. Marsh*, and the forgery of the power of attorney was by the same person as committed it in that case.

One of two members of a partnership was a director in a joint-stock association created for the purpose of carrying into effect loans and other financial operations. The partnership carried on business as stock brokers. The partner who was such director entered into an arrangement with a person to "place" the debentures of a railway company for a commission of 5 per cent, and at a meeting of the directors, without mentioning his arrangement, but merely declaring that he had an interest in the transaction, proposed to the association that it should undertake to "place" these debentures at a commission of 1½ per cent. The proposal was adopted, and debentures to a very large amount "placed" by the association. It was held that the partners were liable, jointly and severally, to make good to the association the profits which it ought to have received for the 51 L. R. A.

increased amount of the commission. *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 H. L. 180, 42 L. J. Ch. N. S. 644, 29 L. T. N. S. 1, 21 Week. Rep. 696.

When a partner in the course of a partnership business commits a fraud, or does acts prohibited by law, the firm is liable, although the other partners have no knowledge of such fraud or illegal acts. *Tenney v. Foote* (1880) 95 Ill. 99.

Where one who had entered a firm as special partner, by failure to conform to the requirements of the law regulating limited partnership had thereby become a general partner, and one of the general partners, being the executor of an estate, had embezzled trust funds by placing them, they consisting of interest-bearing securities, in the funds of the partnership, it was held that the knowledge of the special partner, who had thus become a general partner, as to the irregular loan made by his partner, the executor, was sufficient to put him on inquiry as to the manner in which the business of the firm was being conducted; and that, although there was no evidence to show that he participated in, or knew of, the fraudulent conversion, he was liable as a general partner to the estate. *Guillou v. Peterson*, 80 Pa. 163; Citing at length, and approving, *Marsh v. Keating*, 2 Clark & F. 250, 1 Scott, 5, 1 Bing. N. C. 198, and *Stone v. Marsh*, 6 Barn. & C. 551, *Ryan & M.* 364.

A loan was obtained by a firm from a bank upon the deposit of certain securities as collateral. Thereafter, on the order of the firm written by one of the copartners, and the deposit of certain municipal bonds, these securities were surrendered by the bank to an agent of the firm. The municipal bonds belonged to a third party, and were fraudulently so applied by such partner. They were afterwards sold by the bank, and the proceeds credited against the indebtedness of the firm to the bank. It was held that the innocent partner was liable in the action, and that it was not necessary for the plaintiff to show, in order to fix his liability, that the former securities went back into the assets of the firm, or were in some way of benefit to the firm after they were released by the bank. *Fripp v. Williams*, 14 S. C. 502.

Defendants had been partners in business of buying fat hogs and shipping them to market.

One of them conversed with plaintiff, who had endeavored to sell his hogs, and finally told him that they, the partners, could ship his hogs, as they had a lot on hand and his lot would make about two carloads. They did not agree on any certain price. The plaintiff was to pay whatever it was worth for the trip, for shipping. Plaintiff's hogs were shipped with others of defendants. Another of the partners was present at the time plaintiff delivered his hogs for shipment. The partner first mentioned went with the cargo of hogs to market, there sold them, received pay for them, and absconded. It was held that the defendant partners, the individual members of the firm, were liable to plaintiff. *Jackson v. Todd*, 56 Ind. 406.

Where a managing partner of a firm had been in the habit of borrowing small amounts from time to time to be used in the partnership business, and the plaintiff, being aware of that fact, loaned money to one partner in the form of a check, which the partner making the loan requested to be made payable in currency, and promised to return the amount within an hour from collections from bills which he showed that he then had in his possession, but which amount thus borrowed it was evident he intended to convert to his own use in fraud of the partnership, it was held that the partners were individually liable to pay the amount thus loaned. *Stark v. Corey*, 45 Ill. 431.

Where custom-house officers appointed to view 117 tuns and 13 gallons of wine, certified that 33 tuns were damaged, and sunk one third in value, and by mistake the clerk in the custom house allowed the whole 33 tuns for damage instead of one third, so that the Crown was defrauded of £535, the court decreed that though the importation and entry were made by one of the company or partnership, yet all the partners who were so at the time were liable in the whole to the Crown. *Atty. Gen. v. Stranyforth* (1721) *Bunbury*, 97. The only thing in the case that would indicate that the partners were liable as for a tort is the above statement, that the Crown was defrauded. The statement of fact would go to show that the liability of all the partners might have been on the ground that they had not paid the whole of the duty due to the Crown, but only a part, and that they yet owed two thirds of the duty on the 33 tuns.

The English bankruptcy act of 1869 provided that an order of discharge should not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust. It was held that where a debt has been incurred by one of several partners, for which the partnership is liable, and the partnership goes into liquidation under the act, a partner who has received his order of discharge is not thereby released from such a debt if it was incurred by fraud, though he himself was innocent of such fraud. *Cooper v. Pritchard*, L. R. 11 Q. B. Div. 351, 52 L. J. Q. B. N. S. 526, 48 L. T. N. S. 848, 31 Week. Rep. 834.

When persons occupying relations to others as partners, though not partners *inter se*, have obtained undue advantage by means of false representations and unlawful acts, they are answerable *in solido* for whatever loss has been incurred, without regard to their obligations as partners. *Ralvey v. Brackenridge*, 39 La. Ann. 660, 2 So. 410.

In an action by the United States against the defendants as members of a partnership, for violation of the revenue law, it appeared that one of the partners, in violation of the act of Congress, fraudulently marked, in the likeness and imitation of the inspector's mark, fifty boxes of manufactured tobacco with intent to evade the duties thereon, and afterwards

sold the same; that the other defendants and members of the firm had no actual knowledge of, and gave no actual consent to, such fraudulent marking and the sale thereof until this suit was commenced. It was held that the defendant was liable as a member of the partnership, as it was his duty, at his peril, to see that no such fraudulent marks were made on said boxes of tobacco. This was an action of debt under the provisions of the internal revenue act. It is a general rule that every partner is civilly responsible for the fraud of his copartner perpetrated in relation to the partnership business. On the other hand, it is generally a rule that in criminal law no man is punishable unless he has been guilty, both of a criminal act or omission, and a criminal or unlawful intent. Without the latter there can generally be no crime. Penal statutes not authorizing indebtedness have never been considered as within the rule. The same reason which would apply the rule to such statutes would also apply it to civil actions for libels. For every libel is a malicious defamation, and malice also supposes a wicked intent. Yet, in an action for a libel published in a newspaper against the proprietor it has been held that he was liable, though it was published against his orders and without his knowledge, in his absence. (*Dunn v. Hall*, 1 Ind. 344.) As well in the case of libels as in the case of revenue frauds, the act of an agent is the act of his principal, and in such cases the principal is liable under the rule *Qui facit per alium facit per se*. Now, every partner is an agent for all his copartners. His acts bind the firm, and are in legal contemplation the acts of the firm. *United States v. Thomasson*, 4 Biss. 99, Fed. Cas. No. 16,478.

In an action against the members of a partnership for the fraud of one partner in receiving money belonging to the state which the partnership was not entitled to take, it was held that one copartner is not responsible and liable to be punished on the criminal side of the court for the torts or crimes of his copartner, unless he has participated therein, and that that is the true intent and meaning of the provisions of the Code. But that, if in the business of the partnership money is received fraudulently by one member of the firm from an innocent party, both are liable to the latter for it; that if representations of certain facts as existing are fraudulently made by one partner unknown to the others in the partnership business, and the facts never existed, but the whole statement is a mere fiction, the firm will be bound to the same extent as if it were true and the facts existed. This whole doctrine proceeds upon the intelligible ground that where one of two innocent persons must suffer by the act of a third person he shall suffer who has been the cause or occasion of the confidence reposed in such third person. (*Story*, Partn. § 108.) *Alexander v. State*, 56 Ga. 478.

Where a Chinaman, who was a member of two Chinese firms, made a note signing the name of one of the firms thereto payable to the firm's order and indorsed by it by this individual member and also by the other firm, with a waiver of demand of payment, notice of nonpayment, and protest signed by the several indorsers, the defense was that the note was a forgery made and indorsed by the individual member of the two firms at the procurement of the plaintiff without consideration and without the knowledge or consent of the firms whose names appeared thereon as makers and indorsers, and that they were uttered by an individual member at the instance and connivance of the plaintiff for the purpose of defrauding the firms, the members of which were the defendants. Also that the signing of the one firm

name and indorsing it in the other firm name violated the provisions of their articles of co-partnership, which provided that no member of the firm should enter into any such obligation without the consent of all the members first obtained. It was held that under all the circumstances the testimony as to plaintiff's complicity in the fraud was not to be believed; that he was a bona fide holder; and that the defendants were bound by the individual member's apparent authority as a partner to indorse the notes. *Johnson v. Mon Lee*, 30 N. Y. S. R. 392, 10 N. Y. Supp. 9.

Where one of the members of a firm of promoters in the organization of a corporation made misrepresentations and concealments of other facts which he should have divulged, whereby persons were wrongfully induced to subscribe for stock, an action may be maintained by such persons against the partnership and all the members thereof, to rescind the purchase. *Walker v. Anglo-American Mortg. & T. Co.* 72 Hun, 334, 25 N. Y. Supp. 432.

In an action commenced by attachment, where one of the grounds assigned was that defendants were about fraudulently to conceal, remove and dispose of their property and effects so as to hinder and delay their creditors, and the fact stated upon which the conclusion was based was that one of the defendants' partners offered to hire a man to set fire to the store, which was insured to a considerable amount, but there was no evidence connecting the defendant copartner with this attempted wrong, the court refused to charge the jury, upon the request of the plaintiff, that it was not necessary for the plaintiff to prove that all the members of the firm were engaged in such attempts or designs. On appeal the court of appeals held that the action of the court upon this instruction was clearly erroneous, the alleged fraud was one touching the partnership property, and was about to be committed presumably for the benefit of the partnership. In such cases the partnership is liable for the wrong. *Wilson-Obear Grocery Co. v. Cole*, 26 Mo. App. 5.

Defendants sold goods received from plaintiff to be sold on commission. Prior to the sale, and at the time when it was made, the defendants represented to the plaintiff that the party to whom they made the sale was solvent, a safe, cautious business man, and every way worthy of credit. Facts and circumstances were proved to show that at least two or more members of the firm must have known at the time of the sale that the person to whom it was made on credit was insolvent, and utterly unworthy of credit. It was held that the partnership, and all the members thereof, were liable for the fraud of the partners who committed it, and that the plaintiff was entitled to recover against the partnership and the individual members for such fraud; citing *Story on Partnership* to the effect that if one of the partners should commit a fraud in the course of the partnership business all the partners may be liable therefor, though they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. *Castle v. Bullard*, 23 How. 172, 16 L. ed. 424.

A partner was sent by his firm to New Brunswick to buy shingles to be shipped to the firm in Maine. He passed the shingles through the revenue office as of American growth, and the firm received and disposed of them. Being (as was supposed) what he represented them to be, they did not pay the duty that they should have paid. In truth the shingles were of New Brunswick, and liable to duty. The court, in

holding that the partnership was liable to the penalties for violating the revenue law, held that partners are all liable to make indemnity for the tort of one of their number committed by him in the course of the partnership business. It rests upon the theory that the contract of partnership constitutes its members agents for each other, and that when a loss must fall upon one of two innocent persons he must bear it who has been the occasion of the loss, or has enabled a third person to cause it. These defendants received the shingles on their arrival at Bangor, presenting at the custom house false certificates of their American origin. They paid no duties, they removed the property to their own lumber sheds, and sold it and divided the profits, retaining a portion for themselves. They have, therefore, now the profits of sale of property which was not their own, but which had been forfeited to the United States, and they have secured, and now hold, these proceeds through the tortious act of their own partner who planned and effected the fraudulent importation for their benefit and his. *Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491. Mr. Justice Field dissented, holding that no act of a partner, done in violation of law, will bind his partners unless they originally authorized or subsequently adopted it. Such authorization and adoption are not matters to be presumed from the relation of the partners to each other, but are to be proved, like any other matters done outside of the scope of the partnership business for which liability is sought to be fastened on the firm.

Fraudulent representations by one partner in the course of the partnership business will bind the firm, and create a liability coextensive therewith. *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

Any tort committed by one partner in the course of the copartnership business will bind the partnership. But the selling of the interest of a partner in the property and interest of a firm is very different from conducting or operating the firm business. Such a sale necessarily works a dissolution of the firm, and what is sold is not what belongs to the firm, but to the individual selling. It was so held where all the partners in a concern but one sold their interest to the plaintiff, who purchased in order to become a partner of that one, and it was the fraudulent representations of the latter that were complained of. *Schwabacker v. Riddle*, 84 Ill. 517. This case is cited in the principal case, *PAGE v. CITIZENS BANKING CO.*, and the statement is there made that in *Schwabacker v. Riddle* it was held: "Partners are liable *in solido* for the torts of one, if committed by him as a partner in the course of the business of the partnership." The language above quoted was simply a statement of the judge who delivered the opinion, in passing. What was held, was as first above stated, and the decision was that the partners other than the one who made the fraudulent representations were not liable.

2. In purchase of property.

Where goods are obtained for the use of a firm by means of the fraud of one of the partners, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same situation in reference to the rights of the seller, as if he had directed his partner to procure the property, or had concurred with him in the transaction; and the result will be the same, if, on being notified of the frauds committed by his copartner, and that the firm will be held liable therefor, he omits to repudiate

or disaffirm what has been done by his copartner; and he will be held to have accepted and ratified the fraud, and will be from thenceforth deemed a joint wrongdoer. *Hawkins v. Appleby*, 2 Sandf. 421.

Where one member of a firm is guilty of fraudulent representations as to the solvency of the firm, and secures a purchase of goods thereby, replevin in the cepit will lie against the firm and the individual members thereof. *Olmsted v. Hotelling*, 1 Hill, 317; Citing and approving *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 323.

As has been said, replevin in the detinet and trover and conversion will lie on the same state of facts. The same may be said of replevin in the cepit and trespass. In the above case the court held that the fraud amounted to a wrongful taking.

One of the defendants by fraudulent representations induced the plaintiffs to sell him goods, and thereafter the defendants shipped the goods under a fictitious name to another part of the state. One of the defendants other than the one who made the representations went to the place where the goods were shipped, represented himself by the fictitious name, obtained the goods from the express company, and sold them for less than one half of their value. The declaration charged a conspiracy on the part of the defendants, and also conversion. The defendant who made the representations testified that the others were his partners, and the testimony disclosed that the other two assisted in putting up and shipping away some of the goods purchased from plaintiffs. The court held that if they were in fact partners, and one alone made the false representations upon which the goods were purchased for the firm, and they were fraudulently disposed of by him, all were jointly liable. (*Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073.) That if the other two defendants were not partners, but joined in, and knowingly assisted in, the fraudulent disposition of the goods, then all would be jointly liable, even though those two received no direct benefit. *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116.

The complaint charged the defendants, partners, with having purchased merchandise from the plaintiffs with a design to defraud the plaintiffs, and not to pay for the same, and asked a judgment against the defendants for the amount of the debt and adjudging them guilty of fraud in contracting it. The defendants admitted the purchase, but denied the fraud. The evidence tended to prove that the fraudulent purchase complained of was made by one defendant in the name of his firm. The court held that if the defendants or either of them fraudulently intended to procure the goods without payment the fraud was consummated when the possession of the goods was obtained without making payment on delivery, or on call according to the terms of sale. The debt was then fraudulently contracted. That all the partners will be bound by the fraud of one of the partners in contracts relating to the partnership made with innocent third parties. That all are responsible for the injury occasioned by the fraud, and are liable to an action brought upon the contract, or for the recovery of the property fraudulently obtained, whether they were cognisant of the fraud or not. A partner becomes liable for the fraud of his copartner because of the relation each bears to the other as agent in the partnership business, but that the partner who has no knowledge of the commission of the fraud, nor assents to nor ratifies it by adopting the act of his copartner with knowledge of it, is not liable for actual intentional fraud and moral

turpitude implied by a judgment against him for such fraud. *Stewart v. Levy*, 36 Cal. 159.

The three defendants were partners. One of them procured from the plaintiffs, possession of goods by means of fraudulent representations. Another, after the goods were in the possession of the defendants' firm, made equivocal and temporizing statements in regard to them. The third partner had no knowledge of what had been said or done by his copartners and was entirely innocent of any fraud in the matter. It was held by a divided court, in an action to recover for goods obtained from the plaintiffs upon fraudulent representations, that the innocent partner was liable to arrest. *Townsend v. Bogart*, 11 Abb. Pr. 355.

To the same effect, anonymous note to *Union Bank v. Mott*, 6 Abb. Pr. 315; *Sherman v. Smith*, 42 How. Pr. 198; *Bull v. Melliss*, 9 Abb. Pr. 58.

In a note to the last case, the case of *Wetmore v. Earle*, in the special term of the supreme court, *Davies, J.*, after consulting with *Ingraham, J.*, held a contrary doctrine, as was also done in *Hanover Co. v. Sheldon*, 9 Abb. Pr. 240.

In an action against copartners to recover a debt fraudulently contracted by one of the partners, all the partners are not liable to arrest, but only the partner who made the fraudulent representations. *National Bank v. Temple*, 30 How. Pr. 432.

One of the three judges composing the court dissented, basing his dissent upon the views expressed in the opinion of the chief justice of the same court in delivering its judgment in *Townsend v. Bogart*, 11 Abb. Pr. 355.

Where one partner in a firm obtains credit by false representations the other partner is not liable to arrest. *McNeely v. Haynes*, 76 N. C. 122.

Where one of three partners in the adventure of buying real estate advertised to be sold by the sheriff on execution is guilty of misrepresentation or other impropriety, the other partner cannot be held to be innocent so as to save any rights to them under a sale adjudged to be illegal, as each partner must be bound by the act of one managing the matter in hand, and his title must stand or fall accordingly. Acts of one partner in the purchase, to effect a fraudulent purchase at a sheriff's sale, will be imputed to all. *Blight v. Tobin*, 7 T. B. Mon. 612, 18 Am. Dec. 219.

Such contract, however, when ratified and adopted by the other members, becomes *inter partes* a valid debt against the firm. *McRae v. Campbell*, 101 Ga. 662, 28 S. E. 920; *Sparks v. Flannery*, 104 Ga. 323, 30 S. E. 823.

3. In sale of property.

Where one partner makes fraudulent representations while engaged in the sale of partnership property, a partnership and every member of it is liable to the party injured thereby. *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209.

Where one of two owners of a vessel made fraudulent representations in regard to its sailing qualities both of them were held to be liable for the fraud. *White v. Sawyer*, 16 Gray, 586.

One of two partners in a firm sold for the firm to the plaintiff a quantity of hogs representing, in addition to a general warranty, that they were raised in a particular place, which would indicate that they were unusually healthy. The hogs having proved to be unsound hogs and fatally diseased, this action was brought with two counts, one for warranty and the other for fraud. The action was sustained on the count for fraud, which, of course, necessitated knowledge on the part of the defendants.

The partner who defended had no knowledge whatever of the transaction, but, it having been shown that he was a partner, and that the selling of the hogs was in the due course of the partnership business, it was held that he was liable, not only for a breach of the warranty, but also for the fraud, the knowledge of his partner being imputed to him. *Morehouse v. Northrop*, 83 Conn. 388.

Where one of two partners sold a vessel and made representations to the seller that the vessel was in certain condition, but also stated that he knew nothing about it himself, but that his partner, the other defendant, had told him that such was the case, and it proved that the representations were false, by means of which the plaintiffs, the purchasers, suffered loss, it was held that where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated, but this rule is subject to some modification. The circumstances which modify it are that one partner states what was told him by another. He was either so informed by his partner or he was not. If he was so informed, then the representation was made by his partner and bound him. If he had not been so informed, then he made a false representation himself, and that bound his partner. Referring to his partner did not take away the effect of his statement, for they were joint owners engaged at the time in a joint undertaking respecting which the representations were made, and they were equally responsible for each other's statements in regard to it. *Cook v. Castner*, 9 Cush. 266.

Where one partner, while acting for the firm, makes an exchange of lands by means of false representations, the other partner is liable for the fraud, though he personally takes no part in the transaction, and is ignorant of the fraud. *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403.

All of the members of a firm are liable for a fraud committed by one of them in the sale of partnership property. In this case by direction of one of the defendants, who were engaged in selling linseed meal, their foreman mixed and sold teal-seed, which was inferior to pure linseed meal. The court instructed the jury that if one of the defendants sold the meal to the plaintiffs, such defendant knowing that teal-seed meal was inferior and of less value than linseed meal, this knowledge would bind the defendants, and be the same as if they all knew it. The exceptions to the instructions were overruled. *Locke v. Stearns*, 1 Met. 560, 35 Am. Dec. 382.

One partner cannot convey the whole title to the real estate of a firm, but where the firm are the owners of real estate he may, on behalf of the firm, enter into an executory contract to convey which will be enforced by a court of equity; and where a fraud is first perpetrated by him in the transaction and prosecution of such a partnership enterprise, all the partners are liable therefor, although the others had no connection with, knowledge of, or participation in, the fraud. *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550.

In New York no action can be maintained against a partnership as such, but must be brought against the partners individually. There can be no doubt that if the above case had arisen in Alabama, under the authority of *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 3 So. 800, the action might have been brought against the partnership by its common name, and the firm held liable as an entity.

Where one member of a firm was guilty of fraud in the sale of a lot of sheep pelts jointly owned by the firm the firm is liable to the 51 L. R. A.

party on whom the fraud was committed; as a tortious act of one partner will often create a liability against the firm, so a fraud committed by one partner in the case of the partnership business binds the firm, even though the other partners had no knowledge of, or participation in, the fraud. *Wolf v. Mills*, 56 Ill. 360.

4. As to trust funds.

(a) When other members liable.

General rule as to liability of a firm for money of a third person in the hands of a member of the firm as trustee, applied to the use of the firm with general consent, in *Hutchinson v. Smith*, 7 Paige, 26.

Where a firm of bankers permit a trustee to draw the trust funds from the bank for the purpose of paying an individual debt of his to them, they are liable therefor to the trust estate for the amount. *Pannell v. Hurley*, 2 Colly. Ch. Cas. 241, 83 Eng. Ch. Rep. 241.

Where one of the members of a firm was administrator of an estate, and used money belonging to the estate for firm purposes, all the other members of the firm having knowledge of the fact, and the firm having been adjudged a bankrupt, it was held that the administratrix *de bonis non* of the estate could prove claims to the amount so used for the benefit of the firm against the firm estate, and also against the individual estate of the partner who had made the misappropriation as administrator. *Re Jordan*, 2 Fed. Rep. 319.

Where a partner who is a trustee or executor improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debt, the *cestui que trust* will be entitled to reimbursement by the firm if the other partners have knowledge of the nature of the fund at the time of the employment. The other partners at the election of the *cestui que trust* are placed with the misappropriating partner in the attitude of trustees of the fund; and they are regarded as having connived at the violation of the trust. If they know that the fund belongs to an estate they are bound to inquire upon what terms it is held. The liability when incurred is a joint and several one. *Penn v. Fogler*, 182 Ill. 76, 52 N. E. 192.

Where one member of a partnership, who was the guardian of an infant, put the funds belonging to his ward into the business of the partnership in which they were used, with the consent of the partners, and died leaving such funds among the partnership assets, and the surviving partner, with notice of the facts, continued the business as surviving partner, and, becoming insolvent, made an assignment of all the assets, including the trust funds of the ward in his hands, the ward may maintain an action against the assignee to recover the fund so misappropriated. *Carter v. Lipsey*, 70 Ga. 417.

One of the defendants, executor of an estate, having in his hands money belonging to the plaintiff as residuary legatee, invested some of it with the other defendant in the purchase of one half of the interest of the latter in the property used in carrying on the business, and entered into a partnership with him. The other defendant had notice that the funds thus invested in the business by his partner were the funds which he held as aforesaid in trust for the plaintiff. It was held sufficient to put him upon inquiry. The investment was made without the consent or knowledge of the plaintiff, and when she had sufficient notice to put her upon inquiry she did inquire into the matter, and without any delay or laches, commenced the action. It was held that both defendants

were liable for the misappropriation of the funds belonging to the plaintiff. *Trull v. Trull*, 18 Allen, 407.

An administratrix commits a breach of trust by continuing money of her intestate in trade; and the partners knowing that a certain proportion belonged to the children of the intestate, who being infants could not contract, held the money on the only terms on which they could hold it as debtors to the children; as if it had been placed with them by way of direct loan. The clear principle of equity is that if the trustee has made use of the trust property the *cestui que trust* has an option to have the profit actually made, or interest. *Ex parte Watson*, 2 Ves. & B. 414, 2 Rose Bankr. Cas. 269.

A firm of commercial correspondents of the executors of an estate, acting under a power of attorney, were held to be responsible to the testator's estate for the amount of the produce of stock, part of such estate sold by them, and applied by the direction of the executors in payment of a balance due from the latter as partners in a commercial concern to their correspondents with full knowledge on the part of the correspondents' firm that the stock was part of the testator's assets. *Wilson v. Moore*, 1 Myl. & K. 127.

One of two partners was the assignee of bankrupts. He applied certain funds in his hands as such to the business of the partnership, to the knowledge of his partner. Thereafter the partnership was dissolved, both members then being solvent, and in the settlement between them the amount of the trust fund so put into the business of the firm was allowed to the partner who was assignee by the other. It was held that the plaintiffs, the new assignees of the bankrupt, could recover the amount thus invested of the partnership; that having received the money with knowledge of its source by both partners, a payment or allowance from one to the other did not discharge the partnership from its obligation to repay it to the fund from which it was taken. *Smith v. Jameson*, 5 T. R. 601, *Peake, N. P. Cas.* pt. 1, p. 279.

One of the members of a firm received money as county treasurer. He appropriated it to a debt from the firm to himself, charged himself with it on the books of the firm in satisfaction of his debt, and made an entry in his books as county treasurer that he had invested the amount of the trust funds, held by the order of the court. It was held that all the members of the firm were liable to the beneficiary. *Price v. Mulford*, 86 Hun, 247.

Where two of three partners who were trustees for certain real estate sold the same, and, instead of applying the moneys arising from the sales according to the trusts of the will, they appropriated them to partnership purposes, with the knowledge of the other partner, it was held that the partnership was liable for the misappropriation of the funds. *Ex parte Heaton*, Buck, 386.

Plaintiff and her husband were clients of a partnership of solicitors consisting of father and son. Plaintiff was possessed to her separate use of a sum of £3,000 which the solicitors advised her on account of her husband's pecuniary difficulties to invest without his concurrence, and on their suggestion she advanced them £1,300, part of the £3,000, which they proposed to advance to another client to purchase an advowson, agreeing to secure her with a mortgage of the advowson. When the transaction was completed plaintiff afterwards advanced to one of the members of the firm the remaining £1,700 on the representation by him that it would be invested on mortgage of the real estate of another client. Thereafter the

other member of the firm died leaving a solvent estate, and after his death the plaintiff was fraudulently induced by the remaining member to execute a deed constituting him sole trustee of the £3,000, and empowering him to invest it as he thought proper without being answerable for any loss. No legal mortgage of the £1,300 was ever effected, and it was paid to the surviving partner under the authority of the last-named deed, and the £1,700 which had never been invested was spent by him. He continued to pay the plaintiff interest on these funds for more than six years after the death of the solvent partner, and died insolvent. On a bill against the executors of the solvent partner, it was held that his estate was liable to make good the loss of the £1,300; that, in consequence of the regular payments of interest by the defaulting partner, laches was not attributable to the plaintiff for not enforcing her rights sooner; and that the dealing with the £1,700 was not part of the regular business of the firm as solicitors, and the receipt of it by one partner alone did not make the other partner liable, and the estate was not liable to replace this fund. *Plumer v. Gregory*, L. R. 18 Eq. 621, 48 L. J. Ch. N. S. 616, 81 L. T. N. S. 80.

Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of the firm is money paid to the firm in the course of their professional business; and consequently members of the firm are liable to make good loss occasioned by the negligence or dishonesty of their partner by whom such money was received. *DunDonald v. Masterman*, L. R. 7 Eq. 504, 38 L. J. Ch. N. S. 350, 20 L. T. N. S. 271, 17 Week. Rep. 548.

D., the partner of the defendant, had been engaged in the business of attorney and conveyancer, and previous to the partnership had received from a person the sum of £350 to be laid out on real security. He furnished the party with a mortgage from an apparent H., which it afterwards appeared he had forged. Five years afterwards the defendant entered into partnership with him, after which the investor desired to call in his money. The pretended mortgagor was then supposed to want the further sum of £150, making, with the original mortgage money, £500. In consideration of the plaintiff advancing the latter amount, an assignment was made to him of the pretended mortgage. £180 of the £500 plaintiff paid to the defendant, who gave him this receipt: "Received of Mr. B. W. the sum of £180 for which I promise to account to him on demand. Chambers." The defendant's partner was not at home when the sum was paid. Some time afterwards the plaintiff called at the office to pay £300, part of the remaining £320 due. The partner then being at home, plaintiff paid the money to him, receiving his receipt for £300, stating that £20 was still due. It was admitted that the defendant was in no respect privy to the forgery, and that no procuration money was paid to either of the partners. It was held that the transaction with the plaintiff, although based upon the original forgery of the defendant's partner, was nevertheless a transaction with the partnership, and that defendant was liable. *Willet v. Chambers*, 2 Cowp. 814.

Plaintiff executed to his solicitors a power of attorney to receive money, being the share of a fund to which he was entitled, which had been paid in court. The solicitors were partners, and one of them enclosed the power of attorney to receive the money to the plaintiff, together with a letter stating the amount that would be due for principal and interest, and asking direction as to the disposition of the money. The power of attorney was to Messrs. Smart,

Buller (the partnership), jointly and severally. Under this power of attorney, Buller alone received the money, signed the receipt in his own name, paid the money into his private banking account, from which he shortly afterwards drew it out, and absconded. It was held that the partnership was responsible for the consequence of Buller's wrongful act. *St. Aubyn v. Smart* (1868) L. R. 3 Ch. 646, 19 L. T. N. S. 192, 16 Week. Rep. 1095.

Plaintiff applied to a member of a firm of solicitors for a loan of money on a mortgage. He was told by the person he applied to that it would be necessary to give collateral securities in addition to the security of the mortgage. These securities were then in the possession of the firm, and plaintiff had therefore, through the firm, obtained loans upon these securities. The statement that the parties from whom the loan was to be made required additional security as collateral was false. The member of the firm with whom the plaintiff dealt sold the shares that were in the hands of the firm as collateral to the loan mentioned and absconded. On two previous occasions the plaintiff had deposited the same securities with this individual member to enable him to raise temporary loans, notice of which transaction appeared in the books of the firm; and it appeared that the firm were in the habit of holding securities payable to bearer, and also sums of money, for their clients. In an action to, among other things, make the partners, as a partnership, liable for the loans of the share, it was held that it was within the scope of the apparent authority of the individual partner to take the custody of the share warrants payable to bearer, and that his partners were liable for his misappropriation of them. *Rhodes v. Moules* (1895) 1 Ch. 236, 64 L. J. Ch. N. S. 122.

Money was paid to one of a firm of solicitors to be invested on a mortgage. It was remitted to him by a check which he paid into the joint account of his firm at their bankers. About a month afterwards he drew out the amount thus deposited, which was never invested, but misapplied by him. He, however, represented that the money had been invested on a mortgage, and he paid the interest for six months. It was held that the client forwarded the money to an individual partner, relying upon his representation, but at the same time on the joint judgment of himself and his partner. The master of the rolls said: Where, as in this instance, money is received by one member of a partnership for the express purpose of a special investment, and it is paid by him into the partnership account, instead of being properly invested, and when the proceeds of that account are received by the firm, it is impossible to say that one partner is not liable for the misconduct of the other in the misapplication of the funds. *Eager v. Barnes*, 31 Beav. 579, 7 L. T. N. S. 408.

A tenant for life of settled estates obtained an act of Parliament for selling the estates and investing the proceeds under the direction of a court for the purchase of other lands to be settled to the same uses. After the estates had been sold and the money paid into court the tenant for life fraudulently obtained an order under which part of the money was paid out to him. One of three partners of a firm of solicitors who acted as such for the tenant for life in obtaining the orders and in every other proceeding under the act was aware of the fraud, but the other two members of the firm were wholly ignorant of it. In an equity suit instituted by the remaindermen after the death of the tenant for life it was held that all three of the partners, and the estate of the tenant for life, were jointly and severally liable to make

good the money. *Brydges v. Bransill*, 12 Sim. 369, 11 L. J. Ch. N. S. 249, 6 Jur. 310.

Where one of a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, it was held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount. It was also held that all the partners were necessary to a suit for that purpose. *Atkinson v. Mackreth*, L. R. 2 Eq. 570, 35 L. J. Ch. N. S. 624, 14 L. T. N. S. 722, 14 Week. Rep. 883.

A. and R., having for many years been partners in business as solicitors, dissolved their partnership, and the business continued to be carried on by A. alone for seven years thereafter, when he became bankrupt. It was then ascertained that a sum of money which had been paid by a client into the general account of the firm at their banker's five years before the dissolution, for the purpose of investment, and which A. had shortly afterwards represented to have been invested, and on which he had regularly paid interest, had been appropriated by him to his own use, and not invested at all. Upon a bill filed by the client against B. to make him liable for the money, it was held, first, that, assuming that defendant was personally ignorant of the whole transaction, and had derived no benefit from the fraud, he was bound by the representation of his partner, the same being in reference to a matter within the scope of the partnership business, and amounting to a guaranty by the firm to the parties concerned; and that, although the plaintiff might have a right of action at law for the money, he had a concurrent remedy in equity on the ground of the fraud. *Blair v. Bromley*, 5 Hare. 542, 16 L. J. Ch. N. S. 105, 11 Jur. 115, Affirmed in 2 Phill. Ch. 354, 16 L. J. Ch. N. S. 495, 11 Jur. 617.

A firm of attorneys at law received and receipted for claims for collection by suit. Suits were instituted, and the judgments recovered on both of said demands. Thereafter one of the partners died, and after his death the other collected the money, but it was not paid to the claimants. The other partner subsequently died insolvent, and, there being no partnership assets to be applied to the payment of these claims, the estate of the partner who died before the money was collected by the other was held liable for their payment. *McGill v. McGill*, 2 Met. (Ky.) 262.

A firm of lawyers received a note from the plaintiff for collection. One of them was administrator of an estate which was indebted to one of the parties, who executed the note in a larger amount than the amount of the note upon a settlement. The administrator returned the amount of the note, and executed a receipt in the name of the firm for the amount of the note and interest. It was held that the giving of a receipt by the administrator, who was a member of the firm of attorneys, in the name of the firm, was a receipt of the money due their client, and made the other party responsible for it. The partner who was administrator had left the state. The firm was dissolved, and the other partner knew nothing of the transaction until his partner had gone, and never received any of the money. A motion was entered against him for the amount of interest, damages and costs under sections of the Code giving this summary remedy in certain cases against attorneys, and, under another pro-

vision, he was stricken from the roll of attorneys and disqualified to practise until the debt was paid. This action was affirmed. *Porter v. Vance*, 14 Lea, 629.

(b) *When other members not liable.*

The general rule is that where a partner lends trust money to his firm no debt is created against the joint estate in favor of the *cestui que trust*, unless the fact of its being trust money is known to the other partners. *Willett v. Stringer*, 17 Abb. Pr. 152.

Neither the partnership, nor the individual partners other than the trustee, are liable for trust funds paid into the firm business by a partner who is a trustee, unless all the other partners have knowledge of the character of the funds thus put in. *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497; *Shaffer v. Martin*, 25 App. Div. 501, 49 N. Y. Supp. 853.

An administrator *de bonis non* invested trust funds belonging to his estate in a lease of furniture and possession of a hotel in partnership with another. The other sold his interest afterwards to defendants. Thereafter plaintiff was appointed by the supreme court trustee of the estate. The trust estate was capable of being traced, identified, and distinguished in the investment made by the administrator in the said hotel and in the business carried on by him in connection with the other defendants. The other defendants when their interest in the said property and business was acquired had no notice or suspicion, nor any reason for any, that the interest of the administrator had been purchased with money he held in trust, or that he was not the absolute and bona fide owner thereof by his own right. It was held that when a partner lends trust money to his firm, his *cestui que trust* do not become creditors of the firm, and are not entitled to share as such in the distribution of its assets, unless the fact of its being trust money is known to the other partners. *Hollembaek v. More*, 12 Jones & S. 107; *Jacques v. Marquand*, 6 Cow. 497; *Ex parte Heaton*, Buck, 386; *Ex parte Aspey*, 3 Bro. Ch. 265; *Ex parte Watson*, 2 Ves. & B. 414, 2 Rose Bankr. Cas. 259; *Willett v. Stringer*, 17 Abb. Pr. 152.

Where a partner, who is a trustee, pays into the partnership as his share of the partnership capital trust funds in his hands without the knowledge, on the part of his partner, of the character of the funds, neither the partnership nor the partner will be liable to the *cestui que trust*. *Gilruth v. Decell*, 72 Miss. 232, 16 So. 250.

Where an executor had made a loan of trust funds to a firm of which he was a member, and thereafter had drawn out all of the money that he was entitled to draw, such drawing being from time to time, and the total amounts of which included the amount of the loan, it was held that, as he had drawn all that he had a right to draw on account of his share of the capital and the loan in question, although it was entered generally to his private account without further designation, yet a subsequent application to the account in question—that is to say, the loan—could not be considered as inequitable or fraudulent in respect to these complainants who were the residuary devisees. *Sherburne v. Goodwin*, 44 N. H. 271.

Where a client had corresponded and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners under the summary jurisdiction of the court, to compel them to pay the money, was refused as to the two partners. *51 L. R. A.*

who had thus been excluded from the fair means of the knowledge of the remittance. *R. Lawrence, 2 Smale & G. 367*, 23 L. J. Ch. N. S. 791, 18 Jur. 742.

The defendants, who were in partnership as solicitors, were employed by a person to lay out £500 on a mortgage. They lent the money to another person on mortgage of certain premises, and retained possession of the mortgage deed. The premises were afterwards sold subject to the mortgage, and the purchaser paid the amount of the mortgage to one of the defendants, and took up the mortgage deed. He afterwards delivered the mortgage deed to the same defendant, and received £300. The interest was kept up by the defendant partner engaged in this transaction, he receiving the interest on the £300 from the purchaser, and the purchaser afterwards paid up the £300, and again took the mortgage deed. The interest money was paid to the client and his agent variously, and after a number of years the client died. Previous to his death the defendants had dissolved partnership. The other defendant and partner was ignorant of the receipt and payments by his partner subsequent to the investment of the £500 until three years after the purchaser paid the £300 and received back the mortgage deed. In an action by the executors of the client against the defendants as members of the partnership it was held that no action would lie against the one partner inasmuch as the subsequent receipt of the mortgage by the other was wholly unauthorized, and not within the scope of the partnership business. *Sims v. Brutton*, 5 Exch. 802, 20 L. J. Exch. N. S. 41.

It is not the ordinary business of a solicitor to receive money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally; and one partner is not liable for the misapplication of money so received by another without his privity. If the money had been received for the purpose of being invested in a specified security, the partner would be bound; but until the matter was brought to an agreement to invest the money on the representation of a specific security it did not come within the ordinary business of the partnership. *Bourdillon v. Roche*, 27 L. J. Ch. N. S. 681.

Certain bonds payable to borrower were deposited with a member of a firm of solicitors by trustees under a will. The solicitors were acting for the estate. The other partners had no knowledge of the deposit, but letters referring to the bonds were copied in the letter book of the firm, and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. The partner with whom the bonds were deposited paid some of the interest on the bonds by checks of the firm, but on each occasion recouped the firm by a check for the same amount on his private account. He afterwards misappropriated the bonds. It was held, reversing the judgment, that the checks, letters, and entries were too ambiguous to affect the other partners with acquiescence in their partner having the custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation. *Cleather v. Twisden* (1884) L. R. 28 Ch. Div. 340, 52 L. T. N. S. 330, 54 L. J. Ch. N. S. 408, 33 Week. Rep. 435.

5. *For individual debt or benefit.*

The general rule as to liability of the firm for money borrowed in the name of the firm and misappropriated by an individual partner is

given in Real Estate Invest. Co. v. Smith, 162 Pa. 441, 20 Atl. 855.

A receiver remitted to his solicitors as his agents money to be paid into court by them to the credit of the cause. The same firm were also solicitors of the plaintiff. One of the firm misappropriated the funds, and absconded. On a motion by the plaintiff in a summary proceeding to compel the firm and the other members of it to pay the money belonging to the plaintiff which had been thus misappropriated by the partner, it was held that the motion could not prevail, as he had received the money as the solicitor of the receiver, and not of the plaintiff. *Dixon v. Wilkinson*, 5 Jur. N. S. 1003, 4 De G. & J. 508.

In an action on a bill of exchange alleged to have been directed to the defendants and indorsed by the drawer and payee to the plaintiff, it appeared that the six defendants carried on business in partnership at the time of the acceptance. The acceptance was written by one of them, and the jury found that he accepted in the ordinary name of the firm, but that the bill was drawn and accepted in fraud of the partnership, and not for partnership purposes. A verdict was directed for the plaintiff reserving leave to move to enter a verdict for the defendants. The court, in refusing the rule, held that where issue is joined on a plea of *non acceptit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet if the proof does not affect the plaintiff with knowledge of the fraud, it does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction. *Musgrave v. Drake*, 5 Q. B. 185, Dav. & M. 347, 13 L. J. Q. B. N. S. 16, 7 Jur. 1015.

Two of three members of a firm engaged in a cotton business were also partners in a grocery business. The third member in the cotton business was not interested in the grocery business, and took no active part in the cotton concern, and was not known to the world as a partner. The two partnerships had the same firm name. The partners in the grocery business, having become indebted to a third party, gave him their acceptance, which not being able to take up when due they, in order to provide for it, indorsed in their common firm name which was applicable to either partnership a bill of exchange to him which they had received in the cotton business in which the third silent partner was interested, and which indorsement was unknown to him, and the party to whom the indorsement was made had no knowledge of him. It was held that such indorsement of the firm name, common to both partnerships, of a bill received by the two partners in the cotton business, bound their partner in that business; and that he was liable to be sued by the indorsee on such indorsement, the latter not knowing of the misapplication of the partnership fund at the time. *Swan v. Steele*, 7 East, 210, 8 Smith, 199.

One of two partners as woollen drapers borrowed money from the plaintiff, and gave a note for the same from himself and partner. Though this money was not brought into the partnership, nor the note given with the privity of the other partner, it was yet held that the other partner was bound. *Lane v. Williams*, 2 Vern. 277.

A township treasurer, a member of a firm consisting of two, deposited the greater portion of the public funds in the bank to the firm's credit in common with the private funds of the partnership, and from time to time orders were drawn on the treasurer and paid indiscriminate-

ly by the firm's checks on this deposit. The firm dissolved, the first-mentioned partner purchasing the stock of goods on hand and the notes and accounts, and he was to pay all partnership liabilities. In a schedule of such liabilities there were \$6,000 due the township, which he paid before the hearing in the court below. No attempt had been made during the existence of the partnership to treat this deposit of public moneys otherwise than as partnership moneys, and they were used as a common fund subject only to partnership check. It was held that such deposit and use of the public moneys by the treasurer as such were in violation of a statute, being a conversion of the public moneys to the use of the partnership; that the other partner, having with full knowledge consented and approved this mode of doing business, and participated in it, was in law alike guilty with his partner for such unlawful conversion. The partnership was liable to the public authorities for the money thus converted; that the partners were *particeps criminis* in the transaction, and the law will leave them where it finds them, and assist neither against the other. The partner who was treasurer having, under the agreement of dissolution, paid the liability to the township partly out of partnership assets and partly out of his own means, the legal transaction was consummated, and he had no right of contribution from his partner; but the other partner, having parted with all his interest by the dissolution agreement, reserving only a right to half of the surplus, was not entitled to an account which rejects the payment made by his partner, and he is only entitled to an account for the surplus remaining after crediting the partner with the amounts paid on the illegal transaction. *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593.

Two firms engaged in the same business formed a partnership for the manufacture and sale of their goods,—that is to say, each firm was a member of the partnership. Afterwards, in consequence of the death of a member of one of the firms, the general assembly by special act created the other members of that firm and the widow and children of the deceased member a corporation. The preamble to the act stated that it was for the purpose of protecting the business of the different members. The corporation, without any further agreement, assumed and took the position of the firm it represented in the partnership, which had been composed of the two firms. By the original articles of partnership between the two firms each was to be allowed to draw on the main partnership to the amount of three fourths of the price of goods sent by it for sale. Drafts were drawn by the other firm, which was a member of the partnership, on the main partnership, to a greater amount, and were discounted by the plaintiff. These drafts were indorsed by a stockholder, who had, until a short time before, been a director of the corporation. The plaintiff knew the provisions of the articles of co-partnership, but did not know that the drafts were in excess of the authorised payment, which appeared only on the books of the main partnership in the city of New York while the plaintiff resided in Connecticut. The plaintiff knew, however, that the drafts were discounted for the benefit of the firm who drew them, and that they were greatly in need of money. It was held that these facts were not sufficient to put the plaintiff on inquiry as to whether the corporation considered itself liable on the acceptance of the main partnership, and that the corporation, as a member of the main partnership, was liable to the plaintiffs on the acceptance. *Butler v. American Toy Co.* 46 Conn. 186. The decision was by a divided court, two of the

three judges dissenting on the ground that the admission of the corporation, or its continuance as a member of the partnership, was *ultra vires*.

Where a party knew when he received an instrument from one of the partners of a firm, or had reason to believe, that it was in payment of the partner's debt, or for his own peculiar advantage aside from the partnership benefit, he acquired no right by this attempted prostitution of the firm; and neither justice nor convenience requires that the person who has knowledge of the fraud, or is ignorant through gross negligence, should have the right to subject a partnership by the contract of one of the partners made for his own benefit. *New-York Firemen Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109.

6. Estoppel.

The appellants, defendants below, were the owners of property, and leased it to another. The appellee, plaintiff below, claimed that he applied to one of the firm for information in regard to the lessee; told him he was negotiating for a partnership with him to buy a half interest, and the defendant told him the property belonged to the lessee. There was nothing to show that the other partner ever had any information that any such conversation had taken place between the appellee and the partner. The action was for maliciously, and without any probable cause, taking the chattels of the appellee of the value as the jury found of \$350. The jury found that the conversation mentioned did occur; that the appellee relied upon the statement made to him by the defendant with whom the conversation was held, and bought from the lessee first the one half, and then the other, of the property in dispute, and that it was worth \$350. The jury found a verdict for \$850. The court held that there was no foundation for vindictive damages against the partner who did not have the conversation and knew nothing of it, and that as to him the verdict was wrong, but that for the actual damages, the appellants being partners, were both liable for the taking of the property in which taking they both joined, although his title as against them was by estoppel by reason of the representations of one partner without the knowledge of the other. What either partner does or says as to partnership property is, as to third persons in good faith acting upon it, as if done or said by both. The appellee remitted the amount added to the actual value of the property and interest, and the judgment for the balance was affirmed. *Wanner v. Winters*, 38 Ill. App. 149.

As to estoppel in trover, see *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846, III. a, *supra*.

e. Approval of other members—firm accepting benefit.

The defendants were partners in business as brewers; and one of them assisted in the dispossessing of the plaintiff from premises for the rent of which the firm were obligated as sureties for the plaintiff. The court held that one partner has no right to involve another, or to pledge him to a fact, unless in the ordinary course of business. In a case of trespass, one partner cannot involve another in the same mischief; yet there may be exceptions, even to such a case, where, for instance, the trespass is in the nature of a taking which is available to the partnership, more especially if the other partners afterwards agree and consent to the act. *Petrie v. Lamont*, 1 Car. & M. 93. 51 L. R. A.

One partner has no right to involve another unless in the ordinary course of their business,—for instance in a trespass,—except in the case where the trespass is in the nature of a taking which is available to the partnership,—and in such case to render one partner liable who did not join in the commission of the trespass, he must afterwards have concurred in it, and received the benefit of it. *Grund v. Van Vleck*, 69 Ill. 478. Citing *Petrie v. Lamont*, 1 Car. & M. 93.

All the members of a partnership company are liable for the tortious act of one of their number when committed in furtherance of the partnership business, and for its benefit. *Dudley v. Love*, 60 Mo. App. 420.

In *Ex parte Bonbonus*, 8 Ves. Jr. 540, late Chancellor Eldon said: "In *Fordyce's Case* Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted upon the danger of placing every man with whom the paper of a partnership is pledged at the mercy of one of the partners with reference to the account he may afterwards give of the transaction. There is no doubt, now, the law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advised, by the nature of the transaction, that it was not intended to be a partnership proceeding, as, if it was for an antecedent debt, *prima facie* it will not bind them; but it will if you can show previous authority or subsequent approbation, a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership and different private concerns it is frequently necessary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions, therefore, must be looked to, as well as that at the time."

The petitioner and the member of a partnership were assignees of a bankrupt. The assignee who was a member of the firm received several sums of money which he paid and applied in discharge of debts due from him and his partner, and otherwise in the joint trade; thereafter the partnership was adjudged bankrupt, and the petitioner, as assignee of the original bankrupt, was permitted to prove the claim against the joint or partnership estate. *Ex parte Apsey*, 3 Bro. Ch. 265.

Plaintiff and his cotrustee executed a power of attorney whereby they empowered the three individual members of a partnership of bankers jointly and severally, not only to receive the dividends of certain stock standing in their names as trustees, but also to sell the capital. The firm according to the power through their London agents received the dividends. The power of attorney was sent to the broker of the firm, who received it, and deposited it in the proper office of the Bank of England, where it remained. Seven years thereafter the broker, by the directions of one member of the firm, sold a part of the trust stock, and the individual member transferred the same at a discount, which he paid into the bank in London, who was the firm's correspondent, to the credit of the firm; thereafter the broker again, by the direction of the same individual member of the firm, sold further part of the trust stock at a discount, which was partly applied by him to the use of the firm, and the rest paid to their said correspondent to the credit of the firm. A similar transaction thereafter took place for a further part of the trust stock. The sums of stock thus sold amounted in all to £10,963, 7s. 11d., and the sum of £10,388, 7s. and 10d., cash,

was the aggregate of the proceeds. The several sales were personally directed by the individual member of the firm spoken of, but they were effected under the power of attorney which was confided to the firm. Previous to the first sale, one of the partners had died and another person had been taken into the firm, and the firm name changed by substituting in it the name of the new member for that of the deceased partner. The sales were effected by the broker employed by the latter or new firm, and the proceeds were by him paid to the credit of the account subsisting between the latter firm and their correspondent. The sales were concealed and the dividends of the stock accounted for by the individual member for some time. It was held that the partnership was liable for the amount of the stock so sold. *Sadler v. Lee* (1843) 6 Beav. 324, 12 L. J. Ch. N. S. 407, 7 Jur. 476.

Where the property taken by the wrongful act of the one partner was appropriated to the use and benefit of the firm, thereby increasing its assets, it was held, affirming the judgment of the trial court, that the defendant, as a member of the firm, was liable for the tort or wrongful act of his partner in selling and taking the property of the plaintiff. *Durant v. Rogers*, 87 Ill. 508.

Where two partners in business made a compromise of their debts, and transferred their property to pay a certain per cent thereon upon being discharged for the balance, and at the same time agreed that any fraudulent representation or concealment of property should revive the claim for the balance, and during the negotiations one of the partners, without the knowledge of the other, made statements relative to some of the property conveyed, tending to show fraud, it was held, in an action against both to recover the balance on the ground of fraud, that these statements were competent evidence. *Pierce v. Wood*, 23 N. H. 519.

In an action of trespass against two partners failure to prove that one had never been on the plaintiff's land which was the subject of the alleged trespass is not conclusive that he was not liable for the trespass charged, where the evidence shows conclusively that he was a partner in business of the other defendant, and tended to show that he had the benefit of the trespasses of his partner if he had committed any, and that the trespass committed by his partner was for the benefit of the firm. *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851.

A person had in his possession four pianos for sale as agent of the makers. He had carried on a music store and become indebted to the complainant, the maker. He afterwards took a partner, and the partnership continued for about eleven years, when it was dissolved. The partner taken in by the party first named when it was dissolved took the assets, and was to wind up the concern by paying its debts. The bill in this case was filed against both partners, the real purpose of it being to hold the partner last named responsible as incoming partner for the debt and liability of the former contracted with the complainant before the formation of the partnership and while he was doing business alone. There was a dispute as to what took place at the formation of the partnership in regard to the statement as to the original debtor's condition in business, and as to the assumption by the partnership of the former liability. It was shown that four pianos of the complainant were on hand at the time of the formation of the partnership. They went into the stock of the firm. The fact was that the former was the agent of the complain-

ant for the sale of the pianos. If he failed to sell, the pianos were to be returned. The partner claimed he bought these pianos as part of the stock. The other had no right to sell them except as agent, and defendants or the firm could get no better title than he had. As they went into the stock of the concern both partners are liable to the plaintiff for them. *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea, 358.

Where one of two joint owners took possession of a chattel, and sold it under an agreement between the owners that he should do so, and he made the sale by means of false and fraudulent representations, and divided the profits equally with the other owner, in an action brought against both for fraud by the vendee they were both held liable, although the representations were made in the absence of the other, there being no proof that, on learning that they had been made, he repudiated the contract or had ever offered to restore any part of the consideration, and it was held that the liability of the defendants was the same as if partners in the transaction. *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211.

If a partner causes an attachment to be made to secure a debt due to the firm, the subsequent sale of the goods and application of their avails upon an execution recovered in the suit are evidence of the ratification of the attachment by all the partners; and if the attachment is wrongful they are liable in an action for tort. *Gurlier v. Wood*, 16 N. H. 539.

The owner of negotiable securities transferable by delivery intrusted them to one partner of a firm to be used for the purpose of raising money for the owner's benefit. The sum of \$3,000 was loaned by a bank on a note of the firm with the bonds mentioned as collateral security. This sum was placed to the credit of the firm on the books of the bank, and subsequently paid out on their checks. On the books of the firm the member who had received the bonds from the owner was given credit for the \$3,000 advanced to the firm, and subsequently drew out that sum from the concern. Thereafter the other defendant became a partner with the two, the firm name remaining unchanged. The bonds remained pledged with the bank as security for the note until a new note of the same firm in the amount of \$4,000 was made, and the same bonds pledged as collateral. The party with whom the owner had dealt accounted to the latter for \$1,367 of the \$3,000 which he raised on the bonds. The bank retained \$3,000 to pay the old note, and the additional \$1,000 was passed to the credit of the firm upon the books of the bank, and was subsequently drawn out on checks of the firm. Thereafter the new firm paid off this \$4,000 note and obtained a renewal note for the amount on their firm note, pledging the bonds as security therefor. The bonds were afterwards sold by the bank for \$5,526.85, out of which the bank paid the \$4,000 note and interest, and credited the new firm with the balance, \$1,460.85, which was credited on the firm books to the partner who was originally in the transaction. And it appears that different credits he had with the firm were in due course paid over to him. The \$1,000 had also been thus credited to him. The jury found that, not only the partner to whom the owner had committed the bonds had full knowledge of the facts, but that the other original partner knew before the \$1,000 was advanced by the bank to whom the bonds belonged; and the court held that with this knowledge the third partner was affected. It was held that all three of the partners were liable to the plaintiff, the owner of the bonds, for the balance of \$1,460.85, and interest, and also for the \$1,000 advanced to the firm when the note was first

increased. *Townsend v. Hager*, 19 C. C. A. 256, 38 U. S. App. 862, 72 Fed. Rep. 949.

A person who was a partner of the defendants, for the purpose of inducing the plaintiff to buy out the defendants' interest in the partnership represented to the plaintiff that the assets of the firm were of a certain value, and stated what its liabilities were. Relying on such representations, the plaintiff purchased the interest of the defendants in the firm, and thereafter became equal partner with the person who had made the representations to him. Those representations were false, the value of the assets being greatly inferior, and the liabilities amounting to a great deal more, than had been thus represented. By reason of the sales of the property of the firm and the payment of its debts by plaintiff a rescission of the contract was impracticable. Before the commencement of the action the party who had made the representations had become wholly insolvent, and had died. It was held that, even though the partner who made the representations had no authority from the defendants to make them, the case would be the same, as it could not be doubted that he, with the knowledge and consent of defendants, took part in the negotiations in the course of which the representations were made, and the object of the negotiations was the benefit of defendants by securing a purchaser. And that the plaintiff was entitled to recover the loss which he had sustained by reason of the fraud, and relieved of any obligation to reform the contract. *Lindmeier v. Monahan*, 64 Iowa, 24, 19 N. W. 839.

If a member of a copartnership borrows money in behalf of his firm the liability of the firm is not affected by the fact that the partner afterwards misappropriates the money to his own purpose. If one who is a member of a copartnership borrows money on his own account, the credit being given to him, the fact that he afterwards applies the money to the purposes of the firm will not render the latter liable therefor. *National Bank of Commerce v. Meader*, 40 Minn. 323, 41 N. W. 1043.

A false representation made by one partner, affecting a partnership negotiation, binds a copartner who participates in the benefits thereof. *Scott v. Hynes*, 12 Mo. App. 596.

One of two partners having authority to bind the other by drawing and indorsing bills of exchange raised money by bills in fictitious names indorsed by him in the partnership name, and the money was afterwards applied to the partnership purposes. It was held the other partner was liable to the persons from whom the money was so obtained. *Thicknesse v. Bromilow*, 2 Crompt. & J. 425.

After the dissolution of a partnership one of the partners collected money for the plaintiff as his agent. The transaction had no connection with the firm business. The partner who collected, and who by the dissolution agreement was to collect, the debts of the firm and pay the firm debts, made a deposit of the money of the plaintiff so collected, and used it in paying firm debts. It was held that the other partner was not liable to the plaintiff. *Dunlap v. Limes*, 49 Iowa, 177.

One member of a firm, having money of the plaintiff's intestate in his hands as agent, put it into the firm business, placing it to the credit of the firm in its books. The other partner at the time supposed this was a payment into the firm by his partner for his own credit. The firm afterwards knew that the money was Riley's and used it. The court charged that if the money was in fact applied to the partnership uses and for the benefit of the partners, with the knowledge and consent of both the partners, the partnership is liable whether the credit was 51 L. R. A.

given to the partnership or to one of the members of the firm. The jury found for the plaintiff, and the court affirmed the judgment. *Houser v. Riley*, 45 Ga. 128.

Where one of a firm of attorneys received money belonging to a client, and deposited it in the banking house in which they kept their account and to which they were indebted as a firm, and the money so deposited was applied in payment of their indebtedness to the bank, the court sustained the rule in a summary proceeding to compel both members of the firm to repay the moneys so deposited to their client. *Re Ford*, 8 Dowl. P. C. 684.

One of two partners carrying on business as merchants also carried on the business of bill broker on his own account, and in that capacity he received from plaintiff several sums of money by checks and proceeds of drafts on the plaintiff as the price of certain promissory notes, and the money was by the broker paid into, and used with, the partnership funds. It was afterwards discovered that these notes had all been forged by the broker, who absconded, and the remaining partner executed a deed of assignment of all the joint effects to trustees for the benefit of all their creditors. Upon a bill filed for that purpose the court held that the plaintiff had a right to be paid his claim out of the partnership assets. *Wallace v. James* (1854) 5 Grant Ch. (U. C.) 163.

As to other authorities on this subject, see *Brainerd v. Dunning*, 30 N. Y. 211; *Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. 424; *Re Ketchum*, 1 Fed. Rep. 815; *Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491.

2. Other torts.

1. When other members liable.

While the defendants were partners in the business of harness makers, one of them bought of the plaintiff a great number of bits to be made up into bridles, which he immediately pawned to raise money for his own use. It was held that the innocent partner was liable for the price of the goods. *Bond v. Gibson*, 1 Campb. 185.

The plaintiff gave to the defendants, brokers in copartnership, two promissory notes payable to their order, that they might get them discounted and pay the proceeds to him, for which they were to receive a reasonable reward. On this state of facts the court held that a duty arose to get the notes discounted, or to return the notes to him. And the law would imply a promise on the part of defendants to do this on request when it appeared that the notes came into their hands in the course of their business as brokers to procure money upon them. The plaintiff afterwards drew upon the defendants for £200 on account of the notes. The defendants did not discount the notes while in partnership, but, after the dissolution thereof, one of the defendants, in fraud of his copartner, indorsed the partnership name on the notes and passed them away, and applied the proceeds to his own personal use. The court further held that while one defendant was no doubt an innocent sufferer from the misconduct of his partner, yet the plaintiff's dealing was with the firm, and he had a clear right to hold both partners liable. *Hammond v. Heward*, 11 U. C. C. P. 261.

A member of a business firm was also a member of a banking firm, and, as the latter, loaned \$800 of a depositor's money to the business firm without the knowledge or consent of the depositor or that of any of his partners. He credited the firm account of the business firm with the amount, and charged the account of the depositor with the same so loaned, and exe-

cuted a note in the name of the business firm payable to the depositor, which he left in a bundle of the depositor's papers. The banking firm afterwards made an assignment for the benefit of its creditors, and the assignee delivered the note to the depositor, the plaintiff, and he brought this action against the members of the business firm, the defendants. The money received by the business firm was used in paying the firm debts. One of the members of the business firm besides the individual who was active in these proceedings was also a member of the banking firm. It was held that the other member of the business firm was estopped from repudiating the contract and avoiding the note while taking the benefit of the depositor's money in paying the firm's debts, and that a partnership firm is liable to others for the tortious acts, as well as the contracts, of its members within the scope of the partnership. *Wiley v. Stewart*, 122 Ill. 545, 14 N. E. 835.

Where an attorney is in partnership with another, and they carry on a business in their joint names, which are put on their papers in causes in their office, each of them is liable to the penalties of the act for practising as an attorney without entering his certificate, although it does not appear that one of them had any profit or advantage from the suit for suing in which the action in *qui tam* is brought. *Edmonson v. Davis*, 4 Esp. 14.

Partners, like individuals, are liable for torts committed by their agents under express commands, under the maxim *Qui facit per alium facit per se*, and the partner acting in the name of the firm touching its business, and with a knowledge of the other members, must be regarded as the agent of all. *Hall v. Younts*, 87 N. C. 285; *Gray v. Cropper*, 1 Allen, 337; *Linton v. Hurley*, 14 Gray, 491; *Locke v. Stearns*, 1 Met. 560, 35 Am. Dec. 382.

In an action by the wife of a person who had died from excessive use of intoxicating liquor against the defendants as a partnership, who had sold him the liquor, it was held that the action of one of the partners in selling liquors to the husband of plaintiff, and thereby contributing to his death, was attributable to the firm as a wrong, and that all the members of the partnership were liable therefor. *King v. Bell*, 13 Neb. 409, 14 N. W. 141.

A partner in business is liable for the unlawful keeping or selling, by his copartner, of intoxicating liquor. *Maine Rev. Stat. chap. 27, § 57*.

It is a general rule that a trading firm is liable for money borrowed by a member in the name of the firm ostensibly for firm purposes, and misappropriated by him. *Phillips v. Stanzell* (Tex. Civ. App.) 28 S. W. 900; *Caraway v. Citizens' Nat. Bank* (Tex.) 29 S. W. 506.

One of the members of the firm running a steamboat sent a notice to a postmaster that the mail boat to Mobile would stop at his place, which notice contained the following: "N. B.—Advise all who may feel interested in the above." The postmaster posted it up on the door of a storehouse near the postoffice, and it was generally known by this means that one of the defendants' steamboats would touch at that point on a certain date for the purpose of receiving and taking on board passengers from Mobile. Plaintiff and his wife arrived at the place, and, being informed that the boat would stop on the day mentioned, remained for the purpose of taking it for Mobile. They remained out all night on a cold night, from which both suffered. The boat passed the place without landing. The partner who was running the boat stated, on learning that the boat was billed to stop, that he would not stop at Pascagoula that night, but would run according to 51 L. R. A.

the regular advertisement, and that his partner had no right to go where she was not advertised to go, and that if there was any damage occasioned by the failure to stop in this case his partner ought to pay it. A judgment against the partnership in favor of the plaintiff was affirmed, the court holding that the action was founded on the violation of a general duty, and not on a breach of a special contract, and that wherever the action in cases of this kind is against a common carrier the courts are inclined to consider it as founded on tort, unless a very special contract be shown by the declaration. *Helm v. McCaughan*, 32 Miss. 17.

One partner in a firm engaged in dealing in furniture and draperies is not, merely because of being a partner, liable for a libel published by another partner or a servant of the firm by placing a placard on a piece of furniture, the property of the firm offering it for sale. But where one partner had so placed the libelous placard, and another partner was present and saw it, and knew it was put on his property, and acquiesced in his partner's refusal to remove it at the plaintiff's request, the jury might well conclude it was placed on the furniture either by his express authority or by his assent. *Woodling v. Knickerbocker*, 31 Minn. 298, 17 N. W. 387. Same principle: *Price v. Mulford*, 36 Hun. 247; *Ex parte Watson*, 2 Ves. & B. 414, 2 Rose Bankr. Cas. 259; *Smith v. Jameson*, 3 T. R. 601, Peake, N. P. Cas. pt. 1, p. 279.

The members of a partnership are liable *in solido* for the tortious conversion of succession property by the firm, which is put into the firm by one of its members while acting as curator of an estate. *Birdsall v. Bemiss*, 2 La. Ann. 449.

The following cases are additional authorities holding that for the wrong of an individual member of a partnership the other members are liable, though innocent of it: *Miller v. Manice*, 6 Hill, 114; *Manufacturers' & Mechanics' Bank v. Gore*, 15 Mass. 75, 8 Am. Dec. 83; *Boardman v. Gore*, 15 Mass. 331; *Sawyer v. Goodwin*, 36 L. J. Ch. N. S. 578, 15 Week. Rep. 1008; *Meyran v. Abel*, 189 Pa. 215, 42 Atl. 122; *Draper v. Moore*, 2 Cin. Sup. Ct. Rep. 167; *Vinsen v. Lockard*, 7 Bush, 460; *Hawkins v. Appleby*, 2 Sandf. 421; *Burgess v. Northern Bank*, 4 Bush, 600; *Stockwell v. Dillingham*, 50 Me. 442, 79 Am. Dec. 621; *Lewis v. Reilly*, 1 Q. B. 349, 4 Perry & D. 629, 5 Jur. 98; *Ex parte Bushnell*, 3 Mont. D. & D. 615, 8 Jur. 937; *Kerr v. Sharp*, 83 Ill. 199; *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403; *Ryan v. Morrill*, 83 Ky. 352; *Royer v. Aydelotte*, 1 Cin. Sup. Ct. Rep. 80; *Jacobs v. Shorey*, 48 N. H. 100, 97 Am. Dec. 586; *Kilby v. Wilson*, *Ryan & M.* 178.

2. When other members not liable.

In an action by an indorsee of a bill of exchange against the acceptors it appeared that the bill was accepted by a partner in the name of the firm, but without authority from his partner, and in violation of the terms of the articles of partnership. There was no evidence that the plaintiff had notice of the partnership deed or that the bill was not accepted for the purpose of the firm, and the only evidence that he gave value for the bill was the statement of his attorney that he gave the partner who accepted the bill a check for the amount of it less discount. The check was not produced, and the plaintiff was not present to explain the transaction. It did not appear that the plaintiff had ever had any other dealing with the firm. The jury found for the defendants. On a rule to show cause why the verdict should not

be entered for the plaintiff it was decided that, on proof being given that the bill is tainted with fraud in its inception, the burden is thrown upon the party who seeks to enforce payment to show that he gave value for the bill. The rule was discharged. *Hogg v. Skeen*, 18 C. B. N. S. 426, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383.

Where money is deposited with one of the members of a firm for investment, and the scope of the partnership does not include the investment of money, and the partner with whom the money is deposited wrongfully converts it, the partnership is not liable. *Harman v. Johnson*, 2 El. & Bl. 61, 3 Car. & K. 272, 22 L. J. Q. B. N. S. 297, 17 Jur. 1096.

Complainants had a lien upon a bale of cotton for the rent of the land on which it was raised. One member of a mercantile firm composed of two took possession of the bale with full knowledge of the complainant's lien upon it for the rent of the land, and removed and had it marked with the initials of his individual name, and, collecting it as his own, refused to deliver it to the complainants on request. In an action in equity to enforce the lien of the landlord by a seizure and sale of the cotton and a payment of the proceeds of the sale to the complainants the other partner demurred to the complaint on the ground that it showed upon its face that he was neither a necessary, nor a proper, party. It was held that, as the only averment in reference to the other partner was that the partner who took the bale was his partner, the mere fact of partnership did not render the one liable for the acts of the other unless they were done in reference to and within the scope of the partnership business, and that demurrant was improperly made a party to the action. *Abraham v. Hall*, 59 Ala. 386.

One of the members of a firm acting in its behalf procured a writ of replevin to be brought in the name of a third person, and signed his own name to the replevin bond as surety. He stated to the plaintiff, who was a deputy sheriff, that the firm was responsible, that a signing of the bond bound the firm, that he was authorized by the firm to bind it by his signature alone, and the plaintiff was thereby induced to accept the bond and serve the writ. By means thereof the plaintiff obtained and disposed of the goods replevied for its own benefit, judgment was rendered for the defendant in replevin, and the goods were not returned. The plaintiff was held liable for taking an insufficient bond, and commenced this action against the partnership for the fraudulent representations made by one of its members. It was held that a declaration stating these facts did not set forth sufficient facts to charge the other partner for the fraud. *Gray v. Cropper*, 1 Allen, 337.

One member of a firm has power to bind his partner by his contracts; but this does not extend to cases of tort, where one has been guilty of a fraud committed against a third person, which is wholly unknown to the other partner. A fraud committed by one of the partners will not charge the partnership. *Sherwood v. Marwick*, 5 Me. 295; *Pierce v. Jackson*, 6 Mass. 242.

Plaintiff went into a drugstore, which was owned and kept by defendants as partners, and asked for extract of dandelion. One of the defendants took down a jar and undertook to put up a quantity of the drug called for. In doing so he put up, by mistake, extract of belladonna. Plaintiff testified that, as the defendant "was doing it up, he reached out like he would take a dose out of the box from which he was putting up the drug. He had got the lid on, and rather, I suppose, than take the lid off the box, he motioned towards the jar, and said 'Take it 51 L. R. A.

out of that.' I had out my knife, and reached over and took out about as much as I had been in the habit of taking, and asked him if that was too much, and he smiled and said 'No, that will not hurt you.' I took it on the point of my knife, and put it in my mouth." The defendant testified: "The first that I saw or knew of Gwyn's [plaintiff's] taking any of it was when he was in the act of doing so. I have no recollection of his speaking to me about it. I gave him no permission to do it, and did not sanction it." The court held that whatever duty or care the defendant who was in the store and doing up the drug may have owed the plaintiff in such a transaction, the firm did not owe him any unless giving away goods was the trade of the firm business, and there was no evidence that it was. *Gwyn v. Duffield*, 68 Iowa, 708, 24 N. W. 523.

The following cases are additional authorities to the effect that for the wrong of an individual member of a firm the remaining members are not liable: *Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151 (See *Hess v. Lowrey*, 122 Ind. 225, 7 L. R. A. 90, 23 N. E. 156); *Platt v. Koehler*, 91 Iowa, 592, 60 N. W. 178; *Terry v. Platt*, 1 Penn. (Del.) 185, 40 Atl. 243; *Mechanics' & Traders' Ins. Co. v. Richardson*, 33 La. Ann. 1308, 39 Am. Rep. 290; *Ex parte Agace*, 2 Cox Ch. Cas. 312; *Coomer v. Bromley*, 5 De G. & S. 532, 16 Jur. 609; *Breckinridge v. Shrieve*, 4 Dana, 375; *Elliston v. Deacon*, L. R. 2 C. P. 20; *Columbia Nat. Bank v. Rice*, 48 Neb. 428, 67 N. W. 165; *Daniels v. Hammond*, 154 Mass. 165, 28 N. E. 12; *Rice v. Doane*, 164 Mass. 186, 41 N. E. 126; *Roberts v. Pepple*, 55 Mich. 367, 21 N. W. 319; *Mecutchen v. Kennady*, 27 N. J. L. 230; *Dounce v. Parsons*, 45 N. Y. 180; *Van Voorhis v. Brown*, 29 App. Div. 119, 51 N. Y. Supp. 440; *Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. 483; *Battle v. Street*, 85 Tenn. 282, 2 S. W. 384; *Rich v. Davis*, 4 Cal. 22; *Rich v. Davis*, 6 Cal. 141; *Rocky Mountain Nat. Bank v. McCaskill*, 16 Colo. 408, 26 Pac. 821; *Gilruth v. Decell*, 72 Miss. 232, 16 So. 250; *Ex parte Eyre*, 1 Phill. Ch. 227, 3 Mont. D. & D. 12, 12 L. J. Ch. N. S. 266, 7 Jur. 162; *Bignold v. Waterhouse*, 1 Maule & S. 255; *Ex parte Bidduihp*, 3 De G. & S. 587; *Riley v. Noyes*, 44 Vt. 455.

IV. Engaging in unlawful business.

Where the articles of partnership are such as ordinarily exist between partners engaged in lawful business one partner does not authorize the other to engage in unlawful business. In such case, if one partner commits a tort which consists in violation of a statute making the act a crime, the other partner is not liable in an action of tort unless he either authorized or ratified it. *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,678.

Though the mutual agency of partners cannot be implied in an unlawful transaction, yet, if one knew and sanctioned the act of the other, it would be the act of both. If persons are associated for the purpose of illicit traffic it is a very obvious, if not necessary, conclusion, that each assents to what the other may do for the common profit. The character of the traffic may be proved by the stock in trade, the furniture and fixtures of the shop, and the run of custom. *State v. Bierman*, 1 Strobb. L. 256.

V. Liability, joint and several.

Partners are individually responsible for the negligence of the servants and agents of the partnership, and when one of the partners does an act in the course of the partnership business he is considered in this respect as an agent of

the partnership, and other partners are liable, even if they do not assent to the act.

All torts are joint and several, and where one partner commits a tort in the transaction of the partnership business the injured party may, at his election, sue all the partners or any one or more of them. *Mode v. Penland*, 93 N. C. 292.

In actions *ex delicto* generally, and always where a contract is not the gravamen of suit, and is merely a matter of inducement or recital, a plaintiff may, at his option treat the tort committed by two or more persons as either joint or several, and accordingly sue all or any of the tortfeasors. And if one of the wrongdoers be sued alone, as the tort attaches upon each individual, he cannot plead the nonjoinder of the others in bar or abatement, nor give it in evidence under the general issue. *White v. Smith*, 12 Rich. L. 595.

The liability of a partnership for tort is joint, and that of the individual members thereof several as well. It was so held where property was wrongfully taken by partners and sold; and the partner who was a principal actor, and jointly liable for the conversion, settled with the plaintiff for his half of the damages. In such a case it was held that the other member of the firm was liable to the plaintiff in an action for the same amount, being the remainder to which plaintiff was entitled for his damages, and for which he originally had an action jointly and severally against the firm and each of the members thereof. *McCrillis v. Hawes*, 38 Me. 566.

Upon an information for the treble value for goods that came to the hands of the defendants knowing that they had not paid the duties, it was determined at the trial that if several persons were concerned either in partnership or otherwise, yet the Crown might come against any one of them for the whole penalty, it being in the nature of a tort, and not a contract, as in cases of tort the subject might come upon anyone concerned in the tort. *Atty. Gen. v. Burges* (1726) *Bunberry*, 223.

An action lies for copartners in tort against two or more, also partners, for falsely and fraudulently recommending an insolvent person as worthy of credit, whereby the plaintiffs were induced to trust him with goods, which the defendants immediately attached, with other property of the insolvent person, in consequence of which the plaintiffs lost their goods. *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141. In this case the court said: 'Torts and frauds may be joint as well as several. Two persons may agree together to do a trespass, or may act in concert without any previous agreement, or one may be present and tacitly assent to the act of another and participate in the fruits of it; and, in these cases both, or either, may be sued. So, two may conspire to commit a fraud, and are answerable jointly in an action of the case in the nature of a conspiracy. If the fraud is actually committed, it is not necessary to allege the conspiracy. *S. P. Miller v. Manice*, 6 Hill, 114.'

VI. Conclusion.

No reference is made in the opinion in the principal case, *PAGE v. CITIZENS' BANKING Co.* to § 2658 of the Civil Code of Georgia, which provides that partners are not responsible for torts committed by a copartner.

It might, perhaps, be said that there was no need to refer to it, as it does not refer to the liability of a partnership, but to that of partners only. This would be so were it not for a recent decision of the same court (*Osborn v. Woolworth*, 106 Ga. 459, 82 S. E. 581), wherein 51 L. R. A.

it was held that, since the Code expressly declares that a partnership is not liable for the torts of its members, the mere fact that all the members approved of the tort committed by one of their number cannot make the partnership liable for such tort upon the idea of ratification. The distinguishing of the latter case as to the main doctrine is ingenious, and, although somewhat refined, it is but fair to say, reasonably clear.

It is suggested, however, that within the purview of the authorities cited herein, whether actual or express malice,—as distinct from that which the law for its own purposes fastens upon defamatory words, when spoken or published,—and such as will support an action for malicious prosecution, or for uttering or publishing privileged defamatory statements, can be imputed to a partnership as such, is still an open question.

Nevertheless, it would seem, from all the decisions herein, that the general trend of the later ones is toward the doctrine asserted in *PAGE v. CITIZENS' BANKING Co.*, and even to extend it.

The time has gone by when corporations can escape liability for the wilful, intentional, and even malicious, acts of their agents; and there appears no good reason why a partnership should not be held liable for a like act of one or more of its members.

The principle upon which either is held liable is the same, *i. e.*, agency; and the same rule should apply to both.

P. H. V.

J. Henry MEYER, *Plff. in Err.*,

v.

STATE of Georgia.

(.....Ga.....)

*A merchant who gives to a designated class of customers an opportunity to secure, by lot or chance, any article of value additional to that for which such customers have paid, violates the provisions of section 407 of the Penal Code, which declares that no person "shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing."

(October 27, 1900.)

ERROR to the Augusta City Court to review a judgment convicting defendant of violating the statute against carrying on a lottery. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. T. Davidson and Henry C. Roney, for plaintiff in error:

Penal Code, § 398, as to gaming houses, and all the other sections as to gaming, have included in them the element of play-

*Headnote by COBB, J.

NOTE.—For earlier cases in this series respecting gift enterprise as lottery, see *Yellowstone Kit v. State* (Ala.) 7 L. R. A. 599, and note; *Long v. State* (Md.) 12 L. R. A. 89, and note; *State v. Bonell* (La.) 10 L. R. A. 60; *State ex rel. Kellogg v. Kansas Mercantile Assn.* (Kan.) 11 L. R. A. 430.

As to trading stamps, see *State v. Dalton* (R. I.) 48 L. R. A. 775.

ing and "hazarding" money, or other things of value; likewise §§ 406, 407, and 408, as to lotteries and gift enterprises.

It cannot be said that one is gambling where he receives value for his money in the kind of commodities he knows the proprietor of the place sells for money.

Heelman v. State, 6 Ohio N. P. 258.

Schools offer scholarships as a premium for the scholar having the best standing. Newspapers offer scholarships and other prizes to the parties who will cut out and return to the office the largest number of votes cut from the daily issues of their papers. A large number of the merchants in Augusta give "premium discount checks" upon a customer's purchasing, for cash, so many dollars' worth of goods, and these checks can be taken to the premium store and exchanged for such articles kept therein as the value of the tickets represent. But in none of these cases is it considered that the parties offering these premiums are violating the law. But by the use of these premiums an additional amount of trade is brought to the merchant.

To constitute gaming, it is necessary that the game which is played in the commission of the offense should contain a controlling element of chance or hazard.

14 Am. & Eng. Enc. Law, p. 668.

There can be no wagering where there is no mutuality of risks.

14 Am. & Eng. Enc. Law, p. 669.

A "scheme or device for hazarding money is where one loses money and the other retains it."

Wilson v. State, 67 Ga. 660; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. Rep. 234.

Mr. C. Henry Cohen, for defendant in error:

Presenting a ticket to every customer who purchases of the person presenting it a certain amount in value of goods, which ticket entitles the holder to one guess as to the number of beans contained in a glass globe exhibited, and the one guessing the nearest to be entitled to a valuable prize, is a game of chance or gambling.

Hudelson v. State, 94 Ind. 428.

A game of pool or billiards, when the amount lost was ten cents, was held sufficient.

Middaugh v. State, 103 Ind. 78, 2 N. E. 292.

Questions of chance are for the jury.

Glascock v. State, 10 Mo. 508.

No exception is made by the statute on account of the smallness of the quantity, or of the use to which it is applied by the winner.

Hitchins v. People, 39 N. Y. 454; 14 Am. & Eng. Ency. Law, p. 668.

A "gift enterprise" in which a tradesman sells his wares at market value, and, by way of inducement to purchase, gives to each customer a ticket whereby he is entitled to a chance to win certain articles, the result to be determined by chance, is a game, and all persons aiding or abetting in the transaction are liable to indictment for gaming.

51 L. R. A.

14 Am. & Eng. Enc. Law, p. 681; *Bell v. State*, 5 Sneed. 507; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Eubanks v. State*, 3 Heisk. 488.

A wheel of fortune is held to be a game of hazard in—

Atkins v. State, 95 Tenn. 474, 32 S. W. 391.

A lottery is also held to be a game of hazard.

14 Am. & Eng. Enc. Law, p. 682.

Any form or device whatever, by use of cards or other like instrument of like character, by which one obtains from another money or property, is held sufficient.

State v. Quinn, 47 Iowa, 368; *Waddell v. Com.* 8 Ky. L. Rep. 249, 1 S. W. 480; *Kolschorn v. State*, 97 Ga. 343, 23 S. E. 829.

Cobb, J., delivered the opinion of the court:

Meyer was arraigned on an accusation under § 407 of the Penal Code, which declares that "no person, by himself or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing." The accused was tried by the judge of the city court of Richmond county, presiding without a jury, upon an agreed statement of facts, and was convicted. That portion of the agreed statement of facts upon which the judgment of conviction was based was, in substance, as follows: The accused was a wholesale and retail dealer in cigars and chewing gum. On the day alleged in the accusation he was operating a "nickel-slot trade machine." The manner of the operation of this machine is as follows: A nickel is placed in the slot, a handle is pulled down, a wheel within the machine revolves, and when it comes to a stop the number of cards constituting a "hand" in a game of poker are exhibited. The person depositing the nickel is entitled to a cigar or package of chewing gum, each valued at five cents, and in addition thereto to a prize according to the hand displayed; the highest prize being one hundred cigars or packages of chewing gum for a "royal flush," and the lowest two of either commodity for two jacks or a better pair. Many customers purchase the same cigar and the same chewing gum over the counter, and pay a nickel therefor, while others purchase through the operating of the machine, and take the chance of getting more than the value of their money. A portion of the agreed statement of facts the judge refused to consider. These facts are, substantially, as follows: There is no element of chance in the operation of the machine, except that of getting more than a nickel's worth. The use of the machine is entirely voluntary to the customer, and the same is operated as an inducement to trade; the result being that for every cigar sold through the machine the accused gets about four cents instead of five cents, and about the same price for chewing gum, but, on account of the operation of the machine, the amount of business done is largely increased. This is a case made for

the purpose of testing the question as to whether one who uses such a machine in his business violates the law. The accused made a motion for a new trial, which was overruled, and he excepted.

We do not think the judge erred in refusing to consider that portion of the statement of facts above detailed. The judgment was right on the facts passed upon by him, and, even if the facts which he refused to consider had been treated as properly before him, the judgment should have been the same. A "lottery" is defined to be "a scheme for the distribution of prizes by lot or chance." Webster International Dict. "A hazard in which sums are ventured for the chance of obtaining a greater value." Worcester Dict. For other definitions, see Anderson's and Bouvier's Law Dictionaries. If, then, the scheme or device for the hazarding of money which is prohibited by the Penal Code must be of the same nature as a lottery, before anyone could be held to have violated the law who had not actually run a lottery, it must be shown that he engaged in a scheme of similar nature; that is, a scheme or device for the distribution of prizes by lot or chance. We will not undertake to demonstrate that the scheme or device resorted to by the accused was a lottery, though this position, as will appear from the citations below, could be abundantly supported by authority. But we will consider the question as to whether he engaged in a scheme having for its purpose the distribution of prizes by lot or chance. Any scheme or device operated by a person by which one participating therein might either lose the money invested or get more than his money's worth, the operator retaining the money so lost, is a scheme or device for the hazarding of money, within the meaning of the section of the Penal Code above quoted. *Wilson v. State*, 67 Ga. 658. So, it was held in *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 820, that where the accused kept and maintained a machine so contrived that if one dropped a nickel in the slot therein he would either lose the nickel or win fifteen cents, he was guilty of a violation of the law contained in the section above quoted. In the case of *Prendergast v. State* (Tex. Crim. App.) 57 S. W. 850, a scheme very similar to the one referred to in *Kolshorn's Case* was held to be a lottery. In *Christopher v. State* (Tex. Crim. App.) 53 S. W. 852, it was held that a slot machine similar in its method of operation to those described in the two cases last referred to was a gaming device, within the meaning of the statutes of Texas on the subject of gaming. In *Reeves v. State*, 105 Ala. 120, 17 So. 104, it appeared that the accused owned and operated a device consisting of a circular board, in the center of which was an arrow turning on a pivot, pointing to numbers around the edge of the board. Opposite to each number was placed an article of jewelry ranging in value from five cents to one dollar. Upon paying ten cents, one was allowed the privilege of whirling the arrow, and was entitled to receive the article of jewelry oppo-

site the number on which the arrow stopped or its equivalent in value. The scheme was held to be a lottery. In *Chavannah v. State*, 49 Ala. 396, a circular device revolving on a pivot, and which had a fixed index pointing to numbers or figures which correspond with certain numbers or figures on cards sold to players, who sometimes won, but more often lost, was held to be "a device of like kind" with a lottery.

But it is said that none of the cases above referred to is controlling in the present case, for the reason that in all of them there was a mutuality of risk, and that the scheme operated by the accused was not within the meaning of our statute, because it imposed no risk whatever upon the customer, the whole risk being assumed by the accused. In *Quarles v. State*, 5 Humph. 561, the supreme court of Tennessee held that a sale of goods above their market value, to be paid for when a particular candidate was elected at an election then pending, is betting on an election, but the testimony must show that the goods were sold at a price above their value. This decision rested upon the idea that there was no mutuality of risk in the wager unless the purchaser agreed to pay more than the goods were worth. In *Shumate's Case*, 15 Gratt. 653, the court of appeals of Virginia, on a state of facts identical with those in the case just referred to, reached exactly the opposite conclusion. In reply to the suggestion that there was no mutuality of risk, Robertson, J., in the opinion, says: "It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." In *Bell v. State*, 5 Sneed, 507, it was held that the fashionable sporting artifice, commonly called "a gift enterprise," by which a merchant or tradesman sells his wares for their market value, but, by way of inducement, gives to each purchaser a ticket, which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery, is common gaming. Caruthers, J., in referring to the scheme described in the evidence, says: "Is it not that species of gaming called a lottery? A small sum is ventured for the chance of a greater; one dollar, or five dollars, perhaps, for a book, and the chance of a watch valued at forty, or a set of instruments at two dollars, or a box of wafers worth ten cents. If the book is certain, without hazard, the watch is not; that depends upon chance. So all pay their money, at least in part, for the chance of winning a prize of greater or less value. According to every correct idea of legal definition, this must be gaming, and all concerned

are guilty of that offense. All these artifices to evade and cheat the law and entrap the unwary are but aggravations of the offense." In *Hudelson v. State*, 94 Ind. 426, the indictment alleged that the defendants published an advertisement that they would, on a day named, give to the person buying goods at their store to the amount of fifty cents, and guessing nearest the number of beans in a glass globe in their window, a gold watch. This was held to be a good indictment under a statute making it penal to advertise a lottery. In *Davenport v. Ottawa*, 54 Kans. 711, 39 Pac. 708, it appeared that a firm placed in its window a locked box containing \$25, and advertised that all persons buying goods in their store to the amount of fifty cents or more would receive a key, and only one key would be given out which would unlock the box, and that the person receiving the key which would unlock the box would be given the \$25. The accused sold goods to various persons at the usual and ordinary prices, without extra charge on account of the key, and gave to each of these persons a key, to which was attached a card stating the above offer. It was held that these transactions were, in effect, sales of merchandise and lottery tickets for an aggregate price, and that the conviction of a member of the firm was proper under an ordinance prohibiting the sale and offering for sale of lottery tickets. In *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532, it appeared that the proprietors of a newspaper offered to each person who would subscribe at the usual subscription price for the paper during a given year a ticket which entitled the holder to participate in a distribution of prizes. The distribution was made by lot. It was held "that the scheme was a lottery within the purview of the criminal laws, and it made no difference that the tickets were not sold, but were given to subscribers and to no one else." It was said in the opinion that "the fact that the subscription price of the Times was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper." In *United States v. Wallis*, 58 Fed. Rep. 942, the accused was indicted for sending through the mails a newspaper containing an advertisement of a lottery. It appeared that the scheme advertised was very similar to the one described in the case last above referred to. A demurrer to the indictment was overruled, the court resting its decision upon the case of *Horner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409. In that case the Supreme Court held that a scheme of the Austrian government, to facilitate the sale of its bonds, which were sold at their face value, by which prizes of different value were awarded to different purchasers by drawings by chance, was a lottery. The supreme court of New Jersey held that a public exhibition, where prizes of different values were distributed by chance to the holders of the tickets to the performance, was a lottery. *State v. Shorts*, 32 N. 51 L. R. A.

J. L. 398, 90 Am. Dec. 668. From the authorities above cited, it is clear that the accused in the present case, if not guilty of operating a lottery, was undoubtedly guilty of maintaining a scheme or device of a similar nature thereto.

Judgment affirmed.

All the Justices concur.

M. A. CLARKE, *Plff. in Err.*,
v.

Agnes HAVARD.

(111 Ga. 242.)

- *1. One who received money from the owner thereof for the express purpose of lending it out at interest, and with authority so to do, either general or limited, and who afterwards did lend the money to another, taking therefor a promissory note payable to such owner, is to be regarded as his agent, although the borrower, at the time of executing the note or subsequently, signed a paper purporting to constitute the person with whom he dealt in the transaction his agent to obtain the loan.
2. When, in such a case, the agent exacted from the borrower a commission which, added to the stipulated interest, made an amount exceeding that which could be lawfully charged as interest, the transaction was usurious, if it was understood between the lender and the agent that the former was to pay nothing for the latter's services, and the circumstances were such that the lender must necessarily have known that the agent intended to charge the borrower, and did charge and collect from him, such commission for making the loan.

(July 11, 1900.)

ERROR to the City Court of Atlanta to review a judgment in favor of plaintiff in an action to recover the amount alleged to be due on a promissory note. *Reversed.*

The official report prepared for the court was as follows:

This was a suit on a promissory note. In the court below a verdict was directed for the plaintiff. Judgment was accordingly entered for the amount sued for. The following evidence was introduced on the trial, to wit: T. A. Clarke, sworn for the defendant, testified as follows: "I am the husband of the defendant, and represented her in getting the money on the note sued on. Went to Mr. Barnett and asked for the money. He let us have \$655, and my recollection is that he took out \$15 of that amount for searching the titles to the place. This was all I promised to pay. Can't read. Thought the note was for the amount I got, until the Georgia Loan & Trust Company wrote for the interest, and then the roocas began. Thought it was Mr. Barnett's money we were getting. He

*Headnotes by LUMPKIN, P. J.

NOTE.—For bonus to agent as usury, see *Vahlberg v. Keaton* (Ark.) 4 L. R. A. 462; and *Banks v. Flint* (Ark.) 10 L. R. A. 459.

had his sign on his door, that he loaned money. Did not know the note was payable to the security and investment company until long afterwards. The note and papers were signed at the same time the money was paid. Defendant can't read. Mr. Barnett brought the papers to my wife, folded up, and told her to sign. She asked what amount she was getting, and he said \$655. She then signed the papers, and that was all. They were not read over to her, and no bond for titles was given her. I signed the application for the loan in her name." Manda A. Clarke, defendant, testified as follows: "My husband, T. A. Clarke, made the arrangements for me to borrow the money. I went to Mr. Barnett's office and signed the papers for the money. Can't read. He did not read to me the papers signed. Money was paid over same time papers were signed. Never knew the note was for \$750 until long afterwards. None of the papers were read to me. Mr. Barnett just brought the papers to me, folded up, and told me to sign. Never heard a word about having to pay Mr. Barnett \$95 commission." Samuel Barnett, sworn for plaintiff, testified as follows: "The defendant employed me to obtain the loan. She signed the application. Ninety-five dollars was paid me as commission for procuring the loan. I represented the borrower, and the payee of the note knew nothing of my commission. I did not know the defendant and her husband could not read. Neither asked that the papers be read. I explained the matter to them, and did not prevent their reading. I did not notice that they did not read the papers. I am not the agent of the lender, and did not act as such. The Georgia Loan & Trust Company got \$30 of the commission I charged. They and I are brokers, and do not act as agents of any lenders. We obtain money from different capitalists at different times. The interest paid on the note was sent to the Georgia Loan & Trust Company, at Macon, Georgia, as a matter of convenience, and is not a payment until it reaches the lender. I had nothing to do with collecting the interest. The security and investment company, the payee of the note, is a partnership. Don't know whether the members of the firm are stockholders in the Georgia Loan & Trust Company or not. Said Georgia Loan & Trust Company did not loan the money. It was sent them by the security investment company, payees of the note, who loaned the money. The security investment company got no commissions, and only 7 per cent interest." Plaintiff also introduced the application for loan. This contained a statement that S. Barnett was constituted the agent of the borrower (defendant) to procure a loan of \$750. was addressed to S. Barnett, contained the statement that applicant had no other real estate, and was dated January 18, 1896. Indorsed, "Approved," by security investment company. Plaintiff also introduced in evidence the following statement:

Atlanta, Ga., January 20th, 1896.

Amanda A. Clarke, in Account S. Barnett
51 L. R. A.

Loan Sec. I. Co., 5 years 6 mo., 7 per cent, \$750.00; to commissions, etc., \$95.00; net cash, \$655.00.

[Signed] Manda A. Clarke.

T. A. Clarke, recalled, stated that he did not know the Georgia Loan & Trust Company had anything to do with the loan until they called for payment of interest.

On the above evidence, the court, over the objection of defendant, directed a verdict for plaintiff, and verdict and judgment were entered for plaintiff for the amount sued for, and the defendant excepted.

Mr. R. O. Lovett, for plaintiff in error:

The note attached to the suit shows that it was secured by deed. Evidently the purpose of the suit was to enforce the security, by levy, of the execution sought. This could not be done where no bond for title was given.

Griggs v. Stripling, 59 Ga. 500.

The plea and evidence put in issue this fact. Judgment should cover the issue.

Code, § 5329; *Tompkins v. Corry*, 14 Ga. 119.

The note is dated January 1, 1896. The application for a loan was made January 18, 1896. No explanation is given of this difference in dates.

On the question of usury under the facts, see—

Merck v. American Freehold Land Mortg. Co. 79 Ga. 213, 7 S. E. 265; *Hughes v. Griswold*, 82 Ga. 299, 9 S. E. 1092; *Beach v. Lattner*, 101 Ga. 357, 28 S. E. 110.

Messrs. Humphries & Humphries also for plaintiff in error.

Mr. Samuel Barnett for defendant in error.

Lumpkin, P. J., delivered the opinion of the court:

This case turns upon the questions dealt with below. It is an action upon a promissory note for the principal sum of \$750, and three coupon interest notes thereto attached. The main note is dated January 1, 1896, and due January 1, 1901, with interest from date at 7 per cent per annum, evidenced by ten coupon notes, including those sued upon, which were, on their face, overdue when the action was brought. The large note is payable to the order of the Security Investment Company of Bridgeport, Connecticut, and stipulates that, if default should be made in the payment of interest, it should, at the holder's option, become due and payable, regardless of the date of maturity. The smaller notes are payable to the investment company or bearer, and stipulate for interest after their maturity at 8 per cent per annum. The plaintiff's petition contains an allegation that all of these notes were, directly after their execution, duly assigned to her. This allegation is not denied in the answer, but the defendant therein alleges that "the contract, as made by her, was that she was to borrow of the payee of said notes the sum of \$665;" that this was the amount ac-

tually loaned to her; and that "she does not owe the amount claimed in said suit as principal, because there is charged as part of said principal the sum of \$95, the same being charged against this defendant as commissions by officers and agents of the payee of said notes, and the same is illegal, being charged under the name of 'commissions' to avoid the laws against usury." The answer further states that the amount of the usury is \$89.95, and sets forth in detail the facts and figures upon which this assertion is based. It seems to have been properly conceded that the defense of usury, if well founded in fact, was good against the plaintiff, though she became a bona fide holder for value before the maturity of the notes. See *Angier v. Smith*, 101 Ga. 844, 28 S. E. 167. At the conclusion of the evidence on both sides, the court directed a verdict in favor of the plaintiff for the full amount of the principal and interest claimed in the petition, and the defendant excepted. The evidence is set forth in the report preceding this opinion.

1. The first question for determination is, Did the evidence warrant a finding that Barnett was the agent of the investment company to make the loan? We think it did. The loan was certainly made for and in behalf of that company. Of necessity, it had to be represented in the transaction by someone acting as its agent. It could not possibly make a loan in any other way. There is no evidence tending to show that it was in fact represented by anyone other than the Georgia Loan & Trust Company or Barnett. He and the Georgia Company were acting in concert. He testified that it did not loan the money, and that the investment company did. But how? On this particular point his testimony is not lucid, but the real meaning of it, when taken in connection with other things stated by him, is not difficult of ascertainment. He said: "The Georgia Loan & Trust Company got \$30 of the commission I charged. They and I are brokers, and do not act as agents of any lenders. We obtain money from different capitalists at different times. The interest paid on the note was sent to the Georgia Loan & Trust Company, at Macon, Georgia, as a matter of convenience, and is not a payment until it reaches the lender." He further testified that the defendant employed him to obtain the loan; that he represented the borrower; that he was not the agent of the lender, and did not act as such. As will have been observed, the written application signed by the defendant, and purporting to constitute Barnett her agent to procure the loan, was dated January 18th, though apparently the note was executed on January 1st. Barnett stated facts and conclusions therefrom. The conclusions, however, were merely his own. Are they necessarily correct, and as such binding and conclusive upon the defendant? Would not these facts and the other facts in the case warrant other and very different conclusions? He obtained money from the investment company to lend out. For

whom? Why, for the company, of course. At the time he received this money the defendant had not asked for a loan. It was on hand when she called. Up to that point, who, and who alone, was represented by Barnett? The answer is simple. Does it alter the actual facts of the transaction that the borrower signed a paper, bearing a date seventeen days later than that of the note, stating that Barnett was thereby made her agent to borrow \$750? Doubtless this discrepancy in dates is susceptible of explanation. Indeed, the defendant's receipt to Barnett for the money borrowed was dated January 20th. But what difference would it make that the note was dated back, which must have been the case if we accept as true the statement of the witness T. A. Clarke that "the note and paper were signed at the same time the money was paid." Could not the jury have found, and ought they not, in view of all the evidence, to have found, that the contract embraced in the application was purely colorable? The law cares nothing about the form of a transaction, but characterizes it according to its substance and results. What is the substance of this transaction? Manda A. Clarke, wishing to borrow money, applied to Barnett for a loan, supposing she was dealing exclusively with him. He had on hand money which had been sent to him by the investment company through the Georgia Company, his coagent, to be loaned. He let the applicant have the money, taking her note payable to the investment company, after deducting \$95 for commissions. The Georgia Company collected what was paid on the interest notes, and forwarded same to the owner. Against all this there is nothing to show agency for the borrower, except Barnett's statement of a mere conclusion, backed by the seemingly belated application for the loan. Certainly, it would not have required a strain to find that the loan was made by Barnett as agent of the investment company. What service did he render the defendant, as her agent, which was not directly connected with that he performed in behalf of the investment company, agreeably to his undertaking to effect for it a loan of money which it had previously sent to him for that purpose? How, under the circumstances, could it have been possible for him to do anything in her behalf in procuring the loan? He did not ask the investment company to make a loan to the defendant. All he had to do when she applied to him for the money was to let her have it. This he did, and in so doing rendered her no more service, save as to examining her titles, than every lender does when he loans money to a borrower on application. There is no question here as to Barnett's right to make a charge for examining the titles. This case is obviously different upon its facts from that of *Merck v. American Freehold Land Mortg. Co.* 79 Ga. 213, 7 S. E. 285, and numerous others of its class, in which the lender received the borrower's application, passed upon it for himself, and for himself decided whether or not the security was good

and the terms offered satisfactory. Here Barnett passed upon these and all kindred questions for the lender, manifestly with authority so to do, which was either general or limited by instructions not disclosed. If this does not amount to agency, we have no conception of what agency is. The trial court therefore could not properly have directed a verdict for the plaintiff on the theory that the evidence demanded a finding that Barnett was exclusively the borrower's agent, and in no sense the agent of the lender.

2. It is, however, contended that even if he was such agent, and even if he did exact a commission which, added to the stipulated interest, would make an amount exceeding the maximum legal rate of interest, the transaction was not usurious, for the reason that the lender did not receive any part of the commission, or know that a commission was charged. In this connection Barnett testified, "The payee of the note knew nothing of my commission." He did not testify that this payee was ignorant of the fact that it was his custom to charge commissions,—a custom which must inevitably pertain to the business of brokers who lend out money belonging to others. Everybody at all informed with reference to such matters knows that services rendered by such brokers are not, and in the nature of things cannot, on sound business principles, be rendered gratuitously. The evidence in this case warranted a finding that the investment company knew Barnett was in the business of lending money; that it sent him its money to lend, and must also have known that he expected compensation for his labor. It is doubtless true, as Barnett testified, that it knew nothing of his commission; that is, it did not know the precise amount he charged when he made this particular loan. That this is really what he meant by the words, "The payee of the note knew nothing of my commission," is conclusively shown by what he says in his brief as attorney for the defendant in error. We quote therefrom: "The Security Investment Company did not know what commissions Barnett charged. They themselves received nothing,—only their 7 per cent interest." That is, the company knew Barnett charged commissions, but did not know to how much they amounted. And, independently of the above-quoted expression, there is little room for doubting that the company, when it forwarded the money to be loaned, was not ignorant of the fact that Barnett expected to make something for placing it in the hands of a borrower. Affecting not to know this would be admitting a total disregard of the plainest principles of human nature. So, then, the jury might well have concluded that the investment company knew Barnett was to be paid, and also that it understood it was not to do the paying, and, further, that it must have known the borrower, when he came along, was to do so. They could therefore have found that the company occupied the position of at least tacitly authorizing its

51 L. R. A.

agent to exact such a commission on the loan as the borrower might be induced to pay. A money lender cannot, in this state, lawfully contract for or reserve any greater rate of interest than 8 per cent per annum, and the prohibition is just as strong against doing so indirectly as it is against doing so openly and without pretense. It is now too well settled to admit of doubt that if the agent of a money lender, with his knowledge, charges the borrower a commission, it is the same thing in law as if the lender charged it himself. This is so because he gets a benefit from the agent's services, and because in such cases there is, as to this matter, no separation of principal and agent. The payment of a commission to the lender's agent, being a part of what the borrower expends for the use of the amount he actually receives, is in effect a payment to the principal, if he gives countenance to the exaction of such commission, and is in the nature of interest on the loan. If, then, the commissions so paid and the stipulated interest together exceed the lawful interest, the transaction is usurious. These are familiar principles, and should be readily accepted as sound. It only remains to show that this court did not depart from them in the case of *McLean v. Camak*, 97 Ga. 804, 25 S. E. 493, and in so doing make clear the distinction between that case and the one now before us. The facts of these cases are widely different. Watson was Mrs. Camak's general agent to collect and invest her funds. She paid him for making collections, and it did not appear but that she expected to pay him, also, for his services in making investments. In this connection the writer, in speaking of the making by Watson of the loan then under review, said (page 813, 97 Ga., and page 496, 25 S. E.): "She paid him for making collections for her, and it is not improbable she expected to pay him for his services in making investments for her, as well. It appears, he did not consult her about the advisability of making this particular loan, and she knew nothing of it until some time after it was made. It is certain she did not authorize him to make it only on condition that he would look to the borrower for payment for his services, and would charge her nothing. That he did not charge her anything, and that she never agreed to pay him for his services in this particular instance, is true,—most probably, for the reason that he considered himself sufficiently compensated by the commission he received from the borrower, and therefore never called upon Mrs. Camak for payment, or rendered her a bill for his services." The defendant did not probe to the bottom of the question whether Mrs. Camak did or did not expect to pay Watson for lending the money to Mrs. McLean, but chose to rely on the naked circumstance that she did not in point of fact pay, as conclusive upon the inquiry whether or not she really supposed she would be asked to pay. The verdict was in her favor, and was maintainable on the theory that the evidence did not demand a find-

ing that she either directly or indirectly authorized or sanctioned the making by her agent of a contract infected with usury. It is in the present case, as already noted, obvious that the investment company never expected a bill from the Georgia Company or from Barnett for their services in making the loan to Clarke. The *McLean Case* is, at best, a close one, and the doctrine of it should not be extended beyond its peculiar facts. It was carefully considered, and the court, foreseeing the danger of going too far on the line then pursued, took occasion to remark (page 808, 97 Ga., and page 495, 25 S. E.): "We do not mean to say the borrower must show that the lender expressly, in so many words, authorized his agent, before the transaction was consummated, to exact a commission. If the lender be shown to have had actual knowledge of the agent's intention to charge a commission, and, before accepting or ratifying the contract of loan, became aware of the fact that a commission had been reserved, the law would imply assent to the agent's acts from the principal's silent acquiescence." The language just quoted applies to the case now in hand; for, if our reasoning is sound, there was ample evidence to warrant and support the inferences that the investment company understood perfectly well that no commission was to be charged against it; that it was fully aware of an intention on the part of the Georgia Company and Barnett to make a charge against the borrower for their services; that, when the note was returned to the investment company, it must, under all the circumstances, necessarily have known that a commission had been taken from the maker; and that, without prosecuting any inquiry as to the amount of the commission exacted, but choosing rather not to be too well informed as to this matter, it by "silent acquiescence" assented to Barnett's act in appropriating the same. In other words, it is fairly inferable from the evidence submitted pro and con that there was a tacit understanding between the investment company and its Georgia agents that they should undertake in its behalf to effect loans of the funds which it advanced to them, looking in each particular instance to the borrower alone for compensation, which was to be realized by the exaction of such commissions as he might be willing to pay under the guise of a written agreement, signed by him, purporting to constitute the particular agent of the company with whom he dealt his agent to apply for and negotiate in his behalf the desired loan. If so, such pretended collateral agreement between the lender's agent and the borrower would be but a thin and transparent cloak, ill concealing the real nature of the transaction it was intended to shield.

Before concluding, it is but fair to point out that it would have been perfectly legitimate and proper for the plaintiff to meet and overcome the defense sought to be established by introducing evidence, if available, to show that the investment company, although not it-

self agreeing to pay its Georgia agents anything for their services, nevertheless expressly limited their authority, in the matter of exacting commissions from borrowers, to reserving such a commission only as, added to the stipulated interest to be paid to the company, if less than 8 per cent, would not render any particular loan usurious. For illustration, if such was the limited authority of the Georgia Company and Barnett, they could not, without violating their duty to their principal, have charged the defendant a commission amounting to more than 1 per cent per annum, for the interest which she agreed to pay on the loan was at the yearly rate of 7 per cent; and it follows that if, without any secret understanding with or connivance on the part of the company, they proved themselves to be faithless to their trust, it would not be legally bound by any collateral agreement made between them and the defendant whereby she authorized them to reserve, as compensation for their alleged services to her, the large commission which they exacted. That this is sound reasoning will, we believe, be apparent, when considered in connection with the following extract taken from the opinion filed in the *McLean Case* (page 807, 97 Ga., and page 494, 25 S. E.): "It is a homely axiom that 'it takes two to make a contract.' Therefore, unless a borrower shows affirmatively that one who loaned his money at the highest legal rate assented to the exaction of a commission by the latter's agent, it cannot be said that the lender ever understood and agreed that the collateral agreement between his agent and the borrower should be considered and become a part of the contract of loan. The borrower has no right to assume that even a general agent has power to bind his principal by such an agreement; for, the same being illegal and prohibited by law, the borrower is put upon immediate notice that the agent is transcending his general powers, and going beyond the legal scope of his agency. Only by showing that the agent was in fact authorized by his principal to reserve the commission can the borrower claim immunity because of an act by the agent which he is bound by law to know was illegal and not binding upon the principal unless previously authorized or subsequently ratified by the latter. It is not enough to show that the agent reserved a commission, instead of turning over the entire amount of the principal sum which he undertook to loan in behalf of his principal, for the lender, in the absence of information as to the true state of facts, would have the right to assume that his agent would prove faithful to his trust; and, though the agent be a general one, the lender would be under no duty of anticipating that he would make an illegal contract, and consequently, if the agent actually made such a contract without the knowledge or consent of his principal, the latter would not be bound by it. . . . What we wish to be understood as holding is that, unless it be shown that the lender had knowledge of the illegal agreement between the borrower and

the agent, the law will not imply any assent on the part of the lender thereto, but will treat him as authorizing and ratifying a loan on the terms communicated to him by the agent, and expressed in the instruments which the borrower has signed as setting forth the contract made by him with the agent. It certainly would seem that if, by executing and delivering these formal instruments, the borrower induced the lender to honestly part with his money in consideration of the undertakings on the part of the borrower therein set forth, the latter would be estopped from claiming that such was not the real contract assented to by the lender." In the present case it would seem that in the court below the plaintiff stood squarely upon the contention that Barnett was in no sense the agent of the investment company, but acted solely in behalf of the defendant, as evidenced by her written application for the loan. At any rate, it is certainly true that the plaintiff did not offer any evidence tending to show that the authority of Barnett in the matter of charging commissions from borrowers was in any wise limited by the company; and consequently the record before us contains no hint or suggestion that, in reserving the large commission exacted of the defendant, Barnett proved himself to be a faithless and unscrupulous agent. If the plaintiff desires to avail herself of such a contention, opportunity to do so will be afforded her by the judgment we now render, for we feel constrained to order another hearing on the ground that the trial judge erred in not submitting the case to the jury.

Judgment reversed.

All the Justices concur.

G. H. MILLER *et al.*, Plffs. in Err.,
v.

F. B. FREEMAN, Admr., etc., of G. S. Freeman, Deceased.

(111 Ga. 654.)

*1. Where a partnership has been fully launched and is continuing, one of the partners cannot maintain against the other an action at law for damages resulting to the partnership by reason of the defendant's failure to perform a duty imposed upon him by a stipulation in the partnership agreement. This is true, although the plaintiff may seek to recover only his *pro rata* share of the damage, and although at the time the suit is brought the partnership may owe no debts to third persons, and there may be no other debt due by either party to the other.

*2. An accounting may be had in equity by one partner against the other, without a final winding up and dissolution,

*Headnotes by SIMMONS, Ch. J.

NOTE.—In respect to the statement of accounts between partners, see note to Vanbeber v. Plunkett (Or.) 27 L. R. A. on page 820.

As to the rights of partners *inter se* in partnership real estate, see note to Yorks v. Toser (Minn.) 28 L. R. A. 86.

51 L. R. A.

in a case where the partnership has, by the agreement, several years to run, and where the partnership articles contemplate a settlement at the end of each season.

(August 7, 1900.)

ERROR to the Rome City Court to review a judgment in favor of plaintiff in an action brought to recover damages for alleged breach of a partnership contract. *Reversed.*

The facts are stated in the opinion.

Messrs. Dean & Dean, for plaintiffs in error:

An action at law cannot be maintained by one partner against his copartner to recover money due him on account of partnership transactions.

Bates, Partn. § 849; *Hills v. Bailey*, 27 Vt. 548; *Willey v. Renner*, 8 N. M. 641, 45 Pac. 1132; *Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052; *Stanberry v. Cattell*, 55 Iowa, 617, 8 N. W. 478; *Elmer v. Hall*, 148 Pa. 345, 23 Atl. 971; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 683; *Stone v. Mattingly*, 14 Ky. L. Rep. 113, 19 S. W. 402; *Bowzer v. Stoughton*, 119 Ill. 47, 9 N. E. 208; *Harrie v. Harris*, 39 N. H. 48; *Burns v. Nottingham*, 60 Ill. 531; *Kidgway v. Grant*, 17 Ill. 117; *Frink v. Ryan*, 4 Ill. 322; 17 Am. & Eng. Enc. Law, pp. 1254-1273; *Devore v. Woodruff*, 1 N. D. 143, 45 N. W. 701.

A partner cannot sue at law for damages caused by his copartner's misconduct.

Leber v. Dictz, 22 Misc. 524, 49 N. Y. Supp. 1002; *Hollister v. Simonson*, 36 App. Div. 63, 55 N. Y. Supp. 372; *Lord v. Peaks*, 41 Neb. 891, 60 N. W. 353.

A partner to whom is left the management of the business is not liable for honest errors in judgment; nor for a failure to take the utmost precaution.

Exchange Bank v. Gardner, 104 Iowa, 176, 73 N. W. 591.

Until a settlement of partnership affairs, a partner who is in arrears in the partnership accounts is the debtor of the firm, not of a copartner who has paid the partnership debts.

Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052; *Pendleton v. Beyer*, 94 Wis. 31, 68 N. W. 415; Bates, Partn. § 849, and note.

Mr. C. N. Featherston, for defendant in error:

To the rule that one partner cannot sue another at law there are well-settled exceptions, within which this case falls, and the rule generally has been much relaxed.

Parsons, Partn. *277.

Such a suit may be brought for breach of any distinct agreement in partnership articles, where the damages do not involve the whole partnership affairs, or can be ascertained without the settlement of intricate partnership accounts.

Parsons, Partn. *276; Story, Partn. § 218.

Or where the items of account are few and easily settled by a jury.

Lcsley v. Rosson, 39 Miss. 368, 77 Am. Dec. 679; also *Townsend v. Goevecy*, 19 Wend. 424, 32 Am. Dec. 514, 516; *Duncan v. Lyon*, 3 Johns. Ch. 351, 8 Am. Dec. 513.

But the rule itself never prevailed in Georgia. Here a partner could always sue at law in any case that he could elsewhere sue in equity.

Poul v. Perdue, 44 Ga. 454; *Goodson v. Cooley*, 19 Ga. 599; *Miller v. Andres*, 13 Ga. 360.

The Millers are liable to Freeman for the damages resulting to him from their breach of the partnership articles.

Story, Partn. § 173; *Murphy v. Crafts*, 13 La. Ann. 519, 71 Am. Dec. 519.

Nor is Freeman bound to await the end of this ten years' term before demanding this indemnity.

Rondeau v. Pedesclaux, 3 La. 510, 23 Am. Dec. 463.

Mcarrs. Wright & Ewing also for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

Suit was brought in the city court by F. B. Freeman, as administrator with the will annexed of G. S. Freeman, against Miller & Son; the petitioner alleging that a contract had been entered into between his testator and the defendants, which was in substance as follows: Plaintiff's testator had leased to the defendants a certain described tract of land for a term of fifteen years from January 1, 1893. Defendants were to furnish during 1893 as many peach trees as would be required to plant the land leased, and also to furnish trees to replant whenever necessary during the first three years of the lease. Plaintiff's testator was to cultivate, prune, pick, and pack the fruit as directed by the defendants; the same to be cultivated during the first three years in a designated way. After the expiration of the three years the orchard was to be cared for according to the terms prescribed in the contract. The defendants were to attend to the procuring of packages necessary to ship the fruit, and were to have full control of the shipping and selling of the fruit. After three years all expenses necessary to a proper carrying on of the business were to be borne equally by each party. The net profits derived from the sale of the fruit were to be equally divided between the plaintiff's testator and the defendants. It was distinctly stipulated that all of the conditions in the contract were to be binding upon the heirs, executors, and assigns of the parties. The petition further alleged that since the death of the plaintiff's testator the defendants have, in their dealing with the petitioner, treated the contract as binding and obligatory; that in 1898 defendants failed to procure the packages necessary to ship the fruit in sufficient time to properly and seasonably ship and market the same, and thereby petitioner was damaged in amounts which are set forth in detail in the petition, aggregating the sum of \$2,396.10, for which sum, with interest, petitioner prays judgment. By an amendment to the petition it was alleged that one inducement which moved the plaintiff's tes-

51 L. R. A.

tator to enter into the contract was that the defendants were experienced fruit shippers, and plaintiff, under the contract, relied upon them to procure the necessary packages to ship and market the fruit; that there is nothing due and unaccounted for between the plaintiff and defendants on the contract, except the matter set forth in the petition; that the parties to the contract interpreted the same as providing for a division of the profits at the end of each season, and have so acted; that there are no debts due by the parties to the contract to others in connection with the business with which the contract deals, and there is no debt due by either one of the parties to the other, except the claim set forth in the petition. To this petition the defendants demurred. The court overruled the demurrer, and the defendants excepted.

There were but two questions argued by counsel for plaintiff in error: First, can one partner maintain an action against his copartner in a court having no equity jurisdiction? And, second, the title to the property alleged to have been damaged being in the partnership, ought not the action to have been brought in the name of the partnership? No question was raised here as to whether the contract between the parties constituted them partners. See, however, in this connection, the case of *Gray Bros. v. Blasingame*, 110 Ga. 343, 35 S. E. 653.

Treating the contract as one of partnership, we think that the present action was not maintainable at law, and that the judge erred in overruling the demurrer to the petition. The case fell within the recognized rule that one partner cannot, before a final winding up of a partnership, maintain against his copartner an action at law based upon partnership transactions. This rule has but few exceptions; most of the so-called exceptions being apparent only, and not real. After the partnership is practically at an end, whether it be a single venture or otherwise, the rule cannot apply, for the parties are no longer partners. So an action may be maintained for the breach of an agreement to enter into a partnership, or of an agreement to contribute to the capital stock, or in any other way assist in launching the partnership. And, where the basis of the suit is a matter not connected with the partnership affairs, the rule, of course, cannot apply. The present suit is, however, not like those just mentioned. It falls within the general rule against suits between partners, and cannot be maintained unless it is within the exception to that rule which is thus stated by Judge Story: "Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either assumpsit or covenant, as the case may require, will ordinarily lie to recover damages for the breach thereof." *Story*, Partn. 7th ed. § 218. While this statement of the exception is very broad, we think that, in seek-

ing to determine whether this case is within it, it should be construed with reference to other authorities, and to the cases upon which it is based. A careful consideration of the statement, and of the authorities cited to sustain it, will show that the cases falling within this exception are of three classes: (1) Those in which the partnership is inchoate and has never been launched; (2) those in which the partnership is at an end; and (3) those in which the stipulation which is violated, and for the breach of which the action is brought, is one between the partners individually, and "the damages resulting from which belong exclusively to the other partner, and can be assessed without an accounting." See 2 Bates, Partn. § 889. The statement of the exception in Parsons, Partn. 4th ed. p. 258, § 191, that, "whenever there has been any breach of an express stipulation between persons who are partners, an action for damages will be sustainable, unless the breach or the stipulation itself, or both, are such that they involve the whole partnership business and accounts, and the damages can be determined only by first settling those accounts," is more carefully worded; and the instance given as an illustration is where "one partner agrees to pay another a certain salary or commission, or other compensation for his services, over and above his share of the profits, and independently of them." This is not in any sense inconsistent with the doctrine laid down in the case of *Hill v. Palmer*, 56 Wis. 130, 14 N. W. 23, in which it was said: "The test seems to be that if the damages resulting from a breach of a covenant or stipulation in the partnership agreement by one partner belong exclusively to the other partner, and can be assessed without taking an account of the partnership business, covenant or assumpsit may be maintained by the injured partner against the other for such damages."

Among the cases cited to sustain the judge in overruling the demurrer in the present case are several in which the stipulation violated was between the partners individually, and not for the benefit of the partnership. Such cases are not in conflict with what is here laid down. Others of those cases are suits for a wrongful dissolution, or cases in which the partnership was never launched. With most of them the only fault is that, in ruling properly the particular cases, broad statements, made in reference, not to the cases decided, but to partnership cases generally, are not always guarded and restricted with sufficient care. So far as we can find, every case worthy of note in which this point is expressly decided seems to be an authority against the ruling of the court below in the present case. In § 196, Collyer, Partn. 6th ed., it is said that the right of one partner to maintain an action at law against his copartner for the breach of a stipulation in the partnership agreement, during the existence of the partnership, does not extend to cases "where the damages to

be recovered are of necessity payable out of, or when recovered payable into, the partnership fund." Mr. Wood, in his notes to the text just cited, states the test as follows: "An action for damages for the breach of an express agreement entered into by one partner with another will lie if the damages, when recovered, will belong to the plaintiff alone." In Gow, Partn. 3d ed. pp. 71, 72, *et seq.*, the first statement of the right to sue for the breach of a partnership agreement is as broad as that of Judge Story, which it is cited to sustain. Every single instance given to illustrate it is, however, in perfect accord with those authorities which limit the right to sue at law during the continuance of the partnership to those cases in which the stipulation is between the partners personally, and not for the benefit of the partnership, or between it and one or more of its members. After mentioning cases where the breach is of an agreement to advance money to launch the partnership, and of an agreement, not for the benefit of the partnership, but between the partners personally, and of an agreement to account, it is said: "Where a penalty is reserved in case of breach of a partnership agreement, one partner can recover on the covenant against his copartner; and if it is stipulated in the articles of partnership that one of several partners shall sue for the penalty agreed on, and divide the amount between his copartners who have not committed a breach of the articles, such agreement will be binding, although the party appointed to sue, if he incurred the penalty, could not sue himself. . . . The same rule applies to every other species of lawful covenant by which partners reciprocally and severally bind themselves *inter se* to the performance of any particular act or thing." In 2 Lindley, Partn. (Rapalje's ed. p. 456), it is pointedly stated that, before the English judicature acts of 1873 and 1875, "no action at law could be brought by one partner against another for the recovery of money or property payable to the firm, as distinguished from the partner suing. . . . An agreement by each partner with his copartners might, indeed, be framed so as to enable one to be sued by the others, if care was taken to exclude the partner sued from all share in what was sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment; but an agreement drawn so as to accomplish both these objects was not generally convenient." Again, in the same work (p. 562), it is said: "An action for damages for the breach of an express agreement entered into by one partner with another would lie if the damages, when recovered, would have belonged to the plaintiff alone." With this the other authorities are in accord. "An action at law will lie for a premature dissolution in violation of the partnership agreement; but, to sustain such an action, the claim must be, not for the recovery of any share of profits or agreed compensation due him from the

firm, but for the wrong done him personally, as distinguished from a breach of duty owing to the firm. This rule applies to the violation of all other stipulations in the articles, the damages resulting from which belong exclusively to the other partner, and can be assessed without an accounting." 17 Am. & Eng. Enc. Law, 1st ed. p. 1264. "Partners can, by agreement, separate any part of the business from the general rule of partnership, and make a separate and individual obligation of it, as between each other; and in such case the liability can be enforced at law, independent of the state of the partnership accounts. But the real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." 2 Bates, Partn. § 878. See also *Ryder v. Wilcox*, 103 Mass. 24, 29; *Wills v. Simmonds*, 8 Hun, 180; *Stone v. Wendover*, 2 Mo. App. 247; 15 Enc. Pl. & Pr. p. 1046.

Where, therefore, the stipulation is an agreement by one partner individually to do something for the benefit of the other individually, and imposes an obligation binding the one personally to the other, its breach gives a right of action at law, if the damages can be assessed without an investigation of the partnership accounts. But where the stipulation is for the benefit of the partnership, and consequently of both partners, neither partner alone has a right, the partnership relation existing, to sue in his own name, and at law, for the damages arising from its breach. There was in the present case no covenant to furnish crates, but merely an agreed distribution of partnership duties, by which the duty of securing crates was put upon the defendants, while the cost of the crates was to be defrayed by the partnership. The defendants did not agree to contribute the crates, but merely to see that crates were procured. The crates were to be used, not by the plaintiff, but by the partnership; and the right to the profits was in the partnership, and not solely in the plaintiff. The damage arising from the breach was to the partnership, and the plaintiff was not damaged at all, except by the reduction of the amount he should receive of the partnership profits. Had there been losses, he would have been damaged only by having to contribute more to the payment of such losses. While the damage arising from the breach of the defendant's agreement was to the partnership, one cannot sue himself, or be in the same action party plaintiff and defendant, and therefore the partnership could not maintain a suit against the defendants. Further, the compensation owed to the partnership by the defendants for their breach of duty was a partnership asset, and one partner could not collect and keep it. 2 Bates, Partn. § 849. These rules—that a partnership cannot sue one of its members, and that one partner cannot recover from his copartner an amount due the partnership—are universally recognized, 51 L. R. A.

and the plaintiff sought to evade them by suing for only his *pro rata* share of the amount due the partnership. This cannot be done. See *Id.* § 1018. "One partner cannot recover his share of a debt due to the partnership in an action at law prosecuted in his own name alone against the debtor." *Vinal v. West Virginia Oil & Oil Land Co.* 110 U. S. 215, 28 L. ed. 124, 4 Sup. Ct. Rep. 4. And a suit against one of the partners does not in this particular differ from a suit against a stranger. While the partnership continues, whatever sum is due from the defendants on account of their breach of the partnership agreement is due to the partnership, and not to the plaintiff alone, and must be considered as partnership assets. "So long as the community relation subsists, neither party has a remedy at law in respect to the joint assets." *Hunt v. Morris*, 44 Miss. 314. And the plaintiff, therefore, ought not to be permitted to maintain the present action. Until after a dissolution or termination of the partnership agreement, he cannot maintain such an action at law; and the judge should have sustained the demurrer to the plaintiff's petition, as it showed that the partnership relation still continued. While it appeared that, further than the claim made in the present suit, neither partner owed anything to the other, and that the partnership owed no debts to third persons, it did not appear that debts were not due to the partnership, or that there were no funds on hand, or that the profits already collected had been equally divided. And, even had all these things appeared, there may have been partnership transactions the next day, as a result of which the partnership may have become indebted to third parties, and other such transactions may occur at any time. One partner should not be compelled to make payment to the other, to settle a partnership matter, when the partnership assets may be used for that purpose. The liability of one partner to the other is for such sum only as will settle all cross claims, and this is usually best ascertained by an accounting. See *Abbott*, Trial Ev. 2d ed. p. 281. Even though the defendants in the present case are liable to account for their failure to properly provide crates, and for the resulting damages, their share of the undivided profits may be greater than his liability, and they may be in fact creditors of the partnership. If this be true, they should not be compelled to submit to a judgment, when they can then recover of the partnership more than enough to pay the judgment. And certainly if the business is continuing, and the partnership likely to become indebted to third persons, it would not be proper to allow such a suit as the present one. The reason given in *Story*, Eq. Jur. § 664, why a somewhat different action between partners cannot be maintained, will, with little change, apply to the present case. It is impossible, during the continuance of the partnership, without taking a general account,

to say that any one partner is, on the whole, a debtor of the firm to such an amount. And, if he is, how, in point of technical propriety, can a remedy be instituted against him by the other partner alone, as contradistinguished from the partnership? See 2 Bates, Partn. § 849, where it is said: "Even if there are no debts, yet collections must be received unequally by the partners. The mutual balances are therefore constantly fluctuating quantities, and a judgment on any one item would settle nothing, and, if allowed, would produce a multiplicity of suits."

We think, for these reasons, that the present case is one in which an action at law cannot be maintained by the plaintiff during the continuance of the partnership relation. The amount of the assets and profits can be best determined by an equitable accounting, in which all differences may be adjusted. It is urged as an objection to forcing the plaintiff to seek an accounting that it would be a hardship to force a dissolution of a partnership which is designed to continue for several years longer. We think that this objection is untenable, for two reasons: In the first place, while equity jurisdiction is extended to cases where the law does not afford a full or adequate remedy, a court of law cannot take cognizance of cases not otherwise within its jurisdiction solely because equitable relief can be obtained only on conditions which seem unreasonable or oppressive. In the second place, the rule laid down by the older text writers, and in a few of the older cases, that an accounting cannot be had in a court of equity unless there be a prayer for a dissolution, is now by no means recognized as applying to all cases. There are now many well-recognized exceptions. "It was formerly considered that no account between partners could be taken in equity, save with a view to a dissolution; and a bill praying an account, but not a dissolution, has been held bad on demurrer. But this rule has been gradually relaxed; for it has been felt that more injustice frequently arose from the refusal of the court to do less than complete justice, than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved." 2 Lindley, Partn. Rapalje's ed. p. 494. "Whether one partner is entitled to the remedy of an accounting as against his co-partners, without praying for a dissolution of the copartnership and a winding-up of the business, is, so far as text-books are to be believed, very doubtful; but a careful examination of the voluminous authorities extant upon the subject would seem to leave no doubt whatever that the action is a proper one, and can be maintained, not only during the existence of a partnership, but for the very purpose of settling questions in order to avoid a dissolution. . . . And not only is any such rule [that an account-

ing cannot be had without a prayer for a dissolution] manifestly oppressive in principle, since a partner is surely entitled to the benefit of the articles during the existence of the partnership, and not upon dissolution alone, but it is manifestly absurd, since it implies that the court will dismiss a bill because it lacks a prayer which the court has no power whatever to enforce by its decree, should the parties see fit to disregard it after judgment. . . . There is little doubt, or none, that the rule should be taken from our text-books, or at least to be applied to such cases only as are brought for a receiver and for interim management." Tracy Gould, in an article in the Albany Law Journal for February 28, 1880, vol. 21, p. 168. Among the "more common cases where a partial accounting, or an accounting without dissolution, may be had," are those in which there is an agreement for settlements periodically. 2 Bates, Partn. § 911. See also Story, Eq. Jur. §§ 668, 671. The partnership now under consideration was such that there should be an annual loss or an annual profit, and that there should be annually a considerable period of time when but little partnership business could be done. The contract did not in terms provide for an annual accounting and settlement between the parties, but this was evidently their intention; and the allegations of the petition are clear and distinct that the partnership articles were so interpreted by the partners, and that in the past they have acted on this interpretation. The actual construction thus put upon the articles by the partners should be adopted as the proper interpretation of them. Story, Partn. 7th ed. § 191. The present seems, therefore, to be just such a case as should be excepted from the rule that an accounting cannot be had without a dissolution. An accounting would determine the state of the partnership accounts at the time when an accounting was contemplated by the agreement, and it would make no difference that accounts might be changing between the time of filing the petition and the time the decree is made. According to their agreement, the partners were entitled to an accounting at a certain time, and transactions occurring subsequently to that time could be accounted for on the next annual settlement. Then, too, the fact that at the end of the season there is but little partnership business to be done renders this a case in which an accounting without dissolution would be free from practically all the objections urged in favor of the old rule against it,—a rule which, "though true in some cases, and to a certain extent, has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle," as was said by Lord Cottenham in *Wallworth v. Holt*, 4 Myl. & C. 619.

Judgment reversed.

All the Justices concur.

MISSOURI SUPREME COURT (Division 2).

STATE of Missouri, *Respt.*,

v.

Adolph KODAT, *Appt.*

(.....Mo.....)

1. An assault with a deadly weapon with intent to kill is sufficiently proved by evidence that defendant, after some controversy, had made a threat against the prosecuting witness and fired a pistol after her, sending a ball through her clothing.
2. A divorce granted after the commission of a crime by the husband against a third person will not make the former wife a competent witness against him respecting such crime or conversations with the husband during marriage.

(November 12, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis convicting him of assault with intent to kill. *Reversed.*

The facts are stated in the opinion.

Messrs. Bishop & Rollins for appellant.
Messrs. Edward C. Crow, Attorney General, and Sam B. Jeffries, for respondent:

The divorce of a wife from her husband annuls the marriage, and places her in the same situation, so far as her competency as a witness is concerned, that she was in prior to the marriage.

White v. State, 40 Tex. Crim. Rep. 366, 50 S. W. *loc. cit.* 708; *Toovey v. Baxter*, 59 Mo. App. 470.

Gantt, P. J., delivered the opinion of the court:

The defendant was indicted in the circuit court of the city of St. Louis, duly arraigned, tried, and convicted of an assault with intent to kill Mrs. Josephine Kretsch, on or about the 22d day of October, 1899, in the city of St. Louis. The indictment was in the ordinary form, and amply sufficient. No error has been discovered in the record proper, and none pointed out by the defendant. Indeed, he has no counsel in this court. The instructions were such as have been approved again and again by this court. In the motion for new trial we note that complaint is made of the refusal of certain instructions prayed by defendant. No such instructions have been incorporated in the bill of exceptions, and, as a matter of course, the propriety of refusing them is not before us. The evidence fairly establishes the following facts: The defendant and his wife had separated; she living at No. 1921 South Broadway, St. Louis, and he at a place several blocks distant. She was living in the same house with one —

NOTE.—For husband or wife as witness against the other, see the earlier cases in this series, of *People v. Quanstrom* (1Mch.) 17 L. R. A. 723, and *Frankenthal v. Solomonson* (Wash.) 44 L. R. A. 311.

As witness in action for wife's libel or slander, see note to *Morgan v. Kennedy* (Minn.) 30 L. R. A. on page 529.
 51 L. R. A.

Stussel, the father of her illegitimate child. This child was five months old when she married the defendant. In November following the commission of the crime with which defendant is charged, and before the trial, she procured a divorce from the defendant and married Stussel. On the evening of October 22d the prosecuting witness, Josephine Kretsch, was at the house of Mrs. Kodat, making her a visit. They were sitting outside of the house when the defendant came up and called out to his wife, "Hello, whore! I want my furniture," to which the wife replied, "You can't have any furniture until after the divorce case." The child, who was then eighteen months old, was with its mother, and he kicked the child, and called it a bastard and a son of a bitch. Upon this Mrs. Kodat called upon her husband to fight her, and not the child, and she took hold of him and kicked him. Mrs. Kretsch in the meantime had told the defendant that he ought to be ashamed of himself, and one John Holup, the landlord of the place, ordered defendant to leave the premises. The defendant said: "I'll fix you. I don't know whether you will be living to-morrow night, yet,"—and went away, and in about fifteen minutes returned with a pistol in his hand. Mrs. Kretsch then told Mrs. Kodat that she was afraid and wished to go home; but Mrs. Kodat, seeing the pistol in the defendant's hand, told her to go back, and they both began running back in the yard. The defendant fired after them, the ball passing through Mrs. Kretsch's dress. This is, in substance, the story of the shooting, and the circumstances connected with it, as told by witnesses Josephine Kretsch, Mary Stussel, and John Holup; the narration of each witness, of course, being slightly different from the others in some of the details, but all corresponding in substance and in all the main facts. Frank Kretsch was the only witness who testified on behalf of the defendant. He was the husband of the prosecuting witness, but was not living with her. He swore that his wife's reputation for truth and veracity was bad. He was not present at the shooting, and knew nothing about it. Defendant did not testify. The evidence, if believed by the jury, was sufficient to convict defendant of having made an assault with a deadly weapon, with intent to kill.

The remaining assignment of error presents a point never directly adjudicated by this court, so far as we can discover. It is this: Is a divorced wife a competent witness against her husband in a criminal prosecution against him for an assault upon a third party, when the alleged assault occurred during their marriage? At common law a husband or wife could not testify for or against each other in any legal proceeding in which the other was a party, except in the prosecution of one for criminal injury to the other, as for assault and battery, rape by a third person assisted by the

husband, or forcible abduction. 1 Greenl. Ev. 16th ed. §§ 334, 335; *State v. Berlin*, 42 Mo. 572; *State v. Arnold*, 55 Mo. 89; *State v. Willis*, 119 Mo. 485, 24 S. W. 1008; *State v. Evans*, 138 Mo. 116, 39 S. W. 462. The statute of Missouri has modified the common-law rule to the extent that it permits them to testify against each other in divorce proceedings. Rev. Stat. 1889, §§ 4218, 8918. They may testify for each other in criminal prosecutions, except as to confidential communications, but not against each other. It is perfectly obvious, then, that, inasmuch as defendant was charged in the indictment with an assault upon Mrs. Kretsch, Mrs. Kodat would not have been a competent witness against him if she had remained his wife at the time she was offered as a witness against him. Did her divorce from him after the assault and prior to the trial render her competent? It may be conceded that it is a general rule that the competency of a witness is to be determined by his or her relation at the time his or her testimony is offered. Still, if her incapacity remained notwithstanding the divorce, that rule would not aid the state. As to strictly confidential communications between husband and wife, there can be no doubt whatever that neither death nor divorce will remove the incompetency of either to testify against the other as to such. 1 Greenl. Ev. 16th ed. § 337. But the point with which we have to deal is the admissibility of evidence which does not fall within the common-law definition of confidential communications between husband and wife, but does come within that of privileged statements. 1 Greenl. Ev. 16th ed. § 254, and cases cited. The learned circuit court permitted the wife to testify to statements made by defendant and herself in the presence of the prosecutrix and John Holup, another witness, and a crowd of boys, and to the fact that defendant shot at the prosecutrix and herself as they ran from him, and ruled that Mrs. Kodat or Stussel could not testify to any statements made out of the presence of these persons. This ruling is not susceptible of division; that is to say, evidence of statements made by the wife and husband to each other on the one hand, and the naked fact of shoot-

ing at the prosecutrix on the other. Neither was admissible. In the recent case of *Shanklin v. McCracken*, 140 Mo. 348, 41 S. W. 898, Brace, J., reviewed the cases in this state; and it was ruled that by § 8922, Rev. Stat. 1889, the "disability of the wife is expressly continued in all cases, as to any admission or conversation of her husband, whether made to herself or to third parties." And the statement made in *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506, was cited with approval, to the effect that the wife is not a competent witness to prove what is said in a conversation by another person with her husband, nor to prove any act done in connection with such conversation, and which might be explained thereby. We think Mrs. Stussel's evidence as to her conversation with defendant, and his statements made therein, while yet his wife, were incompetent, and the subsequent divorce did not remove their incompetency. Was she competent to testify to a fact which directly showed that the husband was guilty of the crime charged in the indictment, to wit, that he shot at the prosecutrix? We think most clearly not. It is the policy of the law that the things which are privileged during the marriage relation shall remain forever inviolable, whether the relation has ceased by reason of death or divorce; and the divorced wife, from reasons of public policy, is incompetent to testify against her husband to the same extent that she would have been had the marriage relation never been dissolved. And such, we think, is the overwhelming weight of authority. *State v. Raby*, 121 N. C. 682, 28 S. E. 490; *State v. Phelps*, 2 Tyler (Vt.) 374; *State v. Boyd*, 2 Hill L. 288, 27 Am. Dec. 376; *State v. Jolly*, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

The incompetent evidence, having been received over the objection of the defendant, is presumed to have been hurtful, unless the contrary clearly appears.

Looking through the whole record, we cannot say that this evidence was harmless; and the judgment must for this reason be, and it is hereby, reversed, and the cause remanded for new trial.

Sherwood and Burgess, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Francis ROCHE, Appt.,
v.

Nellie A. SMITH.

(176 Mass. 595.)

A broker through whose efforts a binding contract is made for land between his principal and the owner of the land has earned his commission, notwithstanding the fact that the owner cannot make a good title to the land because of encumbrances not known to the broker, as the remedy of the

principal is against the other party to the contract.

(October 17, 1900.)

A PPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to recover a broker's commission for effecting an exchange of real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Arthur E. Burr, for appellant:

The plaintiff's contract of employment, in this case, was to bring to the defendant one who would exchange property suitable to the defendant in return for the property

NOTE.—For real-estate broker's commissions as affected by defective title, see note to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 598. 51 L. R. A.

of the defendant. This the plaintiff did. The plaintiff's duty was then ended. He had completed his contract of employment with the defendant. The defendant did not choose to carry out the agreement. The agreement may have turned out different from what she expected when she entered into it, but it nevertheless was a bargain, and it was a bargain that the plaintiff obtained for her. The law has said that in such a case the broker's commission is due when the contract for exchange is entered into.

Ward v. Cobb, 148 Mass. 518, 20 N. E. 174; *Rice v. Mayo*, 107 Mass. 550; *Chapin v. Bridges*, 116 Mass. 105; *Cook v. Fiske*, 12 Gray, 491; *Pearson v. Mason*, 120 Mass. 53; *Leete v. Norton*, 43 Conn. 219; *Veazie v. Parker*, 72 Me. 443; *Springer v. Orr*, 82 Ill. App. 558; *Burns v. Oliphant*, 78 Iowa, 456, 43 N. W. 289; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091; *Knapp v. Wallace*, 41 N. Y. 477; *Glentworth v. Luther*, 21 Barb. 145; *Condict v. Cowdrey*, 25 Jones & S. 66, 5 N. Y. Supp. 187; *Collins v. Fowler*, 8 Mo. App. 588; *Hipple v. Laird*, 189 Pa. 472, 42 Atl. 46; *Donohue v. Flanagan*, 28 N. Y. S. R. 757, 9 N. Y. Supp. 273; *Crombie v. Waldo*, 28 Jones & S. 123, 17 N. Y. Supp. 373; *Coleman v. Meade*, 13 Bush, 358; *Greene v. Hollingshead*, 40 Ill. App. 195; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *Cook v. Welch*, 9 Allen, 350; *Drury v. Newman*, 99 Mass. 256; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215; *Holden v. Starks*, 150 Mass. 503, 34 N. E. 1069; *Lighthall v. Caffrey*, 6 Legal News, 202; *Watson v. Brooks*, 8 Sawy. 316, 13 Fed. Rep. 540; *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134.

Mr. George B. Blinn, for appellee:

It is conceded that the said exchange was never consummated. To earn the commission the agreement must be one which the defendant could enforce against Armstrong. But she could not so enforce it because of the said encumbrance, which Armstrong could not remove. The plaintiff therefore cannot recover.

Greusel v. Dean, 98 Iowa, 405, 67 N. W. 275.

Where a broker procures an agreement for the exchange of property executed by his employer and a third party, and the exchange is not consummated owing to a defect in the title of the third party, the broker is not entitled to a commission.

Emens v. St. John, 79 Hun, 99, 29 N. Y. Supp. 656; *Folsom v. Hesse*, 24 Misc. 713, 53 N. Y. Supp. 783; *Norman v. Reuther*, 25 Misc. 161, 54 N. Y. Supp. 152; *Zittle v. Schlesinger*, 46 Neb. 844, 65 N. W. 892; 51 L. R. A.

Freedman v. Gordon, 4 Colo. App. 343, 35 Pac. 879.

Loring, J., delivered the opinion of the court:

This case was submitted to the superior court on an agreed statement of facts. Judgment was entered in that court for the defendant, and from that judgment an appeal was taken to this court.

It appears that the defendant, being the owner of certain land in Boston, "employed the plaintiff to exchange said property for any other suitable property." The plaintiff brought the matter to the attention of Michael F. Armstrong, who offered to exchange a specified piece of land owned by him for the land of the defendant. Armstrong's land was accepted by the defendant as "suitable," and through the efforts of the plaintiff a written agreement was made between the defendant and Armstrong, by which the defendant was to convey her land to him, and he was to convey his land to her. It was stipulated that each lot of land was "to be conveyed within twenty days from this date by a good and sufficient warranty deed, . . . conveying a good and clear title to the same free from all encumbrances, except [in the case of Armstrong's land] taxes for 1897 and a mortgage for \$13,000." On examining Armstrong's title, the defendant discovered that, acting under Stat. 1891, chap. 323, Stat. 1892, chap. 418, and Stat. 1895, chap. 449, the board of street commissioners of the city of Boston had filed plans in the office of the city engineer of the city of Boston, by which certain streets or ways were located over the land to be conveyed to her by Armstrong, in consequence of which he "was unable to convey his said property free from the operation and effect of any of the said doings of the board of street commissioners, and by reason thereof the defendant refused to carry out said agreements." Thereupon the plaintiff brought this suit for his commission.

It is expressly stated that "the plaintiff had no knowledge of the . . . facts relative to the acts of the board of street commissioners of the city of Boston" which are stated above, and that he "acted in good faith in all said negotiations." It was held in *Knapp v. Wallace*, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land,—that is to say, to effect an exchange,—that where the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title, and the land is not conveyed; provided the broker acted in good faith in the matter. In the opinion of a majority of the court, those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other by a

conveyance of other land. Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability to do so does not deprive the broker of his commission; provided the principal made a valid and binding agreement for the sale of the land with the customer produced by the broker. *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174; *Burnham v. Upton*, 174 Mass. 408, 409, 54 N. E. 873. The ground on which this is settled is that, by entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case the decision would have to be the other way, were it not that by entering into the contract with him the principal accepts the customer produced by the broker. What the broker is employed to do is to produce a customer who will buy and pay for his principal's land. *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000. If it turns out that the customer produced by the broker is not able to pay, and does not pay, for the land, the broker has not performed his duty, and has not earned his commission; and it is only because the principal accepts the customer, by entering into a valid contract with him, that it is held, in cases like *Ward v. Cobb*, that the broker has earned his commission. *Coleman v. Meade*, 13 Bush. 358; *Donohue v. Flanagan*, 28 N. Y. S. R. 757, 9 N. Y. Supp. 273; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *Lookwood v. Halsey*, 41 Kan. 166, 21 Pac. 98; *Springer v. Orr*, 82 Ill. App. 558. The law is settled in other jurisdictions in accordance with *Ward v. Cobb* (see *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192); and generally that a broker makes out a case for a commission earned by proving a contract made. See *Cook v. Fiske*, 12 Gray, 491; *Rice v. Mayo*, 107 Mass. 550; *Keys v. Johnson*, 68 Pa. 42; *Veazie v. Parker*, 72 Me. 443; *Conkling v. Krakauer*, 70 Tex. 735, 739, 11 S. W. 117. The same rule obtains when the principal wants to buy in place of wanting to sell. Where the principal wants to buy 100 bushels of wheat at a price named by him, and employs a broker to get him the wheat at that price, the broker earns his commission when he produces a customer, and his principal makes a valid, binding agreement with the customer for the wheat; and the broker's right to his commission is not affected by the inability or refusal of the customer to deliver the wheat. In such a case the broker has not produced a customer able to supply his principal with the wheat, and would not have earned his commission had it not been that his principal, by contracting with the customer, had accepted him. In such a case the principal has a right to full compensation for the loss of his bargain by recovering damages for breach of the contract, and in the event

which has happened the commission paid the broker is paid for that. The rule is the same when the broker is employed to get for his principal a certain piece of land. If through the broker's effort a binding contract is made between his principal and the owner of the land, the broker has earned his commission, and his right to it is not affected by the fact—if it turns out to be the fact—that the owner, the broker's customer, cannot make a good title. The principal has his remedy by recovering full damages for the loss of his bargain in an action at law on the contract, and in the event which then happens it is for that which the commission is paid. We have no doubt that in this commonwealth a party has a right to recover full damages for the loss of his bargain under a contract for the exchange or purchase of land where it turns out that the party who agreed to convey the land has not a good title. *Brigham v. Evans*, 113 Mass. 538; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 33, 66 Am. Dec. 394. The rule which obtains in England and some other jurisdictions never has obtained here. When a broker employed to procure a person to convey land to his principal by way of sale or exchange in good faith produces a customer as a person ready, able, and willing to do so, the principal has three courses of action open to him: (1) He may examine the title of the customer, and accept him or not accept him on learning the result of the examination; (2) he may enter into a contract with him, in which it is provided that his title shall be examined, and if it turns out that his title is not good, the contract is at an end; or (3) he may enter into a binding contract with him for the conveyance of the land. In case he takes the third course of action, he is given full compensation in damages for the loss of his bargain if the customer fails to fulfil his contract by conveying the land. Since the principal gets full compensation for the loss of his bargain in that event, there is no escape from holding that the broker has earned his commission when his efforts have resulted in the making of a valid contract. It does not lie in the mouth of a principal to say that the broker's commission has not been earned, when he has secured through the broker's efforts the land he wished, or full compensation for the loss of it. He cannot retain the right to this compensation, and not pay for the broker's services in obtaining it for him. When the broker knows that the customer produced by him has not a title, and omits to tell his principal of that fact, he has not acted in good faith, and has not earned his commission. *Burnham v. Upton*, 174 Mass. 408, 54 N. E. 873; *Butler v. Baker*, 17 R. I. 582, 23 Atl. 1019.

It is stipulated in the agreed facts that, if the plaintiff is entitled to recover, the amount to which he is entitled is \$800.

The entry must be, judgment for the plaintiff for \$800, with interest from the date of the writ.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Moses T. STEVENS *et al.*, Plffs. in Err.,
v.

Joseph CHAMBERLIN.

(40 C. C. A. 421, 100 Fed. Rep. 378.)

1. The obligation of an employer is fundamentally the same towards an employee who volunteers to assist at work not within the scope of his employment as towards one acting within such scope.
2. A master is not liable for injury to an employee caused by the fall of a heavy casting which, in order to remove its natural support for repairs, has been negligently shored up by a timber set on end, instead of safe and proper shoring, although the shoring was done by the master mechanic, who was an intermediate officer in the establishment, having authority to direct the person injured and some authority as to his employment and discharge.

(February 2, 1900.)

NOTE.—Vice-principalship considered with reference to the superior rank of a negligent servant.

- I. Mere inequality of rank, significance of. Usually held not to warrant inference that the superior servant is a vice-principal.
- II. Doctrine that vice-principalship is not deducible merely from the possession of a power of control over the injured servant.
 - a. General statement.
 - b. Rationale of the doctrine.
 - c. Qualification of the doctrine in cases where an order takes a servant outside the original scope of his employment.
 - d. Power of hiring and discharging subordinates, significance of.
 - e. Application of the doctrine to the various grades of supervising employees.
 - f. Illustrative cases.
 1. General managers.
 2. Employees in control of railway trains.
 3. Supervising employees in railway yards.
 4. Foreman of wrecking gangs on railways.
 5. Employees supervising track work on railways.
 6. Employees supervising various kinds of construction work.
 7. Supervising employees in the mechanical departments of railways and other concerns.
 8. Foreman supervising work in quarries.
 9. Employee supervising the loading of vehicle elsewhere than on railways.
 10. Foreman of gangs loading or unloading ships.
 11. Supervising employees in smelting works.
 12. Employees supervising farms.
 13. Supervising employees in manufacturing establishments.
 14. Supervising employees in mines.
 - (a) Without reference to statutes.

ERROR to the Circuit Court of the United States for the District of New Hampshire to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. Reversed.

The facts are stated in the opinion.

Before *Colt* and *Putnam*, Circuit Judges, and *Webb*, District Judge.

Messrs. Frank S. Streeter, Reuben E. Walker, and Allen Hollis, for plaintiffs in error:

The scope of plaintiff's employment is determined by the nature of the services which he actually rendered in the course of the employment, rather than by any verbal designation of his position.

Rummell v. Dilworth, 111 Pa. 343, 2 Atl. 355.

If he consented, however reluctantly, to perform a new and more dangerous duty,

II. 1, 14—continued.

(b) Appointed under statutes.

15. Subordinate officers of ships.

16. Commanding officers of ships.

III. Doctrine that all superior servants are vice-principals as regards their subordinates.

a. General statement.

b. Relation of the superior-servant doctrine to the doctrine that the head of a department is a vice-principal.

c. Rationale of the doctrine.

1. Unequal knowledge of superior and subordinate.

2. Inability of master or superior agents to supervise all details of the work.

3. Obligation of servant to obey his superior.

4. Duty to use care in giving orders regarded as one of the nonassignable duties of the master.

5. Summary.

d. What constitutes the exercise of control within the meaning of the doctrine.

e. Existence or absence of a power to hire and discharge subordinates; significance of.

f. Illustrative cases.

1. General managing agents.

2. Employees controlling the movements of trains which they do not assist in operating.

3. Employees in control of railway trains.

4. Supervising employees in railway yards and depots.

5. Employees supervising the loading of railway cars.

6. Employees supervising track work on railways.

7. Employees supervising various kinds of construction work.

8. Foremen in the mechanical departments of railway companies.

rather than lose the position which he had, "by so doing he engrafted this duty on his original contract, of which he made it a part."

Leary v. Boston & A. R. Co. 139 Mass. 580, 32 Am. Rep. 733, 2 N. E. 115; *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186; *Wormell v. Maine C. R. Co.* 79 Me. 397, 10 Atl. 49; *Cole v. Chicago & N. W. R. Co.* 71 Wis. 114, 37 N. W. 84; *Cummings v. Collins*, 61 Mo. 520; *Houston & T. C. R. Co. v. Fowler*, 56 Tex. 452.

The evidence fails to show a violation of any legal duty which Stevens & Sons, as master, owed to Chamberlin as servant.

Bailey, Master's Liability for Injuries to Servant, pp. 1-127; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

The fact that the press was broken down was not a violation of the master's duty to provide Chamberlin with reasonably safe machinery and appliances, for the very obvious reason that this duty toward a servant has reference only to machinery and appliances "placed in his hands for use," and "has no application to the safety and condition of the thing which the servant is employed to repair."

Carlson v. Oregon Short Line & U. N. R. Co. 21 Or. 450, 28 Pac. 497; *Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 42 Am. Rep. 240; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. Rep. 507; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

The master is not required to supply the best, or the safest, or the newest appliances,

III. f, 8—continued.

9. Employees in charge of machinery.
10. Supervising employees in manufacturing establishments.
11. Supervising employees in smelting works.
12. Employees supervising the moving of heavy articles.
13. Employees supervising the loading of vessels.
14. Foremen in quarries.
15. Foremen in mines.
16. Officers of ships.

IV. Relation of a general managing agent to his subordinates.

- a. Introductory.
- b. Doctrine that a general manager is a vice-principal.
 1. English and colonial cases.
 2. American cases.
- c. Rationale of the doctrine.
- d. Doctrine that a general manager is not a vice-principal.
 1. English and colonial cases.
 2. American cases.
- e. Opposing theories reviewed.

V. Relation of employees in charge of departments to their subordinates.

- a. General statement.
- b. Rationale of the master's liability for the negligence of a departmental manager.
- c. Limits of the doctrine of departmental control.
- d. Supervising employees held to be heads of departments.
 1. Employees in the operating department of railway companies.
 2. Employees in charge of railway trains.
 3. Employees supervising the construction and maintenance of railway tracks and structures.
 4. Supervising employees in railway yards, depots, etc.
 5. Supervising employees in the mechanical departments of railways.
 6. Employees supervising railway departments not connected with transportation.
 7. Supervising employees in manufacturing establishments.
 8. Foremen in smelting works.

V. d—continued.

9. Employees supervising mining work.
10. Supervising employees under municipalities.
11. Employees concerned with the loading of vessels.
12. The commanding officers of ships.
 - e. Supervising employees held not to be heads of departments.
- VI. For what acts of superior servants a master must answer.
 - a. No responsibility as to matters beyond the scope of the authority of the superior servant.
 - b. Distinction between official and non-official acts of supervising employees.
 1. Generally.
 2. Distinction considered with relation to the doctrine that the nature of the negligent act is the test of liability.
 - c. Breach of nondelegable duties by any superior servant, master liable for.
 - d. Issuance of orders deemed to be an official act.
 - e. Failure to protect subordinates from transitory dangers deemed to be official negligence.
 - f. Theory that a vice-principal does not represent the master except in so far as he is discharging some nondelegable duty.
 1. Theory that a vice-principal does not act as the master's representative when he engages in manual labor.
 2. Qualifications of this theory.
 - g. Theory that a vice-principal represents the master, even when he participates in manual labor.
 - h. Discussion of the doctrine of the dual capacity of vice-principals.
 1. With reference to the standpoints of the courts which reject the superior-servant doctrine.
 2. With reference to the superior-servant doctrine.
- VII. Summary of the effect of the decisions in each jurisdiction with regard to the relation of supervising employees to their subordinates.

but such as can with reasonable care be used without danger except such as is reasonably incident to the business.

Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. Rep. 195; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *The Maharajah*, 40 Fed. Rep. 784; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Atl. 517; *Wormell v. Maine C. E. Co.* 79 Me. 397, 10 Atl. 49; *Ross v. Pearson Cordage Co.* 164 Mass. 257, 41 N. E. 284; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Fritz v. Salt Lake & O. Gas & E. L. Co.* 18 Utah, 493, 56 Pac. 90.

VII.—continued.

- a. *Introductory statement.*
- b. *The United Kingdom.*
- c. *British colonies.*
- d. *Federal courts.*
- e. *State courts.*

In this note only those decisions will be reviewed in which the essential question was whether the negligent employee was a vice-principal by virtue of his official position, and the nature and extent of the control exercised by him over the fellow servant whose injury was caused by his negligence.

A note to be shortly published in this series will be devoted to a discussion of the cases in which the starting point of the investigation is the character of the particular act which caused the injury, and the master is held liable or absolved according as that act did or did not constitute a breach of some specific duty which the law regards as nondelegable. In some instances there is considerable difficulty in distinguishing these two classes of cases for purposes of classification (see the remarks in VI. b, *infra*); but usually the standpoint of the court is so unmistakable as to exclude all uncertainty with regard to the *rationale* of the decision. Wherever any doubt has been felt whether a particular case should be cited under this or the following note, it has been referred to in both of them.

In divisions I.—VI., containing the discussion of general principles, the writer has endeavored to show as far as possible the real value which the cases cited possess as authorities at the present time, but, in order to lessen still further the danger of a misunderstanding on this point, it has been deemed advisable to append the summary in division VII., the principal object of which is to indicate the fluctuations of opinion in the different jurisdictions. The practitioner is cautioned against relying on any cases until he has ascertained from this summary how they stand with relation to other rulings of the same court.

I. *Mere inequality of rank, significance of. Usually held not to warrant inference that the superior servant is a vice-principal.*

So far as regards the jurisdictions in which the superior-servant doctrine is rejected, it is sufficient to point out that, in most instances, the plaintiff's right of recovery on the mere ground of the negligent servant's higher rank is necessarily negatived by the fact that such higher rank, even when it is accompanied by the power of control, will not render him a vice-

If the necessary tools were furnished by the company, but they were not employed in the work, or were unskillfully employed, through the negligence or want of skill of the foreman, the company is not answerable for the result.

Cleveland, C. O. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970; *Carroll v. Western U. Teleg. Co.* 160 Mass. 152, 35 N. E. 456; *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159.

The selection of the proper tools and materials from the common stock is a part of their use, and "from the foreman down to the humblest unskilled laborer" the servant who makes the selection acts as a fellow servant of his coworkers, and not as his master's representative.

principal. In this group of courts therefore, it would seem that the significance of an inequality of grade cannot be of any practical importance, except in those comparatively rare instances in which the control exercised was of such an extent and such a nature as to make the superior servant a head of department as regards his own subordinates, and his negligence proves injurious to a servant not under his control. This precise conjunction of circumstances so rarely arises that few specific authorities for the nonliability of the master in such cases are to be found in the books, but it has been distinctly recognized, both by the Federal court of appeals and the Supreme Court of the United States, that a conductor of a train, although a vice-principal as to the men working under his orders, is a mere fellow servant as to men on other trains. *Northern P. R. Co. v. Polrier* (1896) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, reversing on another point (1895) 29 U. S. App. 583, 15 C. C. A. 52, 67 Fed. Rep. 881, where the above doctrine was conceded.

Ragsdale v. Northern P. R. Co. (1889) 42 Fed. Rep. 383, is to the contrary, but is not sustainable since the above decision, except so far as it is referable to the words of the Montana statute.

In *Daniel v. Chesapeake & O. R. Co.* (1892) 38 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162, the court was of the opinion that a conductor, being a vice-principal as being in control of his own train, was also a vice-principal as to a brakeman on another train. The *Ross Case* (V. b, VII. d, *infra*), was relied on, and as the decision of the Supreme Court of the United States just cited negatives that construction of its earlier ruling, it would seem that this West Virginia ruling must have lost its authority even if it had not been overruled on the other grounds stated in VII. e, *infra*.

Norfolk & W. R. Co. v. Hoover (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994 (divisional train despatcher, not vice-principal as to engineer, not employed by him, for the mere reason that he is of a superior grade) may also be cited as sustaining in some degree the general principle stated in the text, though here the difference of department was not alluded to by the court.

In nearly all the very numerous instances in which the courts belonging to this group had laid it down in general terms that the defense of common employment prevails, without respect to difference of grade or rank, the nature of the facts under discussion shows that the particular situation which the court had in

McLaughlin v. Camden Iron Works, 60 N. J. L. 557, 38 Atl. 677; *McDermott v. Boston*, 133 Mass. 349; *Floyd v. Sugden*, 134 Mass. 563; *Robinson v. Blake Mfg. Co.* 143 Mass. 528, 10 N. E. 314; *McKinnon v. Norcross*, 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183; *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 289; *Van den Heuvel v. National Furnace Co.* 84 Wis. 636, 54 N. W. 1016; *Ling v. St. Paul, M. & M. R. Co.* 50 Minn. 160, 52 N. W. 378; *Prescott v. Ball Engine Co.* 176 Pa. 459, 35 Atl. 224; *Thyng v. Fitchburg R. Co.* 156 Mass. 13, 30 N. E. 169; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Moore v. McNeil*, 35 App. Div. 323, 54 N. Y. Supp. 956; *McAndrews v. Burns*, 39 N. J. L. 117; *Devlin v. Phoenix Iron Co.* 182 Pa. 109, 37 Atl. 927; *Harms v. Sullivan*, 1 Ill. App. 251; *Rawley v. Colliau*, 90 Mich.

31, 51 N. W. 350; *Hefferen v. Northern P. R. Co.* 45 Minn. 471, 48 N. W. 1, 526.

The duty to provide a reasonably safe place for the servant to work in "is not absolute, but relative."

Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Finlayson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. Rep. 507; *Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. Rep. 48; *Porter v. Silver Creek & M. Coal Co.* 84 Wis. 418, 54 N. W. 1019.

When Chamberlin went to work at the press, the place was safe. The danger from which his injury resulted was created by the subsequent acts of his coworkers and himself in doing the work in which they

view was that in which a superiority of rank is accompanied by a power of control. See, for example, *Columbus & I. C. R. Co. v. Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615; *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 50 Am. Rep. 68, 11 N. E. 77; *O'Brien v. American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297; *Baltimore & O. R. Co. v. McKenzie* (1885) 81 Va. 71; *Norfolk & W. R. Co. v. Nuckols* (1893) 91 Va. 193, 21 S. E. 342.

A master is not responsible to his servant for the negligent performance of some detail of the work intrusted to another servant, whatever may have been the grade of the latter servant. *Kimmer v. Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

There is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment in consequence of their being workmen in different classes. *Lord Chelmsford in Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 80.

The same remark may be made as to the language used in cases decided under statutes which are declaratory of common-law principles. Thus, it has been laid down that the law of California "recognizes no distinction growing out of the grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were, in common, engaged." *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255.

In most of the courts which apply the doctrine that a servant is the representative of the master in respect to any fellow servant over whom he exercises control (see III. *infra*), the rule is that, unless the higher rank of the negligent servant gave him the right of controlling the injured servant, the defense of common employment will prevail, even though the two servants are in the same department of the business.

In *East Tennessee, V. & G. R. Co. v. Rush* (1885) 15 Lea, 145, it was held that an engineer and a servant employed to put danger signals on the track, though they are of different grades, are fellow servants.

In *Nashville, C. & St. L. R. Co. v. Wheless* (1882) 10 Lea, 741, 48 Am. Rep. 317, the court, in holding a railroad company not liable to a brakeman for the negligence of the engineer, said: "Of course in some cases a rail-

road company may be held liable to a brakeman for the negligence of an engineer, as where the former is in fact acting under the orders of the latter. We do not mean to hold that the relation of superior or inferior may not, in some cases, exist between them—only that it did not in this case so far as the record shows. In this view we are of opinion that the facts do not show that the engineer was, in the sense we are considering, the superior of the plaintiff in this instance. They were engaged in a common service, each performing his particular part. They may both be said to have been acting under the orders, either express or implied, of the conductor. But the engineer did not assume any supervision of the work, or give any orders in regard to it, and the plaintiff cannot, in any fair sense, be said to have been acting in this particular matter under the orders, either express or implied, of the engineer; and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence, and pay does not change the result."

To the same effect is the language used *arguendo*, in *Coal Creek Min. Co.* (1891) 90 Tenn. 711, 18 S. W. 387.

See also *Wright v. Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100, holding that a section master who rides to and from his place of work on one of the railroad company's trains is a fellow servant with the engineer of such train, for whose negligence the former cannot recover, even though such engineer is also the conductor of the train; *Lincoln Coal Min. Co. v. McNally* (1884) 15 Ill. App. 181, denying recovery where a shift boss in a mine injured a miner not under his control by his carelessness in lowering a board down a shaft.

Pittsburg, Ft. W. & C. R. Co. v. Devlinney (1867) 17 Ohio St. 197, held a brakeman of one train to be a fellow servant of the conductor of another. But this case seems to be in conflict on this point with a more recent one in the same state,—*Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389,—where, in an action brought by a sectionman who was struck by a train, it was held error to take the question from the jury, inasmuch as the evidence tended to show that the train was run by the conductor at an unlawful rate of speed, and no warning signals were given. Compare also, to the same effect, *Daniel v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 883, 15 S. E. 162, and the comments on it *supra*.

This principle of the last two cases has been embodied in the Ohio act of 1890, declaring that persons "having charge or control of employees in any separate branch or department"

were all engaged. The master's duty extends only to providing a place for work that is free from unreasonable defects of a permanent character.

Minneapolis v. Lundin, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525; *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; *Hermann v. Port Blakeley Mill Co.* 71 Fed. Rep. 853; *Cleveland, C. O. & St. L. R. Co. v. Brown*, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970; *Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Connors v. Holden*, 152 Mass. 598, 26 N. E. 137; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Golden v. Sieghardt*, 33 App. Div. 161, 53 N. Y. Supp. 460; *Baron v. Detroit & C. Steam Nav. Co.* 91

Mich. 585, 52 N. W. 22; *Porter v. Silver Creek & M. Coal Co.* 84 Wis. 418, 54 N. W. 1019.

The duty of instruction and warning exists only when there is a danger known, or which ought to be known, to the employer, of which the employee, through youth or inexperience, is ignorant, and which the employee cannot reasonably be expected to discover by the exercise of ordinary care.

Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789; *Stuart v. West End Street R. Co.* 163 Mass. 391, 40 N. E. 180; *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186; *Johnson v. Ashland Water Co.* 77 Wis. 51, 45 N. W. 807; *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall*, 119 Pa. 149, 13 Atl. 65; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Louisville & N. R. Co. v. Boland*,

are not fellow servants of subordinate employees in other departments. In Kentucky alone it is held that the negligence of a servant who is higher in rank than the injured one will affect the master with liability, even where the superiority of rank is not accompanied by a power of control (see VII. *infra*).

For practical purposes, therefore, the courts are unanimous as to the doctrine that vice-principals are not to be inferred from the mere fact of superiority of rank. Very different is the situation when the investigation begins to concern itself with the significance of the superior servant's right to control the inferior. The solvent effect of the introduction of this element is strikingly indicated by the irreconcilable conflict of views disclosed in the cases cited in the following divisions of this note. The boundaries between the domains of each particular theory are so extremely obscure and ill-defined at their points of contact that it is often impossible to determine with certainty the principle to which a case should be referred; and the difficulty of classifying the cases on a satisfactory basis is enormously increased by the fluctuations of opinion in the same court. See especially the cases as to conductors of trains.

All that is possible, therefore, is to review the authorities under the broad categories into which the larger portion of them seem naturally to fall, and to note any instances in which the arrangement is necessarily defective owing to an overlapping of theories or other causes.

II. Doctrine that vice-principals are not deducible merely from the possession of a power of control over the injured servant.

a. General statement.

The rule accepted by the great majority of the courts is that, for the purpose of determining whether the negligent employee is one of those for whose acts the master is responsible, the fact that one servant has control over another is immaterial, and that a master is not responsible for the negligence of a superior servant, even in giving orders, whereby injury is sustained by the inferior servant. *Moody v. Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185; *Howard v. Hood* (1892) 155 Mass. 391, 29 N. E. 630; *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400; *O'Brien v. American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Indiana Car Co. v. Parker* (1884) 100 Ind. 181; *Fones v. Phillips* (1882) 30 Ark. 17, 43 Am. Rep. 264 (reviewing instructions); *Blake v. Maine C. R. Co.* 61 L. R. A.

(1879) 70 Me. 60, 35 Am. Rep. 297 (*arguendo*); *Feltham v. England* (1866) L. R. 2 Q. B. 33, 7 Best & S. 676, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151; and the cases cited in II. f. *infra*.

"The common law of England is that, where fellow servants are engaged in a common employment, whether one is inferior to the other, whether one is bound to obey the other or not, the master is not liable for injury occasioned to the one through the negligence of the other. There has been some discussion how far the law of Scotland is the same, but it was long ago settled that the law of England is as I have stated." Lord Esher in *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58, 62, 63.

"A servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences." *Keenan v. New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 30 N. E. 711, *Citing Sherman v. Rochester & S. R. Co.* (1858) 17 N. Y. 153; *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 371.

"The fact that the person whose negligence causes the injury is a servant of a higher grade than the servant injured, or that the latter is subject to the direction or control of the former, and is engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule stated, nor make the master liable." *Vitro v. Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

"The rule [i. e., as the defense of common employment] is the same, although the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object." *Lehigh Valley Coal Co. v. Jones* (1878) 86 Pa. 439.

In several of the states the opinions of the courts have undergone a change, the result being sometimes a departure from, sometimes an adoption of, the principle generally accepted. See the summary in VII. *infra*.

This rule applies whether the negligent order was given to the servant injured or to another servant whose act in obedience to the order caused the injury. *Moody v. Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185.

The following are a few of the numerous cases in which the order was given to a fellow servant of the injured person: *Alaska Treadwell Gold Min. Co. v. Whelan* (1897) 168 U.

96 Ala. 626, 18 L. R. A. 260, 11 So. 667; *McCarthy v. Mulgrew*, 107 Iowa, 76, 77 N. W. 527; *Collins v. Laconia Car Co.* 68 N. H. 196, 38 Atl. 1047; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. Rep. 195; *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; *Porter v. Silver Creek & M. Coal Co.* 84 Wis. 418, 54 N. W. 1019.

The negligence, if any, was that of a fellow servant of Chamberlin.

The master having discharged every duty which devolved upon him under the circumstances, all that remained to be done was "that each workman, whatever his rank, or skill, or experience, should, with reasonable diligence, discharge his duty towards his employer and his fellows."

Ross v. Walker, 139 Pa. 42, 21 Atl. 157, 159.

S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *Hussey v. Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143; *McGinley v. Levering* (1893) 152 Pa. 366, 25 Atl. 824; *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517; and whether the control exercised was that incident to a more or less permanent relation, or merely temporary. *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 387, 60 N. W. 651.

For purposes of procedure the rule in question is treated as creating a presumption of fact, which, where the evidence is merely that the negligent servant controlled the injured one, requires the court to declare that the action is, as matter of law, not sustainable. *White v. Eldlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184 (error to rule that a foreman represented the master, where there was no evidence tending to show that he had the requisite authority).

A verdict should be directed for the plaintiff where there is no evidence indicating special reasons for making an exception to the general rule that a mere foreman is not a vice principal. *Dube v. Lewiston* (1891) 83 Me. 211, 22 Atl. 112.

Considered in its relation to the sufficiency of the pleadings, it entails the consequence that a complaint which alleges an injury resulting from the negligence of an employee whose designation indicates no more than that he was in control of the injured servant with respect to the work in progress is demurrable, unless it also avers facts of which the legal effect is that the superior servant represented the master. *Flynn v. Salem* (1883) 134 Mass. 351. Compare *Lawler v. Androsoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 402 (roadmaster ordered plaintiff to work in culvert known to be dangerous—demurrer sustained to complaint alleging merely that the roadmaster carelessly managed the repairs of the culvert); *Brazill & C. Coal Co. v. Cain* (1884) 98 Ind. 282 (demurrer properly sustained where the only negligence alleged was that a "bank boss" in a mine sent a servant (minor of nineteen years), who had been engaged in mining coal, to drive a bank car); *Peterson v. Whitebreast Coal & Min. Co.* (1879) 50 Iowa, 673, 32 Am. Rep. 143 (demurrer properly sustained to petition seeking to recover on the theory that the delinquent servant had "charge and control" of plaintiff). See also *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 635; *McDonald v. Eagle & P. Mfg. Co.* (1881) 67 51 L. R. A.

The fellow-servant doctrine, rightly understood, is very simple. It is a mere application of the axiomatic proposition that there can be no legal liability without a breach of legal duty.

The legal fiction which supposes the master to supervise every detail of his business operations exists only for the benefit of strangers to that business.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 482, 13 L. R. A. 824, 22 Atl. 552; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159; *Mast v. Kern*, 34 Or. 247, 54 Pac. 950; *Donnelly v. San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983;

Ga. 761 (mem.) (1882) 68 Ga. 839 (full report).

The line which divides the cases controlled by this general rule and by the principle that the duty of giving instruction to servants who require it is nonassignable (see note on instruction, *James v. Rapides Lumber Co.* (1898) 44 L. R. A. 87, *infra*), is sometimes exceedingly thin, as where it is held that the fact that an employee has more experience than another, and is authorized to give the latter directions in respect to their common work, does not make him the vice-principal of the employer. *Rozelle v. Rose* (1896) 3 App. Div. 132, 39 N. Y. Supp. 363 (unsafe method of doing work adopted).

All that would be necessary under such circumstances to convert nonliability into liability would be the introduction of evidence showing that the inexperience of the injured servant was an element in the accident, and that the master understood, or ought to have understood, the special danger arising from this source. In most instances, probably, the facts would readily bear this construction.

b. Rationale of the doctrine.

The theory upon which the rule stated in the last section rests is that the risk of a superior servant's negligence is as much an ordinary risk of the employment as is the risk of the negligence of a coequal or inferior servant.

"The same rule of liability must necessarily apply . . . to the several grades of employments, where those in the inferior are subject to the direction and control of those in the higher grades, as to cases where all occupy a common footing and possess equal authority. . . . And what substantial difference is there between a case of injury from the negligence of a servant with superior authority, and one from like negligence of a servant of equal authority, employed at a distance from, and without the immediate influence of, the party injured? How could the latter better guard against the injury in the case last mentioned than in the former one? If distance is to have effect, what shall the distance be? It is manifest that no distinction or exception as to liability of the principal, resting on the inability of the injured party to protect himself in the particular case, could be made without practically abrogating the entire rule." *Sherman v. Rochester & S. R. Co.* (1858) 17 N. Y. 153.

"There is no principle which should make the employer liable to one of his common laborers for injuries sustained in consequence of the negligence of his foreman or overseer, which

Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Yager v. The Receivers*, 88 Fed. Rep. 773.

Streeter was a mere gang boss, and not a superintendent of a distinct department.

What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. Rep. 810; *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525; *Cleveland, C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970; *Balch v. Haas*, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. Rep. 974; *Coulson v. Leonard*, 77 Fed. Rep. 538; *Gaynon v. Durkee*, 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. Rep. 302; *Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

should not also make him liable for the negligence of another common laborer. There cannot be any distinction of that kind. They all represent the principal, for certain purposes, and the principal is liable to a stranger for an injury received in consequence of the negligence of the former, as well as the latter." *Coon v. Syracuse & U. R. Co.* (1849) 6 Barb. 231.

In *Kalleck v. Deering* (1894) 161 Mass. 469, 37 N. E. 450, replying to the suggestion that the fact of ordering the servant to use an appliance which turned out to be defective was an act belonging to the superior servant as such, and might have the effect of taking the case out of the operation of the doctrine as to common employment, the court said: "Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee. See *Flynn v. Campbell* (1893) 160 Mass. 128, 35 N. E. 453. If the defendants have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact, the question whether the negligence of one of those persons is within or outside of the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases. *Moody v. Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185. 'The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and therefore, when the duty is not personal to the employer the same rule applies whatever the degree of the negligent employee. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

In an article in 24 Am. L. Rev. 190, quoted with approval in *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222, and other cases, Judge Dillon remarks: "The real inquiry is: Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the mere grade, whether higher, lower, or 51 L. R. A.

Even if Streeter could be considered as occupying the position of general superintendent of a distinct department of repair, there is still a reason which prevents Chamberlin's recovery from the master for any negligence of which, in this case, Streeter may have been guilty.

In the absence of any violation of the master's contract duties the master is liable only for the negligence of such a superintendent in the exercise of his general supervisory powers. When the superintendent undertakes the work of a mere gang boss or common laborer, such as Streeter was doing on the day of this accident, he becomes for the time being a co-servant, and for his negligent performance of such work the master is not responsible.

Quinn v. New Jersey Lighterage Co. 23 Blatchf. 209, 23 Fed. Rep. 363; *Stockmeyer*

co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants of whatever grade in the same employment. The true inquiry in each case is, Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common-law liability on the part of the employer; if not, there is such liability; and the inquiry, except as it bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible and practical. It is founded upon just principles, *viz.*, that it is precisely commensurate with the master's personal duties."

The reasons of policy for extending the implication of a contract to assume this risk are necessarily the same as those by which the doctrine of common employment as a whole is sustained.

"Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer if needful." *Cooley, Torts*, 2d ed. 640, adopted in *Norfolk & W. R. Co. v. Houchins* (1897) 95 Va. 398, *sub nom.* *Norfolk & W. R. Co. v. Swaine*, 46 L. R. A. 359, 28 N. E. 578, and in *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258.

"The fellow-servant rule is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants. More than this, it increases the dangers to such servants who may be so employed." *New Pittsburgh Coal & Coke Co. v. Peterson* (1893) 136 Ind. 398, 405, 35 N. E. 7, quoted with approval in *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 381, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258.

This theory, if pushed to its strictly logical conclusions, lands us in a doctrine similar to that which, as will be explained below (IV. d, *infra*), was established in England by *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

But, as limited by the effect of the decisions which embody the conception of the nonas-

v. Reed, 55 Fed. Rep. 259, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186; *The Miami*, 35 C. C. A. 281, 93 Fed. Rep. 218; *Hartford v. Northern P. R. Co.* 91 Wis. 374, 64 N. W. 1033; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Hoke v. St. Louis, K. & N. R. Co.* 11 Mo. App. 574.

Messrs. Charles F. Stine and Edwin H. Shannon for defendant in error.

Putnam, Circuit Judge, delivered the opinion of the court:

This is a writ of error brought to reverse a judgment rendered in behalf of Chamberlin, the defendant in error, against the plaintiffs in error. The case was tried to a jury, and the record brings up the whole proceedings at the trial. The only alleged

signability of certain duties of the master, and applied to the situations in which the effect of the mere element of control is commonly presented, it may be said to stand or fall with the correctness of the argument that, "if the servant is supposed to assume the risks which the master, with due care and diligence, cannot prevent, . . . he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself." For the reason that "in respect to such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence, any more than he can prevent the casual negligence of those inferior in grade." *Brown v. Winona & St. P. R. Co.* (1886) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

In other words, the function of giving directions as to the proper manner of performing the work is not one of those absolute, personal functions for the careful discharge of which a master is responsible whatever agents he may employ. See the language used in *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143, *Hofnagle v. New York C. & H. R. Co.* (1874) 55 N. Y. 608.

c. *Qualification of the doctrine in cases where an order takes a servant outside the original scope of his employment.*

As pointed out in another place, the effect of the decisions regarding the liability of a master for injuries received by a servant through his compliance with the order of a superior to incur risks not within the scope of the original contract of hiring is that, even in the courts which administer the doctrine now under discussion, the mere possession of a power of control is deemed to be a sufficient ground for letting in the operation of the rule of *respondent superior*. The reasons assigned for this somewhat illogical qualification of the general rule are explained in the note to *Dallemond v. Saalfeldt* (Ill.) 48 L. R. A. 753.

d. *Power of hiring and discharging subordinates, significance of.*

By all the courts which apply the above doctrine, it is laid down or assumed that a mere foreman of a subordinate grade is not converted into a vice-principal by the fact that, among his powers, is included that of hiring and discharging his subordinates. *Alaska Treadwell Gold Min. Co. v. Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *Balch v. 51 L. R. A.*

error which we are to pass on is the refusal of the court to direct a verdict for the defendants below. No complaint is made of the other rulings of the learned judge who presided at the trial. All the facts which are needed to enable us to dispose of the issue before us are indisputable.

The plaintiffs in error were the owners of a mill engaged in the manufacture of woolen cloth. In the mill was a press, a heavy structure employed for pressing rolls of cloth. It was bedded in a pit in the floor of the mill. The bottom of the pit was slippery with oil oozing down from the press, and the pit was dark. A portion of this machine consisted of a heavy iron plate supported by two large press screws. These screws required repairs, and, when the defendant in error was injured, they were being taken out for that purpose. While they

Ilaas (1896) 20 C. C. A. 151, 36 U. S. App. 603, 73 Fed. Rep. 974; *Cleveland, C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970; *Noyes v. Wood* (1894) 102 Cal. 389, 86 Pac. 766; *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255; *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Gilmore v. Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707; *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 20 L. R. A. 321, 61 N. W. 663; *Hastings v. Montana Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264.

Averments that the superior officer whose negligence caused the plaintiff's injury was defendant's agent, with full authority "to control the work of, and to employ and discharge, the plaintiff from his employment, as well as other servants of said defendant," do not show that such officer was a vice-principal in performing the act from which the injury resulted. *New Pittsburgh Coal & Coke Co. v. Peterson* (1893) 136 Ind. 398, 35 N. E. 7. See also *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 659, *infra*.

No greater significance will be attached to this power merely for the reason that the subordinate had special reasons for fearing that the result of disobedience would be the loss of his position. *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655 (superior was quick-tempered and passionate).

In the case of officials whose authority is so extensive as to constitute them general managers of an entire business or a department of it (see IV., *infra*), the evidential significance of this element is to be estimated with reference to the fact that such official must always, as a matter of fact, possess the power of determining, either directly or through instructions to some intermediate foreman, what persons shall be employed or discharged.

In a Michigan case stress was laid on the fact that the assistant roadmaster, who was held to be a vice-principal, had control over the section master, by whom the plaintiff was actually hired. *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 303, 17 L. R. A. 636, 53 N. W. 397.

Theoretically, therefore, wherever it is a matter of doubt whether a supervising employee stands above or below the line which separates mere foremen from departmental or general managers, proof that he possessed or did not possess the power of employing and discharging his subordinates may possibly become a material factor in the inquiry. In practice, however, the possession or absence of such a power has very rarely been discussed from this stand-

were being taken out, the heavy iron plate required temporary support, and, by reason of its great weight and its location in a dark pit with a slippery floor, the work demanded great care.

The work was done in behalf of the plaintiffs in error by one Mr. Streeter. He is called by the defendant in error the "master mechanic" of the mill. The evidence is that Mr. Dickson was the general superintendent of the mill, and had full charge over it everywhere; that Streeter was under his direction, and did whatever Dickson wanted done; that in making changes, or anything of that nature, he went to Dickson for directions; and that with reference to small ordinary repairs he did not go to Dickson, but he always consulted him before doing anything else. The evidence also is that there were employed in the mill about 250

or 300 persons; that Streeter was sometimes called "boss machinist," and sometimes "master mechanic;" that he employed the help who were under him, although when he wanted a man he consulted the superintendent, and when a man did not satisfy him he would go to the superintendent, and thereupon the superintendent decided about discharging him; that he employed no persons except those under his orders; that altogether he had seven on his pay roll,—that is, under his orders,—three firemen, one teamster, one machinist, and two helpers; that his principal duties were to work with his hands, and to look after the men who were under him, and that about nine tenths of the time he worked with his hands.

The defendant in error cannot be said to have had any experience in the particular work to which this case relates. He testi-

point and in this connection, the judges naturally preferring to rest their conclusions on evidence of a more decisive character. It would seem that in the group of states with which we are now concerned the only one in which any marked tendency has been shown to ascribe a really differentiating import to evidence that the delinquent employee possessed the power is Michigan.

In one case it was laid down that the power of discharging was not a controlling factor, but an important one. *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397.

The ground of the dissent of two judges in *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663, where the majority held that the boss or foreman of a gang of men unloading and leveling dirt on a railroad, who is under the immediate control of a railroad official who is often present, sometimes daily, directing the work, is a fellow servant of a member of the gang who is injured by the foreman's failure to give notice that the train is about to move, was that, admitting the act which was neglected—*vis.*, giving notice of the intention to move the engine—to be that of a mere fellow servant, the evidence showed the delinquent coemployee to have been in full control of a branch of the company's business with complete power to hire and discharge his subordinates. The cases relied upon were *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502, and *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034. As to the first of these, the possession of the power of discharge is merely mentioned as a cumulative fact. In the second it was certainly laid down, *arguendo*: "Whether or not the servant has power to employ and discharge other servants is also important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable." But there the court did not refer to any other authorities but *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, and *Kansas P. R. Co. v. Salmon* (1873) 11 Kan. 83. These are merely to the effect that a servant invested with the power of employing and discharging other servants is a vice-principal as regards the exercise of that particular power, and therefore do not sustain the theory in and of which they are vouched, *vis.*, that a general agency may be implied from the possession of this power. The majority of the court in the *Schroeder Case* recognized the doctrine of departmental vice-51 L. R. A.

principalship, but did not discuss the evidence directly from the standpoint of the minority.

It should be observed that this court holds section foremen to be mere servants (see summary of Michigan decisions in VII. e, *infra*), a doctrine which shows that the possession of a power of discharge is not regarded by it as conclusively proving the possessor to be a vice-principal. In most of the judgments such evidence is merely referred to as a fact of a corroborative character, rendering still more unquestionable a conclusion sufficiently justified on other grounds. See, for example, *Gormly v. Vulcan Iron Works* (1876) 61 Mo. 492; *Denver, S. P. & P. R. Co. v. Driscoll* (1889) 12 Colo. 520, 21 Pac. 708; *Colorado Midland R. Co. v. Naylor* (1892) 17 Colo. 501, 30 Pac. 240; *Erickson v. Milwaukee, L. S. & W. R. Co.* (1892) 93 Mich. 414, 53 N. W. 393; *Shumway v. Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 53 N. W. 393; *Baldwin v. St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 207, 39 N. W. 507; *Woods v. Lindvall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. Rep. 62.

The absence of the power is, of course, conclusive against the inference that the delinquent employee was a vice-principal, for it would be an abuse of language to apply that term to any official who is incapable of exercising a function so essentially characteristic of a master, as that of deciding who shall or shall not work for him.

Probably for the reason that the above principle is essentially incontestable, it has never been discussed in any reported case known to the writer. The absence of a power of employing and discharging subordinates is not infrequently mentioned among the facts which are deemed to negative vice-principalship, but in all these instances the nonrepresentative character of the employee is undisputable for other reasons. *Peschel v. Chicago, M. & St. P. R. Co.* (1884) 62 Wis. 338, 21 N. W. 269; *Deavers v. Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480; *Richmond Locomotive Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509; *Delaware & H. Canal Co. v. Carroll* (1879) 89 Pa. 382; *Brown v. Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Keystone Bridge Co. v. Newberry* (1880) 96 Pa. 246, 42 Am. Rep. 543; *Foley v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124.

Sometimes the fact that a power of discharge is to be exercised by a foreman subject to the approval of a general superintendent or other higher official is mentioned as a reason by declaring him to be a mere co-servant. *O'Brien*

fies that he was hired as a spare fireman, as a spare night watchman, to wheel the ashes out of the boiler room, to keep the lawn mowed and the yard clean, to sweep up the concrete walk, and to do the chores at the superintendent's house. It is claimed that at times he did lifting of timbers and work of that nature; but, of course, on this writ of error, we must accept this particular issue as he states it. His account of his being set at the work in which he was injured is as follows:

Q. Where were you working on the 3d of December?

A. Out in the yard, piling up old lumber.

Q. If anybody called you, who was it?

A. Mr. Streeter, the master mechanic.

Q. What time?

A. I think about ten o'clock in the fore-

noon. He says, "Joe, we want you to come into the mill, and help fix" what they called the "press." It was broken down, "and we are in a hurry about it, and I want to fix it as soon as possible, and want you to come in and help."

Q. Did you go in?

A. Yes, sir; I did. I went in.

We think, therefore, if it had been important in the case, that the defendant in error would have been entitled to go to the jury on the questions of the nature of his employment, and whether or not the work in which he was injured was within its scope, and whether or not he had any experience in the class of work in which he was employed when injured, and, if yes, to what extent. Nevertheless, in whatever way these particular issues might be determined

v. American Dredging Co. (1891) 53 N. J. L. 291, 21 Atl. 324; Gaynon v. Durkee (1898) 31 C. C. A. 308, 52 U. S. App. 587, 87 Fed. Rep. 302. From our present point of view this situation is plainly the same as one in which the power cannot be exercised at all.

In one case it was denied that the nonpossession of the power deprived the supervising employee of the character of a vice-principal, and it was laid down that "the most satisfactory evidence that one is, as to his coemployees, a vice-principal is that his coemployees are under his supervision, his control, subject to his orders and direction." Union P. R. Co. v. Doyle (1897) 50 Neb. 555, 70 N. W. 43. But this ruling was made in a state where the "superior servant" doctrine prevails (III. *infra*), and it was not necessary to refer to the consideration which would undoubtedly have been deemed controlling in any of the states we are now concerned with,—*viz.*, that an official like the one in question, a head of a department, although he might not have exercised the power directly, could have exercised it by issuing the necessary orders to the foreman who had actually hired the injured person.

Where the alleged breach of duty was the employment or retention of unfit servants, the evidential significance of the power of hiring and discharging subordinates is, as we have already had occasion to mention, considered from a standpoint quite different from that which is appropriate where the general agency of a delinquent employee is in question. The breach of such a duty by a person possessing such a power necessarily imports a breach of a non-delegable duty by one who is the master's agent for its performance, and if the possession of the power is proved, the master's liability is an unavoidable inference.

"Undoubtedly the power to hire and discharge is the test of a vice-principal when the question involved is that of selecting or retaining proper servants; for in this respect the servant would clearly represent the master. But in no other sense is it a test. The power to summarily discharge unworthy servants, and to hire new ones, is often a very necessary and beneficial power for the safety of other servants, for it gives a foreman authority to compel attention to duty. But it does not change the character of the foreman's duties from that of a servant to those of the principal, nor does it impose upon him the master's responsibility in other respects." Hanna v. Granger (1894) 18 R. I. 507, 28 Atl. 659. 51 L. R. A.

e. Application of the doctrine to the various grades of supervising employees.

As will be seen from the general collection of authorities cited in the note, to the following sections, the most numerous illustrations of the doctrine now under discussion are furnished by the decisions absolving the master from liability for injuries caused by the negligence of employees appointed to direct the labors of those small bodies of servants who, in every industrial concern of any considerable magnitude or complexity, must necessarily be intrusted with certain distinct duties which are of such a nature as to segregate them into more or less independent groups, but which are commonly of a somewhat mechanical character, not requiring for their performance the exercise of any of the higher qualities of a superintending officer.

In O'Brien v. American Dredging Co. (1891) 53 N. J. L. 291, 21 Atl. 324, the court said: "Whether the master retains the superintendence and management of his business, or withdraws himself from it and devolves it on a vice-principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow servants."

In another case we find it remarked that an employee is a fellow servant with a foreman under whose direction he is at work, where the only judgment and discretion exercised by such foreman are those which belong to a coworker in a superior grade. Larich v. Moles (1894) 18 R. I. 513, 28 Atl. 661 (where the work to be done was simply getting a load of sand).

That is to say, the controlling conception in the majority of cases is that, to justify imputing the negligence of an employee to the mas-

by the jury, the result of litigation on the other indisputable facts shown in the record would not have been affected thereby. The rule is well settled that, so far as the obligations of an employer are concerned, they are fundamentally the same towards a volunteer as towards one acting within the scope of his employment. The authorities on this point are sufficiently stated in Beven, Neg. 2d ed. 1895, at pages 826-828, and in *Osborne v. Knox & L. R. Co.* 68 Me. 49, 28 Am. Rep. 16. The rule is laid down positively in Pollock, Torts, 4th ed. 1895, than which there is no higher authority. The learned author says, at page 93: "Moreover, a stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as regards the master's liability towards him, in the same position as if he were a servant. Having

of his free will, though not under a contract of service, exposed himself to the ordinary risks of the work, and made himself a partaker in them, he is not entitled to be indemnified against them by the master, any more than if he were in his regular employment."

Of course, there may be peculiar circumstances excepting the case from this general rule, as in *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739; and, as there shown, the calling of a workman from the class of work on which he is employed to a new class of work, for which he was not employed, renders especially applicable the rule with reference to the proper warnings to be given by employers to employees. The case at bar, however, as we will explain, raises no issue of that nature.

In the progress of the work, Streeter.

ter, "he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them." *Dobbin v. Richmond & D. R. Co.* (1879) 81 N. C. 446, 31 Am. Rep. 512.

This principle thus laid down, however, has not been construed in the North Carolina court in the same sense, or applied to the same classes of employees, as in most of the courts which have expressed their views in similar terms (see III. *infra*).

Or, as it has also been put, "in order to constitute one a vice-principal, he must have general power and control over the business, and not mere authority over a certain class of work or a certain gang of men." *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50.

Servants employed at the same kind of work, except that one has authority to give directions to the other as to the manner of doing the work, are fellow servants. *Postal Teleg. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 834.

Compare the language used in *Andre v. Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86, and the cases cited in V. d. *infra*, deciding that certain employees are not departmental vice-principals.

Under the rulings as they stand, there is no warrant for the contention that evidence of the participation of such employees in the manual labor of their subordinates is at all necessary to establish that they are mere fellow servants; and it has been expressly laid down in at least one case that the fact of a foreman's not engaging in such labor is immaterial in this connection. *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

In the cases where it is mentioned, such evidence seems to be regarded as of merely cumulative force. See, for example, *Moore Lime Co. v. Richardson* (1897) 95 Va. 326, 28 S. E. 334; *Baich v. Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. Rep. 974; *Deavers v. Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480; *Central R. Co. v. Keegan* (1895) 100 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Cates v. Imer* (1898) 104 Ga. 679, 30 S. E. 884; *Andre v. Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86.

And the same may be said of evidence that the foreman received the same compensation as his subordinates. *Griffiths v. New Jersey & N. Y. R. Co.* (1893) 5 Misc. 320, 25 N. Y. Supp. 812, Affirmed in (1894) 8 Misc. 3, 28 N. Y. Supp. 75.

51 L. R. A.

From a simply logical standpoint these circumstances may be regarded as negating the inference that the supervising employees were of sufficiently high rank to be general managers or heads of departments. But in all conceivable cases this inference would in any event be so clearly excluded on other grounds where the delinquent employees were of the humble class indicated by such evidence that its practical weight in the determination of their character and capacity would be very slight indeed. In some instances the specific ground upon which supervising employees have been declared to be mere servants is that they were not heads of departments. See cases cited in V. d. *infra*.

In *Mullan v. Philadelphia & S. Mall S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, it was distinctly ruled that an agent of the employer is not a vice-principal unless he has charge of the entire business or a department of it.

But nothing is gained by the use of a test which gets rid of one difficulty by introducing another equally great. The conception of a "department" is one which, even after all the rulings which deal with the subject, remains too essentially vague (see III. b. *infra*, and the remarks of the court in the recent case of *Grattis v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 398, 55 S. W. 108), to serve as an element of differentiation between the cases where the master is liable and the cases where he is not liable. Besides, it is abundantly evident from a comparison of the rulings cited under II. f. *infra*, with those relating to vice-principals in charge of departments, that even this unsatisfactory test would not supply a basis on which the decisions could be reconciled. Only in one class of cases does it seem to suggest a rule of evidence which can be of any practical service,—those, namely, in which the delinquent foreman was himself subject to a higher official, who was plainly the master's general agent, if there was one at all, as regards the work in progress. This subordinate position of foreman, denied to be a vice-principal's, is frequently adverted to by the courts. *Richmond Locomotive Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509 (gang-boss under foreman of machine shop); *Cleveland, C. C. & St. L. R. Co. v. Brown* (1890) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970, Reversing on rehearing (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Rep. 804 (subordinate foreman having a departmental superior); *What Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. Rep. 810 (a foreman in a mine, controlled by a pit-boss who was himself under the superintendent).

having removed one of the press screws, replaced it temporarily by a piece of 3-inch plank set perpendicularly. In some way which the evidence does not make clear, this 3-inch plank gave way, and the heavy plate in falling injured the defendant in error. It is admitted that the work might have been done with safety by the use of ordinary blocking in the place of a perpendicular shore, and there is no evidence that the material for such blocking might not have been found about the mill, while the presumption is that it would have been. Indeed, the evidence of the defendant in error, which we have cited, shows that at the very time he was engaged in piling up old lumber, which was presumably suitable for this coarse blocking, and it also appears that on a previous occasion the blocking for this purpose was at hand. Any question of this character,

however, would relate to the obligation of the employer to furnish suitable materials for doing the work; and as to this there is neither any allegation in the declaration, nor any proof that the materials were not at hand, while, with reference to a charge of negligence in this behalf, the law is well settled that it rests with the employee injured both to allege and to prove that the employer was at fault.

There have been discussed at the bar all the various phases of the obligations of employers to employees. Aside from observing incidentally that, from the necessity of the thing, some of the subordinate rules which have thus been discussed, especially the rule with reference to the condition of the place where the work is to be done, do not apply to repair or construction gangs, except in a much qualified way, as was shown

Gaynon v. Durkee (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. Rep. 302 (general foreman of railway shops who is himself under the control of the master mechanic—workman ordered into unsafe place); Deavers v. Spencer (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480 (track-foreman subordinate to a supervisor); New York, L. E. & W. R. Co. v. Bell (1886) 112 Pa. 400, 4 Atl. 50 (gang-boss in railway repair shops under master mechanic); McBride v. Union P. R. Co. (1899) 3 Wyo. 247, 21 Pac. 687 (gang-boss under control of the master-mechanic's foreman); Keystone Bridge Co. v. Newberry (1880) 96 Pa. 246, 42 Am. Rep. 543 (gang-boss under direction of a superintendent); Johnson v. Ashland Water Co. (1890) 77 Wis. 51, 45 N. W. 807 (foreman in exclusive charge of calking and laying pipes under the general superintendent of a water company); Peschel v. Chicago, M. & St. P. R. Co. (1885) 62 Wis. 338, 21 N. W. 269 (one of several foremen subordinate to a master carpenter); Coulson v. Leonard (1896) 77 Fed. Rep. 538 (foreman with supervision over several men in erecting the iron work of a building, subject to the supervision of a member of the corporation employing them—injury caused by improper signal); Fordyce v. Briney (1893) 58 Ark. 206, 24 S. W. 250 (foreman of car repairers who is under the foreman of the round-house); McGinley v. Levering (1893) 152 Pa. 366, 25 Atl. 824 (assistant foreman); Murray v. Crimmins (1895) 14 Misc. 466, 35 N. Y. Supp. 1023 (same facts); Collins v. Crimmins (1895) 11 Misc. 24, 31 N. Y. Supp. 860 (same facts); Connolly v. Maurer (1893) 6 Misc. 98, 28 N. Y. Supp. 18 (foreman of men engaged under a general superintendent in the construction of a particular part of a building, having authority to tell the men when to work and when to stop, when their services are no longer needed, and when they are required—recently-built arch gave way, from which the foreman had prematurely removed the centers); Bellus v. New York, L. E. & W. R. Co. (1883) 29 Hun, 556 (a wreck master taking his orders from an official in charge of the shops and yards); Barringer v. Delaware & H. Canal Co. (1879) 19 Hun, 216 (section foreman with two superiors, a trackmaster and a superintendent, between him and the company); O'Brien v. American Dredging Co. (1891) 53 N. J. L. 291, 21 Atl. 324 (plaintiff's foot drawn into machinery of dredge set in motion by the "captain" or foreman operating a dredge under the control of the general superintendent of the company); Gilmore v. Oxford Iron & Nail Co. (1892) 55 N. J. L. 39, 25 Atl. 707 (foreman of mine under 51 L. R. A.

a general superintendent); Schroeder v. Flint & P. M. R. Co. (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663 (foreman of gang of graders under the immediate control of another official, who was frequently present directing the work); McDermott v. Boston (1882) 138 Mass. 349 (foreman of laborers in the service of a city who was himself controlled by a general superintendent).

Many of the cases cited under the next subdivision, especially those relating to foremen of section gangs and in mines, will serve to illustrate the same point of view,—whether the control by a higher superior is explicitly referred to or not.

In Balch v. Haas (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. Rep. 974, a case where the negligent servant was the foreman of a gang engaged in excavation, the court reasoned thus: "Clausen was not charged with the superintendence and control of the entire business of his employers; he was not the manager or head of a department of a diversified business; neither was he engaged at the time of the accident in the performance of a special duty which the law devolved upon his employers. On the contrary, he was simply an ordinary foreman, who had charge of a gang of laborers, and who usually worked with them. He did not even have full control of the particular job on which he was employed, for another foreman was engaged on the same work, who seems to have had equal authority, and both foremen were under the general supervision of the common master."

A like deduction is drawn, and for similar reasons, where the master was supervising the operation himself, and the superior servant was working under his directions. Here the very nature of the situation excludes the theory that he was a representative of the master. See Malone v. Hathaway (1876) 64 N. Y. 5, 21 Am. Rep. 573, where (dissenting, Church, Ch. J., and Rapallo, J.) it was held erroneous to give an instruction framed on the theory that vice-principals were predicable of a mere foreman of carpenters,—one charged with the special duty of executing repairs in a building, "but performing them under general or special instructions from the principal, who retains and has the general supervision of the business, and to whom and whose immediate direction, all [the employees] are subject."

Similarly, a vice-principal loses his representative character for the time being when the employer himself assumes control and directs him how to do the work in hand. Prevost v. Citizens' Ice & Refrigerating Co. (1898) 185 Pa. 617, 40 Atl. 88.

with regard to construction in *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433, we do not find it necessary to consider those peculiar obligations; because, on the indisputable facts, the only negligence in this case which can be said to have been a *causa causans*, or to have contributed to the injury of the defendant in error, was the alleged fault of Streeter in not blocking up the plate, instead of using the perpendicular plank. The record, therefore, presents no question except whether or not Streeter and the defendant in error were coemployees with reference to the issue of negligence thus presented.

It should be observed that since the case was tried to the jury the Supreme Court has decided *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, in a manner which clears up some questions

which were before doubtful. There may, of course, be instances where the question whether or not different individuals are coemployees for the purpose of the issue in this case should be submitted to the jury for their determination on proper instructions from the court; but, on facts which are so far from dispute as those in the record at bar, the practice of the Supreme Court has been to dispose itself of that question or to direct the circuit court to dispose of it, as a question of law, or as one not contestable on the proofs in the case. This was emphatically so in *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85. The only other cases relating to this point to which we need refer are *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16

Where this subjection to a general manager, or to the master himself, as his own superintendent, is established, the mere fact that the manager or the master was not actually present in person, and managing the operations when the injury was received, will not have the effect of converting the subordinate foreman into a vice-principal. *Deavers v. Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480. See also *Benn v. Null* (1884) 65 Iowa, 407, 21 N. W. 700, where the master was ordinarily absent.

The immateriality of the fact that no vice-principal was present at the time of the injury is evidently taken for granted in many of the decisions already cited, especially those respecting the foreman of track-repairing gangs, and similar bodies of men, who normally do their work under circumstances which preclude the exercise of a personal control by the higher agents of the master.

In order that this result may follow from the absence of his superiors, it must be shown that, under the arrangements of the establishment, he was to be in sole charge and to wield the same powers of control as the manager himself, whenever that manager should be absent. See *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471 (negligent orders); *Murphy v. Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605; *Baldwin v. St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507; *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701; *Greenway v. Conroy* (1894) 160 Pa. 185, 28 Atl. 692; *Duffy v. Oliver Bros.* (1889) 181 Pa. 208, 18 Atl. 872.

If the negligent servant was, as a matter of fact, a mere foreman, the position of the plaintiff is in no wise improved by the circumstance that he was called a superintendent. *Capper v. Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749; *Greenway v. Conroy* (1894) 160 Pa. 185, 28 Atl. 692; *Miller v. Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70; *Wilson v. Merry* (1868) L. R. 1 Sc. App. Cas. 326, 345, 19 L. T. N. S. 80, per Lord Colonsay.

2. Illustrative cases.

The supervising employees specified below have been held to be mere fellow servants of their subordinates. For brevity's sake everything but the mere designation of the delinquent has been omitted in most instances, the nonliability of the master being understood to be the effect of the ruling where nothing is stated to the contrary.
51 L. R. A.

The facts, as indicated by the memoranda appended to the citations, should be compared with those involved in the cases to be discussed in another note, in which the master's nonliability is referred directly to the character of the act which caused the injury, as being essentially that of a mere servant.

It should be remarked that, in not a few instances, it is extremely difficult to say whether the court intends to rely upon the ground that the operation of the doctrine of common employment is not defeated by the fact that the delinquent controlled the injured servant, or upon the ground that the delinquent was, in any event, a mere fellow servant as to the act which caused the injury, or upon both these grounds. In view of the uncertainty thus created, it has been deemed advisable to include in the following list a good many cases which might, with apparently equal propriety, have been reserved for the following note. These rulings may also be advantageously contrasted with those which illustrate the "superior servant" doctrine in its application to employees holding similar or identical positions.

See III. *infra*.

1. General managers.

The consideration of the status of these functionaries is reserved for division IV. *infra*.

2. Employees in control of railway trains.

As is apparent from the cases cited below, the regular conductor of a train is held to be a mere servant by all the courts outside those which reject the superior-servant doctrine (III. *infra*), and those which, while not accepting that doctrine, hold conductors to be departmental vice-principals (V. *infra*). It would seem that the Supreme Court of the United States is no longer to be reckoned in the latter category. (See V. d, 2, *infra*.) *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175 (breach of rules in starting train before scheduled time); *McCosker v. Long Island R. Co.* (1881) 84 N. Y. 77 (signaled to engineer to back train while brakeman was in a dangerous position); *Thayer v. St. Louis, A. & T. H. R. Co.* (1864) 22 Ind. 26, 85 Am. Dec. 409 (brakeman fell into an open culvert, while obeying an order of the conductor to detach a car, and sought to recover on the ground that the conductor was negligent in not slackening the speed of the train, after the order was given); *Louisville, N. A. & C. R. Co. v. Southwick* (1896) 16 Ind. App. 480, 44 N. E. 263 (conductor was helping a brakeman to unload a

Sup. Ct. Rep. 843; *Martin v. Atchison, T & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

In *Alaska Treadwell Gold Min. Co. v. Whelan* the suit was brought by a workman in the corporation's mine. The business of the corporation was divided into three departments,—the mine, the mill, and the chlorination works,—each of which had a superintendent who was under the general manager. In the mining department there were three shifts or gangs of workmen, and the negligence out of which the accident arose was that of the foreman of the gang in which the plaintiff was working. The court observed that whether or not the foreman had authority to engage and discharge men under him was immaterial, and

that, even if he had such authority, he was none the less a fellow servant with those under him, "employed in the same department and under a common head." It is apparent that Streeter, in the case at bar, was no further removed from the defendant in error than the foreman in *Alaska Treadwell Gold Min. Co. v. Whelan* from the plaintiff below in that case, or than the conductor in *New England R. Co. v. Conroy* from the brakeman who was on the same train with the conductor, was subject to his orders, and was alleged to have suffered an injury through his negligence.

As to the main question in this case, it is useless to burden an opinion with citations from the state courts, where the views have been so conflicting, and the expressions of them almost innumerable; also, where so much has been said on this topic in the vari-

car); *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252 (as to orders given in the management of the train); *Whitmore v. Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220 (backing cars so as to crush car repairer); *Jarman v. Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32 (conductor did not reject an improperly loaded car from his train); *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60 (not placing car on siding while being unloaded, and ordering excessively heavy packages to be carried across the plank that was needed to reach the platform); see, however, summary of Michigan decisions in VII. *infra*. *McGowan v. St. Louis & I. M. R. Co.* (1876) 61 Mo. 528 (assurance that defective rope was safe), recently followed, after a long series of antagonistic rulings (see III. and VII. *e. infra*), in *Grattis v. Kansas City, P. & G. R. Co.* (1899) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (signal to go ahead—held error to instruct a jury on the theory that a conductor was, as matter of law, a vice-principal); *Criswell v. Montana C. R. Co.* (1896) 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525, *Reversing* (1895) 17 Mont. 189, 42 Pac. 767, on the ground that the territorial statute under which the earlier ruling had been made had been abrogated by a self-executing provision of the state Constitution. *Sherman v. Rochester & S. R. Co.* (1853) 15 Barb. 574 (1853) 17 N. Y. 153 (train was run at dangerous speed); *Wooden v. Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199, *Reversing* (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 840 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768 (exercise of discretion in not applying for more brakemen, or settling off cars before descending a steep grade); *Robinson v. Houston & T. C. R. Co.* (1877) 46 Tex. 540 (order to get on moving train); see, however, summary of Texas decisions, VII. *e. infra*. *Norfolk & W. R. Co. v. Houchins* (1897) 95 Va. 398, *sub nom.* *Norfolk & W. R. Co. v. Swaine*, 46 L. R. A. 359, 28 S. E. 578 (directing trains onto track on which a train from the opposite direction is due), overruling earlier cases in this state,—see III. f, 3, VII. *e. infra*; *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258 (signaled to engineer to back a train before the plaintiff, a brakeman, was ready to make a coupling), overruling earlier decisions in this state,—see III. f, 3, VII. *e. infra*; *Heine v. Chicago & N. W. R. Co.* (1883) 58 Wis. 525, 17 N. W. 420 (laborer was injured by the train being started without warning).

The conductor of a construction train was 51 L. R. A.

held to be a mere servant. *Cassidy v. Maine C. R. Co.* (1884) 76 Me. 488 (laborer ordered to jump from moving train).

The same ruling has also been made as to the fireman of a gravel train. *O'Connell v. Baltimore & O. R. Co.* (1863) 20 Md. 212, 83 Am. Dec. 549.

Also as to the foreman of a material train. *St. Louis, I. M. & S. R. Co. v. Shackelford* (1883) 42 Ark. 417 (train set in motion without warning while laborer was shifting rails from one car to another).

And to the foreman of a train crew unloading and leveling dirt on a railway. *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663 (failed to give notice that a train was about to move).

The engineer of an engine not drawing a train, who has no subordinate except a fireman, is a mere servant (*Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. Rep. 837 (disobeyed instructions as to running of engine); even though the engineer in such case may be called a conductor, and has full charge of the engine. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (running engine without orders). See, further, as to this case, V. d, 2, *infra*).

Contrast the cases cited in the general list in III. *infra*, as to the status an engineer obtains by the "superior servant" doctrine under the same circumstances.

In *Hayes v. Western R. Corp.* (1849) 3 Cush. 270, the court declined to discuss the question whether a conductor was a vice-principal, but held that, at all events, the company was not liable for the negligence of a brakeman acting as a conductor on a section of a train temporarily divided. The negligence alleged was that the brakeman neither went on the rear car himself, nor stationed another brakeman there, the result being that the train parted on a grade, and the rear section ran into the forward one.

As to the status of conductors in South Carolina, see V. d, VII. *e. infra*.

3. Supervising employees in railway yards.

A general yardmaster in full control of a yard. *Cincinnati, N. O. & T. P. R. Co. v. Gray* (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. Rep. 623 (while handling an engine in the absence of the engineer, the yardmaster backed a train rapidly against a switch, which, being closed, derailed the car on which the plaintiff, a yard foreman, was, and dashed it against another car on an adjacent track); *McMahon v. Henning* (1880) 1 McCrary, 516, 8 Fed. Rep.

ous opinions of the several justices of the Supreme Court, speaking in behalf of that court, it would not be prudent to accept any particular expression as settling the law beyond what the case itself demanded. Nevertheless, it may well be maintained that the alleged rule of vice-principal, so far as it concerns the relations of different persons employed by the same principal to accomplish a common result, has no proper recognition by the Supreme Court with reference to the issue in this case, as we have pointed it out. On the question of who are co-servants, it was said by Justice Brewer in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914, as follows: "If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if

it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

This expression, so far as it concerns the positive duty of the master, is limited and explained by what precedes it, relating to his obligations to provide suitable places, tools, and machinery, and to use reasonable care in warning his employees, and to other matters of that nature, all of which are admitted to be particulars with reference to which the master cannot relieve himself by deputizing others. None of these obligations, as we have said, applies to the case at bar, or to the allegations and proofs which the record presents. Except for those special obligations the language of Mr. Justice Brewer implies a "personal wrong" on the part of the employer; that is

358 (ran cars together at excessive speed, injuring coupler).

An employee commonly acting for a yardmaster. *Kirk v. Atlanta & C. Air Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621 (gave a signal which caused an engineer to drive his train against the car which plaintiff was repairing—functions said to be merely attending to details); see, however, the summary of North Carolina decisions, VII. e, *infra*.

A foreman subject to the orders of a yardmaster. *Fraker v. St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349 (directions as to the manner of removing a damaged car).

The foreman of a drill crew in a railroad yard, who is "a component part of the crew, an active coworker in the manual work of switching with the specific duty assigned to him by the yardmaster of turning the switches." *Central R. Co. v. Keegan* (1896) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269 (moving detached cars without anyone on them to set the brakes).

A foreman of a switching crew. *Flannagan v. Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 387 (order led plaintiff to mount a car with a defective jaw-strap—verdict for him set aside, as there was no evidence that foreman was charged with the duty of inspecting the cars, or knew of the defect).

The foreman of one of several switching crews working under the general control of a yardmaster. *Harley v. Louisville & N. R. Co.* (1893) 57 Fed. Rep. 144 (signaled at improper time for the movement of a car).

4. Foreman of wrecking gangs on railways.

A wreckmaster. *McGrath v. Texas & P. R. Co.* (1894) 9 C. C. A. 135, 23 U. S. App. 86, 60 Fed. Rep. 556 (wrecking car improperly placed, and no ropes used to keep the derrick in position).

The acting foreman of a wrecking car. *Flipplin v. Kimball* (1898) 81 C. C. A. 282, 59 U. S. App. 1, 87 Fed. Rep. 258 (excessive strain on rope attached to a derrick broke it).

These two Federal decisions may probably be regarded as superseding one to the contrary effect. *Borgman v. Omaha & St. L. R. Co.* (1890) 41 Fed. Rep. 667. (See V. d, 5, *infra*.) But, on the facts, it is just possible that, in the earlier case, the delinquent really occupied a position sufficiently high to make him a departmental vice-principal.

The superintendent of removal of wrecks, taking his orders from the employee in charge of shops and yards. *Bellfus v. New York, L. E. & W. R. Co.* (1883) 29 Hun, 556 (clasp holding 51 L. R. A.

derrick car to trestle while a wrecked car was being hoisted was ordered to be struck loose, the result being that the derrick car was pulled off the trestle).

5. Employees supervising track work on railways.

A roadmaster. *Lawler v. Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492 (declaration demurrable which alleges an order to work under a dangerous overhanging bank); *Brown v. Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484 (see, however, VII. e, *infra*, as to this and the following case); *O'Neill v. Great Northern R. Co.* (1900; Minn.) 82 N. W. 1086 (bolt which had been left in the timber of a bridge which was being taken down struck the plaintiff); *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603 (train run so as to cause collision with hand-car).

(In the first of these cases a mere divisional roadmaster is apparently meant. In the second and third that was certainly his capacity. They were, therefore, not of that grade of roadmasters which perhaps constitutes an employee a head of a department. V. *infra*.)

An employee having the supervision of one-half of a road, and, at the time of the accident, in charge of a repair train. *Mobile & M. R. Co. v. Smith* (1877) 59 Ala. 245 (negligent operation of a train).

A foreman of a section gang. *Martin v. Atchison, T. & S. F. R. Co.* (1896) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603. Affirming (1893) 7 N. M. 158, 34 Pac. 536 (hand-car run so as to collide with train); *Northern P. R. Co. v. Charles* (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848 (ran hand-car without taking precautions to escape collision with trains); *Deavers v. Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480 (jumped on a jack which was holding up the track and caused the rail to fall on plaintiff's foot); *Kansas & A. Valley R. Co. v. Waters* (1895) 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. Rep. 28 (failed to guard against collision of hand-car with trains); *Wright v. Southern R. Co.* (1897) 80 Fed. Rep. 260 (tried to save hand-car from collision with train); *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708 (switch negligently left open); *Justice v. Pennsylvania Co.* (1891) 130 Ind. 321, 30 N. E. 303 (foreman allowed car to run at dangerous speed, the result being that the plaintiff lost his hold of the lever, and was struck by it); *Hoben v. Burlington & M. River R. Co.* (1866) 20 Iowa, 562 (hand-car collided with train); *Clifford v.*

to say, a wrong of a character which could not occur through the mere negligence of any individual deputized by the master in the special department of work in which the person injured is employed. These expressions of Mr. Justice Brewer were adopted and repeated by Mr. Justice White, at pages 264 and 265, 160 U. S., pages 421, 422, 40 L. ed., and pages 270, 271, 16 Sup. Ct. Rep. in *Central R. Co. v. Kegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269, and were carried forward by Mr. Justice Shiras into his opinion in *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, already referred to.

Thus, that the test as to who are co-servants turns rather on the nature of the service than on the relative rank of the different employees has received the express approval of three justices of the Supreme

Court, if it is not to be accepted as determined by the court itself. Nowhere in the decisions of the court, or in the opinions of the various justices thereof, is this test contravened, except as implied in the dissent of a minority of the bench from the results reached. But the line of reasoning of Mr. Justice Shiras in his opinion in behalf of the court in *New England R. Co. v. Conroy* leads to even more positive conclusions. It was said in *Beven*, Neg. 2d ed. 1895, at page 805, referring to the English and Scotch decisions: "The tendency of these decisions is strongly towards including all grades of service, to the very highest, within the principle of nonliability in the case of common employment."

Pollock, *Torts*, 4th ed. 1895, lays down the English rule even more positively. After some discussion of the general principles and

Old Colony R. Co. (1886) 141 Mass. 504, 6 N. E. 751 (*arguendo*); *Hammond v. Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 47 N. W. 965 (failure to send ahead a lookout, when hand-car is near a curve); *Timm v. Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116 (assumed); *Gavigan v. Lake Shore & M. S. R. Co.* (1890) 110 Mich. 71, 67 N. W. 1097 (struck by a car pushed by his collaborators, while he was obeying an order to climb a stationary car to set brakes); *Olson v. St. Paul, M. & M. R. Co.* (1898) 38 Minn. 117, 35 N. W. 866 (no precautions to protect hand-car against trains); *Lagrone v. Mobile & O. R. Co.* (1890) 67 Miss. 592, 7 So. 432 (injury received while holding a fish-bar for foreman to straighten); *Hastings v. Montana Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264 (laborer not warned of approach of a train); *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. C. 557 (at all events as to orders relating to ordinary duties; but no negligence was, as matter of fact, established. See further, as to this case, VII. e, *infra*); *Hanley v. Grand Trunk R. Co.* (1882) 62 N. H. 274 (method of loading rails); *Brunell v. Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129 (failure to place a signal flag to warn approaching trains and men on hand-cars that men were on the track); *Spancake v. Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1006 (no warning as to approach of train was given).

The boss of a small gang of ten or fifteen men engaged in aiding the regular gang upon each section, as occasion requires. *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843 (sudden application of brakes caused collision with following hand car); *s. p. Goodwell v. Montana C. R. Co.* (1894) 18 Mont. 293, 45 Pac. 210 (negligence in allowing a rail to fall on plaintiff's foot—injury caused by order to collaborators).

Whether, in the cases where the negligent orders relate to the use of appliances known to be defective, a foreman of a gang working on a railway track is a vice-principal, is a question which essentially involves the inquiry whether he represents the employer in respect to the duty of furnishing appliances. It is held that, under the normal arrangements of railway companies, he is not an agent of the employee for the purpose, the agency being vested in his superior officers. *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141 (laborer injured by the breaking of a chain while the foreman of the gang required him to use when he knew it was defective); *Barringer v. Delaware & H. Canal Co.* (1879) 19 Hun, 216 (foreman failed to report defective hand car for repairs). 51 L. R. A.

The second of these being a typical case, it will be worth while to give the facts in *extenso*: The section "boss" had charge of about 5 miles of track, and was foreman of the men employed to keep such track in repair, working with them. He had charge of, and was responsible for, the tools and machinery used. He hired his men, or some of them. If he required machinery or tools, he applied to the track master therefor. If machinery gave out, or was defective, he was ordered to take it to the shop and have it repaired. Over him, and in a superior position, was the track master, who superintended the track, who employed the foreman of the section and other proper men, and furnished the tools and machinery necessary. To such track master or his assistant all reports were made. If repairs were necessary, or tools needed, notice was to be given by the section foreman to the track master, who supplied the tools or directed as to the repairs. The foreman was subject to the track master and bound by his orders. The court said: "Under such a state of facts, we think that the learned judge erred in holding that Brown represented the defendant, and stood in its place. Brown was an employee, just as plaintiff was. They were in the same circle of employment; they worked together for a common purpose. Each knew his relations to the other when the employment began, and each took the risks attending the same. The negligence of either was one of those risks. That Brown was foreman, and directed the action or hired the others, does not change the rule. Perhaps the track-master did represent the defendant. We are not called upon to decide that. Possibly no one below the superintendent stood in the place of the defendant in respect to the matter in dispute. It is enough that two officers of a superior grade stood between Brown and the defendant, either of whom presumptively could have hired or discharged Brown at will. So Brown's position was that of an employee, and not a representative of the company."

6. Employees supervising various kinds of construction work.

The chief engineer of a road. *McDermott v. Pacific R. Co.* (1860) 80 Mo. 115 (bridge collapsed). This case is probably no longer law in Missouri. See III. and VII. *infra*.

A bridge carpenter and a division superintendent of depots and bridges are fellow servants; the former cannot recover for the negligence of the latter. *Neubauer v. New York, L. E. & W. R. Co.* (1885) 101 N. Y. 607, 4 N. E.

scope of the rule, so far as the nature of employment is concerned, the learned author says, at page 92: "It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was, by the terms of his service, bound to obey. The foreman or manager is only a servant having greater authority. Foremen and workmen, of whatever rank, and however authority and duty may be distributed among them, are 'all links in the same chain.'"

The law in England was authoritatively declared, in 1868, in *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 326. In *New England R. Co. v. Conroy*, Mr. Justice Shiras, at page 331, 175 U. S., page 185, 44 L. ed., and page 85, 20 Sup. Ct. Rep. cites from the opinion of the lord chancellor, Lord Cairns, found at

page 332, as follows: "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. . . . But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master."

This states the same rule as that given by Mr. Justice Brewer in *Baltimore & O. R. Co.*

125 (mem. judgment; bridge carpenter injured).

An official called a "superintendent" under the general manager of a road (apparently a supervisor of structures). *Carney v. Carquet R. Co.* (1890) 29 N. B. 425 (ordered engineer to cross a bridge while in a dangerous condition owing to a flood).

A superintendent of railway bridges. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468, *Reversing* (1877) 49 Barb. 558 (bridge collapsed). This case is inconsistent with later New York cases. See IV. d, 2, and VII. *infra*.

An employee superintending the construction of a bridge, with gang foreman under him. *State use of Hamelin v. Malster* (1881) 57 Md. 287 (plank used that was too short to afford a secure foothold).

The foreman in charge of the work of constructing an arch of a railway bridge. *Hofnagle v. New York C. & H. R. Co.* (1874) 55 N. Y. 608 (ordered centers to be taken out too soon, thus causing arch to fall).

A foreman of masons working on a railway bridge. *Weger v. Pennsylvania R. Co.* (1867) 55 Pa. 460 (train ran down the hand-car on which the foreman and his gang were returning from work).

A foreman of a gang engaged in placing a bridge pier in position. *Ulrich v. New York C. & H. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5 (selection of improper appliance and improper method of work).

A temporary boss of a bridge gang who is himself a laborer. *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. Rep. 378 (ordered the hoisting of heavy timber with an inadequate force of workmen).

A division foreman of bridges on a railway, who labors with his subordinates. *Yager v. Atlantic, M. & O. R. R. Co.* (1882) 4 Hughes, 192 (bridge got out of the perpendicular and fell owing to insufficient propping).

A foreman on the construction of a bridge with two superiors over him. *Kelly v. Jutte & F. Co.* (1899) 98 Fed. Rep. 380 (negligent management of derrick—failure to inspect it for proper adjustment).

One of several foremen of bridge carpenters. *Lee v. Detroit Bridge & Iron Works* (1876) 62 Mo. 565 (unskillful adjustment of frame which was about to be lowered into a caisson caused it to tip up and throw plaintiff's intestate into the water—not law under recent Missouri decision); *Ludlow v. Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 843 (1895) 71 N. Y. S. R. 510, 36 N. Y. Supp. 452 (1896) 16 Misc. 222, 37 N. Y. Supp. 595 (failed 51 L. R. A.

to secure properly a heavy piece of iron which was being carried on a truck).

A foreman supervising the building of a boat (distinguished from an agent in full control). *Olsen v. Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694 (scaffold gave way).

The superintendent of repairs to a ship. *Hussey v. Coger* (1889) 112 N. Y. 614, 8 L. R. A. 559, 20 N. B. 556 (direction to remove hatches).

A foreman of a pile-driving gang. *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222 (pile not being blocked was shoved against the plaintiff); *Drew v. East Whitby Twp.* (1881) 48 U. C. Q. B. 107 (hammer of pile-driver fell on laborer through neglect of foreman to see that it was properly blocked).

The superintendent of the construction of a trestle. *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017 (timber for cap negligently selected).

The foreman of carpenters under a corporation. *Dewey v. Parke, D. & Co.* (1889) 76 Mich. 681, 48 N. W. 644 (temporary and movable platform for use in taking down partitions was so defectively constructed that a carpenter was injured).

A timber boss superintending repairs to a stairway beside the track on which lifting cars used in mining run. *Jenkins v. Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484 (plaintiff ordered to do work which required him to stand on a track along which a car might at any moment come—foreman omitted to notify signal man not to start the cars).

A foreman of a gang of carpenters working on a building. *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573 (supports of wash-tub were inadequate); *Jenkins v. Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484 (foreman failed to warn laborer of the approach of a car running on the incline where he was repairing a track).

The foreman overseeing the construction of a building. *Summersell v. Fish* (1875) 117 Mass. 312 (derrick fell while being hoisted under superintendence of foreman, and injured a carpenter); *Duffy v. Upton* (1873) 113 Mass. 544 (careless operation of derrick in hoisting timber injured a mason).

A clerk of the works appointed by a company to superintend the construction of a building by an independent contractor. *Brown v. Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94 (as to this case see, further, IV. e, *infra*); *Kiffin v. Wendt* (1899) 89 App. Div.

v. Baugh, just cited, and it fully affirms the law as laid down by Pollock, and as understood to be now held in England, and it is the only reference made by Mr. Justice Shiras to the English authorities on this precise point, and therefore it must be accepted as representing the English law as he understood it. Having thus shown that the English law does not recognize the so-called rule of vice-principal with reference to the issue in this case and that it certainly recognizes no distinction ordinarily arising out of different grades of service, Mr. Justice Shiras continues, at page 333, 175 U. S., page 186, 44 L. ed., and page 88, 20 Sup. Ct. Rep.:

229, 57 N. Y. Supp. 109 (order to use a temporary contrivance).

A gang-boss employed by a contractor, engaged in the construction of a building and supervising the work himself. *Cates v. Itner* (1898) 104 Ga. 679, 30 S. E. 884.

An assistant foreman of a contractor for structural iron work. *McGinley v. Levering* (1893) 152 Pa. 366, 25 Atl. 824 (fellow servant of plaintiff was ordered to use a defective tool).

A carpenter employed by the day by a contractor, and left by the latter in control of the construction of a house while he himself was absent. *Benn v. Null* (1884) 65 Iowa, 407, 21 N. W. 700 (defective scaffold).

The foreman of a squad receiving timbers after they were hoisted by a derrick to be used in a house under construction. *Gunn v. Willingham* (1900) 111 Ga. 427, 36 S. E. 804 (derrick fell, being inadequately secured).

A workman engaged in constructing a dye-house together with two or three other workmen, and having the direction of the work. *McDonald v. Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839 (timber fell, while being hoisted by a derrick managed by the employee directing the work).

The foreman of a crew engaged in repairing a dam. *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143 (plank under a great strain was suddenly released and swung against the plaintiff).

The foreman of masons employed on a building. *Jenkinson v. Carlin* (1894) 10 Misc. 22, 30 N. Y. Supp. 530 (derrick had no check rope, and fell).

A mason working with a "tender" under his orders. *Kennedy v. Spring* (1893) 160 Mass. 203, 35 N. E. 779 (defective staging).

The foreman of bricklayers on a building. *White v. Eldlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184 (unauthorized order to use a defective elevator).

Whether a foreman in charge of a gang of masons engaged in the construction of a subway is a vice-principal was left undecided in *Ricks v. Flynn* (1900) 196 Pa. 263, 46 Atl. 360.

A foreman in charge of the erection of a scaffolding. *Moore v. McNeill* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956 (selection of materials).

A foreman supervising workmen putting in an elevator. *Andre v. Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86 (failed to take proper precautions with respect to the operation of the elevator, so as to prevent the workmen from being struck by the cage); *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174 (subordinate injured while obeying an order to take measurements on one of the upper floors).

The foreman overseeing the construction of 51 L. R. A.

"Leaving the decisions of the state courts, and coming to those of this court, we find the latter to be in substantial harmony with the current of authority in the state and English courts. From this statement the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, must, perhaps, be excepted." etc.

Thereupon, in accordance with the directions of the court, Mr. Justice Shiras proceeds to overrule the case last referred to, so that, taking the whole opinion together, it must be accepted as a statement that the rule of the Federal courts on the question before us conforms to the English rule as

a large iron gasholder. *McLaughlin v. Camden Iron Works* (1897) 60 N. J. L. 567, 38 Atl. 677 (failure to use proper appliances provided by the master for raising a heavy frame).

A foreman of construction. *Frawley v. Sheldon* (1897) 20 R. I. 258, 38 Atl. 370 (implement dropped).

Any workman supervising blasting operations. *Marshall v. Schricker* (1876) 63 Mo. 308 (plaintiff's horse killed by a large stone while standing, to which the foreman had directed plaintiff to remove his team—foreman was said to be "as much engaged in the same general service when blasting, as he would have been in detaching the material to be removed with a pick and shovel." It is a question whether this case is any longer law in Missouri. See III. and VII. e, *infra*); *Perry v. Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021. Reversing (1895) 91 Hun, 243, 36 N. Y. Supp. 208 (failure to notify workmen to pry off an overhanging fragment of rock, left after a blast); *Vitto v. Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1 (order to remove unexploded blast without warning as to presence of dynamite in the hole); *Capasso v. Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 760, Reversing (1898) 25 App. Div. 234, 49 N. Y. Supp. 409 (large piece of rock left in such a position that it fell). See also *Kenney v. Shaw* (1882) 133 Mass. 501, in II. f, 8, *infra*.

A foreman controlling a gang in one of the tunnels of a cement company. *Ross v. Union Cement & Lime Co.* (1900; Ind. App.) 58 N. E. 500 (removed a portion of the loose stones which had been thrown out by a blast, and so caused a large rock which they supported to fall on the plaintiff).

A foreman of a gang of laborers engaged in blasting upon a railroad track, whose duty it is to prepare, care for, distribute, and direct the explosion of the dynamite used. *Sullivan v. New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711 (improper management of fuse—trial judge on a hearing in damages after a default sustained contention of defendant's counsel that the foreman and the laborers were fellow servants, and awarded merely nominal damages).

A foreman of blasting operations forming part of the general work of constructing a canal. *Mancuso v. Cataract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 273 (failure to search holes for unexploded charges).

The foreman of work at one of the shafts of the tunnel driven for the Croton aqueduct. *Riley v. O'Brien* (1889) 53 Hun, 147, 8 N. Y. Supp. 129 (failure to secure a pile of brick to the shaky condition of which his attention was called).

A foreman of a gang of men employed in grading a railroad. *Lindvall v. Woods* (1889)

stated by Lord Cairns. Whether or not this is to be accepted as the conclusive adjudication of the Supreme Court to the extent stated by Mr. Justice Shiras, it is at least certain that there is nothing in the determinations of that court, as they are now to be summed up, which, in view of the evidently subordinate position of Streeter, can be regarded as excepting this case from the general rule of the obligations of the master arising out of the relations of coservants working together at the same time and for the same purpose, while, on the other hand, there is much to thoroughly discountenance

any such exception, and the general drift is against it. Under these circumstances, the request to the court below to instruct the jury to return a verdict for the defendants below, now the plaintiffs in error, should have been granted. We may add that there is no rule of natural justice which holds an employer who is personally without fault liable in damages for the faults of others.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case is remanded to that court for further proceedings, and the plaintiffs in error are awarded the costs of appeal.

41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020 (injury caused by the fall of a trestle constructed to carry the earth excavated from a cutting to an adjoining embankment). The action being dismissed by the trial court in accordance with the judgment of the Supreme Court, another suit was subsequently brought in a Federal court which ruled that this dismissal not being a judgment on the merits was no bar, and the plaintiff was finally declared by the court of appeals to be entitled to recover on the ground that the foreman was a vice-principal. See V. and VII. *infra*.

A civil engineer superintending the construction of a railway for nonresident contractors, he himself being under the control of such contractors. *McBride v. Brojden* (1876) 3 New Zealand, C. A. 271 (laborer injured by the derailment of a ballast-car which was being pushed in front of the engine—a method of transportation authorized by the superintendent).

An assistant engineer superintending grading work. *Cornellson v. Eastern R. Co.* (1892) 50 Minn. 23, 52 N. W. 224 (dangerous method of withdrawing unexploded charge).

The overseer of a gang of laborers engaged in making an excavation. *Wilson v. Merry* (1868) L. R. 1 Sc. App. Cas. 326, 19 L. T. N. S. 30, per Lord Cranworth (*arguendo*); *Daley v. Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840 (conceded—Injury was caused by dangerous method of getting an engine back into place); *Larich v. Moles* (1894) 18 R. I. 513, 28 Atl. 661 (negligent order); *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147 (injury caused by obeying order to work at a particular point—but quere, as to this case under later Illinois decisions. See III. *infra*).

The foreman of a gang of laborers employed by a contractor for the excavation of a tunnel. *Anderson v. Winston* (1887) 31 Fed. Rep. 528 (injury caused by earthslide, danger of which was seen by foreman).

A foreman of a job of excavating work, whose duty it is merely to report want of proper appliances to a vice-principal. *Durat v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102 (failure to inform superintendent of a circumstance creating danger).

A foreman in charge of men constructing a sewer, with authority to hire and discharge them under the supervision of a superintendent of sewer construction, who is himself subject to the instructions of the city engineer, as general superintendent of all public works. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525 (sewer caved in owing to inadequate shoring of sides).

A person superintending the digging of a trench or sewer. *Flynn v. Salem* (1883) 134 Mass. 351 (sewer caved in—demurrer to complaint upheld); *Conley v. Portland* (1886) 78 Me. 217, 3 Atl. 658 (sides of sewer caved in); *O'Connor v. Roberts* (1876) 120 Mass. 227 51 L. R. A.

(same facts); *Dube v. Lewiston* (1891) 83 Me. 211, 22 Atl. 112 (same facts—master held not liable for failure of foreman to use materials furnished for shoring sewers); *Schott v. Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631 (assurance that place of work would be kept secured against transitory dangers—in this case the injury was caused by the act of a fellow laborer); *Zeigler v. Day* (1877) 123 Mass. 152 (similar accident owing to want of proper planking—here the superintendent's compensation was a certain proportion of the profits); *Collins v. Crimmins* (1895) 11 Misc. 24, 31 N. Y. Supp. 860 (similar accident).

A foreman in a waterworks company, having exclusive charge of calking and laying pipes, in the absence of the general superintendent. *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807 (pipe rolled off blocks while plaintiff was assisting the foreman).

The foreman of a gang employed in the construction of a line of telegraph. *Postal Telegr. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854 (negligent directions as to manner of performing work).

A superintendent of the work of removing a telephone pole. *Morgridge v. Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 328 (premature order to workmen to let go their hold on the pole).

An employee having the direction of the actual work of removing a telephone and telegraph line with authority to hire, pay, and discharge employees. *American Teleph. & Telegr. Co. v. Bower* (1898) 20 Ind. App. 32, 49 N. E. 182 (climbed pole and loosened wires after the soil had been removed from the bottom of the pole).

The foreman of a crew engaged in taking down a building. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970, *Reversing on Rehearing* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Rep. 804, in consequence of the decision in the *Baugh Case* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (plaintiff was ordered to chop through a post, no sufficient precautions being taken to prevent the fall of the building while he was so engaged).

See also *Floyd v. Sugden* (1883) 134 Mass. 563, where a foreman in charge of the repairing of a mill property was held not to be a vice-principal. See, further, IV. d, 2, *infra*.

7. Supervising employees in the mechanical departments of railways and other concerns.

The master mechanic of a railway company. *Shauk v. Northern C. R. Co.* (1866) 25 Md. 462 (defective engine—distinction between assignable and nonassignable duties not discussed); *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473 (defective engine—overruled in *Davis v. Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590); *Columbus & I. C. R. Co. v. Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615 (de-

MINNESOTA SUPREME COURT.

Daniel O'NEIL, *Respt.*,
v.
GREAT NORTHERN RAILWAY COM-
PANY, *Appt.*

(.....Minn.....)

- *1. Where a servant is injured, being caught by a bolt which remains in a timber, in the work of tearing away a portion of a bridge, he assumes the danger of the negligence of his fellow servants, as well as the apparent and probable risks of the service in which he is engaged.
- *2. The road master of a railroad company, directing such work, as in this case, is not the vice-principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the master liable for his omissions in that respect.

(May 28, 1900.)

*Headnotes by LOVELY, J.

fective engine). This case is no longer law in Indiana. See summary in VII. e, Indiana, *infra*.

A machinist employed in repairing railroad engines, who occasionally calls in other employees of the railroad company to aid in work which he cannot do alone, is not the vice-principal or superior of such employees. *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 661.

The foreman of locomotive shops. *Beaulieu v. Portland Cc.* (1890) 48 Me. 291 (loose timbers fell on plaintiff).

The foreman at a round-house of a railroad. *Gonsior v. Minneapolis & St. L. R. Co.* (1887) 36 Minn. 385, 31 N. W. 513, dissenting. *Mitchell, J.* (alleged negligence was in ordering servant to pull a car-spring without any assistance, the evidence tending to show that two men were needed to do such work safely).

Contra, such a foreman was assumed to be a departmental vice-principal in *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250.

One of several foremen in a railway machine shop. *Gaynon v. Durkee* (1898) 81 C. C. A. 306, 52 U. S. App. 587, 87 Fed. Rep. 302 (let steam into a boiler while a subordinate was inside it).

A gang-boss in railway shop, under a master mechanic. *McBride v. Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687 (took a man away from work which could not be done safely without him).

A "boss wiper" who directs the engine wipers when to work and what to do. *Knox v. Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491 (negligent order as to moving of engine). As to this case, see III. a, *infra*.

An employee under whose directions an engine cleaner in a round house is to work until he has gained sufficient experience. *Spencer v. Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915 (engine started while cleaner was underneath it).

A gang boss over forty or fifty men working in a railroad repair yard. *Keenan v. New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711 (plaintiff was sent to take a spring from a car standing on a track other than that on which repairs were usually made, and was injured by other cars backing against the one from which he was taking the spring).
51 L. R. A.

A PPEAL by defendant from an order of the District Court for Polk County overruling a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. William R. Begg and A. C. Wilkinson, for appellant:

The case is not within Gen. Stat. 1894, § 2701, making railways liable to their servants for injuries caused by the negligence of a co-servant.

Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 9, 49 N. W. 302.

The doctrine that the master must furnish the servant a safe place in which to work, or else warn him of dangers, has no application to the case at bar.

A foreman of car repairers. *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260 (failure of foreman to set signal flag to protect car repairers).

A foreman of car repairers, who cannot hire or discharge his men, and has no authority except to direct them about their work. *Foley v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124 (here injury occurred while the foreman was assisting in manual labor—car, not being blocked, moved forward and crushed plaintiff's foot).

A foreman in a woolen mill, sometimes called a "boss machinist" and sometimes "master mechanic," who had charge of the repairs of the machinery, but neither made any important alterations in it nor hired or discharged the gang under his control without consulting the general superintendent. *Stevens v. Chamberlin* (1900) (did not block up a heavy plate properly, and it fell on a subordinate).

The superintendent and manager in charge of the machinery in a factory. *Boyce v. Fitzpatrick* (1881) 80 Ind. 526 (operative injured by recklessness of superintendent in passing straw to a flax-brake).

An engineer of a steam roller used in repairing the streets of a city, as regards a flagman subject to his orders and liable to discharge by him. *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 659 (roller started without warning).

An engineer as regards his fireman. *Watts v. Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 373 (fireman was adjusting a pump under the engineer's control).

The foreman of a lathe. *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621 (counter-balance, being left unsecured, flew off and struck an apprentice).

The leader or boss of a gang of hands, himself under the direction and control of a foreman, and doing such work as the latter directs to be done. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509 (heavy wheel, which was being moved, fell on plaintiff).

A foreman of a gang lifting heavy machinery. *Robertson v. Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655 (foreman failed to assist in sustaining some heavy machinery, and plaintiff suffered a rupture).

From the very character of the work, the safety of the place was continually changing. The master could not know just what spikes, if any, would not be drawn.

Gulf, C. & S. F. R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. Rep. 48; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. Rep. 507; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450, 28 Pac. 497; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Kelley v. Chicago, St. P. M. & O. R. Co.* 35 Minn. 490, 29 N. W. 173.

The character and magnitude of the work were not such as to make it the master's duty to personally direct where each servant should work, or warn them of the danger of working in any given place.

Broderick v. St. Paul City R. Co. 74 Minn. 163, 77 N. W. 28; *Kelley v. Chicago, St. P. M. & O. R. Co.* 35 Minn. 490, 29 N. W. 173.

The negligence, if any, of Hess, the road master, was that of a fellow servant, for which defendant is not liable.

Brown v. Winona & St. P. R. Co. 27 Minn.

A workman employed in the picker-room of a factory with two other persons, and having the direction of the work therein as foreman. *McGovern v. Columbus Mfg. Co.* (1888) 80 Ga. 227, 5 S. E. 492 (machine negligently started by foreman while it was being cleaned).

The foreman in charge of a crew operating the grinders in a mill. *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340 (alteration made in machinery rendered it dangerous—water-pipe which supplied pressure plugged).

8. Foreman supervising work in quarries.

A foreman of a quarry. *Cullen v. Norton* (1891) 128 N. Y. 1, 26 N. E. 905 (workmen improperly placed).

The superintendent of blasting at a quarry. *Kenney v. Shaw* (1882) 133 Mass. 501 (workman injured by an explosion in consequence of his using iron drill in a hole in which the superintendent had previously placed some blasting powder, and had neglected to see that it had effectively exploded before giving the order to deepen the hole).

A member of a gang of men engaged in quarrying limestone and burning, who acts as foreman in the work of moving cars to the lime kilns, but at other times does the same work and receives the same pay as the rest of the gang. *Moore Lime Co. v. Richardson* (1897) 95 Va. 326, 28 S. E. 334 (failure to give notice of the approach of a car).

A foreman in a quarry under the management of a superintendent. *Donovan v. Ferris* (1900) 128 Cal. 48, 60 Pac. 519 (failure to notify servant that a blast was about to be fired).

9. Employee supervising the loading of vehicle elsewhere than on railways.

A foreman in charge of a derrick used to move stone on a truck. *Scott v. Sweeney* (1884) 34 Hun, 292 (injury caused by the fall of the boom which was being lowered by the order of the foreman).

A foreman overseeing the loading of an elevator. *Denenfeld v. Baumann* (1899) 40 App. Div. 502, 53 N. Y. Supp. 110 (negligence alleged was overloading).

51 L. R. A.

162, 38 Am. Rep. 285, 6 N. W. 484; *Gonsior v. Minneapolis & St. L. R. Co.* 36 Minn. 385, 31 N. W. 515; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 117, 35 N. W. 866; *Lindvall v. Woods*, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Ling v. St. Paul, M. & M. R. Co.* 50 Minn. 100, 52 N. W. 378; *Oelschlegel v. Chicago Great Western R. Co.* 73 Minn. 327, 76 N. W. 56, 409; *Bergquist v. Minneapolis*, 42 Minn. 471, 44 N. W. 530; *Fraser v. Red River Lumber Co.* 45 Minn. 235, 47 N. W. 785; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611.

Plaintiff assumed the risk of injury from the undrawn bolt, and was guilty of contributory negligence.

Walsh v. St. Paul & D. R. Co. 27 Minn. 367, 8 N. W. 145; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Kelley v. Chicago, St. P. M. & O. R. Co.* 35 Minn. 490, 29 N. W. 173; *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908; *Berger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814; *Pederson v. Rushford*, 41 Minn. 289, 42 N. W. 1063; *Smith v. Winona & St. P. R. Co.* 42 Minn. 87, 43 N. W. 968; *Larson v. St.*

10. Foreman of gangs loading or unloading ships.

A gang foreman under direction of the chief stevedore. *Kenny v. Cunard S. S. Co.* (1885) 20 Jones & S. 434, a. c. (1885) 23 Jones & S. 558 (boards imperfectly secured in a sling fell out).

An under-foreman controlling a gang of laborers loading a ship. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. Rep. 748 (unprotected hatchway).

The foreman of a gang engaged in loading a ship. *McDonald v. Hazletine* (1878) 53 Cal. 35 (accident in this case not due to negligence of foreman, but of laborers).

The foreman of a steamship company, under whom longshoremen are employed, in loading a vessel. *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29 (order to work in a certain place).

A foreman of stevedores. *The Kensington* (1898) 91 Fed. Rep. 681 (handled the load himself).

A master stevedore's foreman. *The Wm. F. Babcock* (1887) 31 Fed. Rep. 418 (hatch left open); *O'Connor v. Hall* (1900) 52 App. Div. 428, 65 N. Y. Supp. 136 (barrel insecurely fastened fell while it was being hoisted).

A foreman of a gang engaged in unloading a ship. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690 (negligence in selection of rope from a stock furnished).

It is error to rule, as a matter of law, that a head stevedore is a fellow servant of one of his subordinates, where there is evidence to the effect that he was in full control of the work, and invested with the duty of furnishing the appliances used. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, Reversing (1872) 9 Phila. 16. See further, as to the case, *V. infra*.

11. Supervising employees in smelting works.

A foreman supervising the silver-room department of smelting works. *Nixon v. Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803 (extemporized a hose to conduct a hot acid—plaintiff, not knowing it to be defective, was injured).

Paul, M. & M. R. Co. 43 Minn. 423, 45 N. W. 722; *Anderson v. H. C. Akeley Lumber Co.* 47 Minn. 128, 49 N. W. 664; *Scharenbroich v. St. Cloud Fiber-Ware Co.* 59 Minn. 116, 60 N. W. 1093; *Soutar v. Minneapolis International Electric Co.* 68 Minn. 18, 70 N. W. 796; *Swanson v. Great Northern R. Co.* 68 Minn. 184, 70 N. W. 978; *Broderick v. St. Paul City R. Co.* 74 Minn. 163, 77 N. W. 28.

It is not necessary that the servant be notified of the particular defect, or of the particular undrawn bolt. It is enough that he is notified generally.

Kelley v. Chicago, St. P. M. & O. R. Co. 35 Minn. 490, 29 N. W. 173; *Smith v. Winona & St. P. R. Co.* 42 Minn. 87, 43 N. W. 968.

In failing to discover and avoid the danger, plaintiff was guilty of contributory negligence.

12. Employees supervising farms.

A foreman of a farm. *Noyes v. Wood* (1804) 102 Cal. 389, 36 Pac. 766 (presumably not in full control—accident was due to a defective scaffold). See California decisions cited under IV. b, 2, *infra*.

18. Supervising employees in manufacturing establishments.

See also subsec. f, *supra*.

A yard-master supervising the out-door work of a manufacturing company. *Moody v. Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185 (plaintiff injured in obeying order to handle a carboy of sulphuric acid which proved to be broken).

A millwright in the employ of a manufacturing company (as regards a carpenter hired by him to assist in a special job). *National Tube Works Co. v. Bedell* (1880) 96 Pa. 175 (selection of appliances—but evidence here showed that those furnished had no flaw that could have been discovered by a reasonable inspection).

The foreman of a wood shop in a car factory (except so far as he may be discharging the duty of providing proper machinery). *Indiana Car Co. v. Parker* (1885) 100 Ind. 181.

A foreman of an oil company. *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun. 579, 28 N. Y. Supp. 196 (selection of plank to serve as a temporary support).

An engineer in charge of the engine room and freezing department of an ice company. *Prevost v. Citizens' Ice & Refrigerator Co.* (1898) 185 Pa. 617, 40 Atl. 88 (negligence in directing work to be done in an improper way).

The foreman in charge of a room in a factory. *Findlay v. Russel Wheel & Foundry Co.* (1896) 108 Mich. 286, 66 N. W. 50 (set a drum in motion in the wrong direction while helping to place a car on its trucks).

14. Supervising employees in mines.

(a) Without reference to statutes.

A "fire-boss" whose duty is merely to direct the miners to leave dangerous places at which gas accumulates, but who has no control over the work. *Morgan v. Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (here the accident, an explosion, did not even occur while the boss was engaged in his duty of imparting information).

An underground boss (except as to nonassignable duties). *Russell Creek Coal Co. v. Wells* 51 L. R. A.

Eicheler v. Hanggi, 40 Minn. 263, 41 N. W. 975; *Trunite v. North Star Woolen-Mills Co.* 57 Minn. 52, 58 N. W. 832.

Mr. C. Wellington also for appellant.

Messrs. H. Steenerson and W. E. Rowe, for respondent:

It shall also be the master's duty to use reasonable care to establish safe and suitable rules and regulations or methods for the performance of the work required of his servants, and to direct and supervise the performance of the work in a reasonably safe and prudent manner.

Gen. Laws 1895, chap. 173.

If the nature and magnitude of the master's work, whether it be that of construction or otherwise, and the number of men engaged in its execution, are such that the exercise of ordinary care for the safety and protection of the workmen from unusual or

(1898) 96 Va. 416, 31 S. E. 614 (a mere fellow servant as to keeping the drifts in safe condition as the work progresses).

One of several in a mine having direction of the work of eight or ten men, himself controlled by the pit boss, who is subject to the direction and control of the superintendent or general manager. *What Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. Rep. 810 (struck the top of a room with a pick, and brought down a piece of rock on the plaintiff).

A gang foreman. *Alaska Treadwell Gold Min. Co. v. Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40 (gate of chute drawn without notice, the result being that the broken rock at its upper end ran through and injured a laborer).

A foreman of a mine (precise functions not stated). *Stephens v. Doe* (1887) 73 Cal. 26, 14 Pac. 378 (miner obeyed order to enter a chamber too soon after blast—no recovery though he had not experience to appreciate the danger).

An employee in a mine whose regular duties were to take charge of the tools and keep the time of the men, and who, in the superintendent's absence, used to give occasional directions as to the work. *Wilson v. Dunreath Red Stone Quarry Co.* (1889) 77 Iowa, 429, 42 N. W. 360 (ordered to use appliances which proved to be defective, said appliances being constructed by the miners themselves).

The slate-pickler boss in a coal mine. *McCool v. Lucas Coal Co.* (1892) 150 Pa. 638, 24 Atl. 350 (slate-pickler killed while complying with an order to perform a certain errand).

A top boss (as regards miners). *Hughes v. Oregon Improvement Co.* (1898) 20 Wash. 294, 55 Pac. 119 (ventilating fan stopped during fire).

A "bank boss." *Brazil & C. Coal Co. v. Cain* (1884) 98 Ind. 282 (complaint held demurrable which alleged that the plaintiff's intestate had been directed to undertake new duties, but failed to allege that the risks thereof were not understood by him).

A shift-boss in a mine, who acts as foreman and directs when and where blasts shall be put in and where the men shall work, and who is appealed to to settle claims arising as the work progresses. *Petaja v. Aurora Iron Min. Co.* (1895) 106 Mich. 463, 32 L. R. A. 435, 84 N. W. 335, Affirmed on Rehearing in 106 Mich. 469, 32 L. R. A. 438, 86 N. W. 951 (too large a space mined out before supports were put in).

A foreman supervising drilling in a mine with authority to hire and discharge subordinates. *Gilmore v. Oxford Iron & Nail Co.*

unnecessary dangers requires that they be given reasonable orders, and that they be not ordered from one part of the work, without warning, into places of unusual dangers and risk which are not obvious to the senses or known to them, but which might be ascertained by the master by a proper inspection, the absolute duty rests upon the master to give such reasonable order.

Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 428, 65 N. W. 914; *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311; *Blomquist v. Chicago, M. & St. P. R. Co.* 60 Minn. 426, 62 N. W. 818; *Myhre v. Tromanhauser*, 64 Minn. 541, 67 N. W. 660; *Abel v. Butler-Ryan Co.* 66 Minn. 16, 68 N. W. 205; *Johnson v. Minneapolis General Electric Co.* 67 Minn. 141, 69 N. W. 713; *Birmingham v. Duluth, M. & N. R. Co.* 70 Minn. 474, 73 N. W. 409; *Stahl v. Duluth*, 71 Minn. 341, 74 N. W. 143.

(1892) 55 N. J. L. 39, 25 Atl. 707 (loose fragment of ore fell on plaintiff).

An "underlooker." *Hall v. Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411 (failure to see that roof of mine was propped safely).

A pit boss. *Hughes v. Oregon Improvement Co.* (1898) 20 Wash. 294, 55 Pac. 119 (ventilating fan stopped during fire); *Deserant v. Cerillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290 (explosion occurred in a room into which workmen went with naked lights, either by the direction of the boss, or with him).

In *Somerville v. Gray* (1863) 1 Sc. Sess. Cas. 3d Series, 768, it was held that the underground manager of a mine, invested more particularly with the duty of providing against danger from the roof of the pit, and having authority to hire and discharge men, and to direct them where to work, was a representative of the mine owners in such a sense as to make them liable for his negligence in keeping a miner at work in a place where he knew there was such imminent danger of the fall of stones that he actually promised the miner to have it propped after a few hours.

To much the same effect, see *Hardie v. Addie* (1858) 20 Sc. Sess. Cas. 2d Series, 553.

But in *Wright v. Roxburgh* (1864) 2 Sc. Sess. Cas. 3d Series, 748, it was held that an underground manager of a mine was a fellow servant of a workman killed by an explosion of fire-damp in a seam at some distance from that in which the manager was carrying on certain operations involving the temporary suspension of a system of ventilation which the evidence showed to be efficient and safe.

Somerville v. Gray (1863) 1 Sc. Sess. Cas. 3d Series, 768, was distinguished on the ground that the injury was caused directly by obedience to the orders of the defendant's foreman.

In *Wilson v. Sneddins* (1866) 4 Macph. Sc. Sess. Cas. 736, an underground manager was also held to be a mere servant, and this is now definitely settled to be the true doctrine so far as the United Kingdom is concerned. See also *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 826, 19 L. T. N. S. 80. See III. *infra*.

(b) Appointed under statutes.

A foreman appointed under the Pennsylvania acts which require the employment of a mining boss who shall keep a careful watch over the ventilating apparatus and all things connected with and appertaining to the safety of the men 51 L. R. A.

If the defendant delegated to Mr. Hess the management of the work in which plaintiff was injured, and if the injury was caused by the negligence or want of ordinary care on the part of Hess in managing the work, then the plaintiff was entitled to recover for the injuries he received.

Bergquist v. Minneapolis, 42 Minn. 471, 44 N. W. 530; *Carlson v. Northwestern Teleph. Exch. Co.* 63 Minn. 428, 65 N. W. 914.

Lovely, J., delivered the opinion of the court:

Action for injuries sustained by plaintiff while working as a common laborer on defendant's road. Plaintiff had a verdict. Upon motion for a new trial the same was denied, conditioned upon the reduction of the recovery, to which he consented. Thereupon defendant appeals to this court.

at work in the mine (statute passed March 3, 1870, amended April 28, 1877, and June 30, 1885) is a fellow servant of his subordinates. *Lehigh Valley Coal Co. v. Jones* (1878) 86 Pa. 432 (explosion caused by defective ventilation); *Delaware & H. Canal Co. v. Carroll* (1879) 89 Pa. 374 (explosion of fire-damp); *Waddell v. Simson* (1886) 112 Pa. 567, 4 Atl. 725 (defective construction of gangway); *Reese v. Biddle* (1886) 112 Pa. 72, 3 Atl. 813 (failure to use props furnished); *Redstone Coke Co. v. Roby* (1886) 115 Pa. 364, 8 Atl. 593 (explosion of fire-damp); *Haley v. Kelm* (1892) 151 Pa. 117, 25 Atl. 98 (deadly gases penetrated through openings which should have been closed); *Lineoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577 (roof collapsed); *Velas v. Patton Coal Co.* (1900) 197 Pa. 380, 47 Atl. 360 (negligent order); *Vosheskey v. Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386 (defective bumper on car).

The theory on which the master is absolved from liability in these cases will be sufficiently apparent from the following extracts from the opinions:

"As the defendants had complied strictly with the 8th section of the act of 3d of March, 1870, in providing a practical and skilful inside overseer or mining boss, and as they had thus fulfilled the duty imposed upon them by the general assembly, it is not for this or any other court to charge them with an additional obligation. . . . The act is one of great practical utility to the miner, and lays upon the proprietors of mines all the burdens they ought of right to bear. They must provide capable overseers for their works, and they must furnish what, by such overseers, is required for the safety and welfare of the men engaged in those works. More than this they cannot do, for upon the judgment and skill of these practical agents they must depend quite as much as any of the men who are engaged in their mines." *Waddell v. Simonson* (1886) 112 Pa. 567, 4 Atl. 725.

"Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where it has a general superintendent over him, who has power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person, and provide suitable and safe machinery. He is to 'carefully watch' and 'to see', for the purpose of protecting from danger, all men at work in the mines, says the statute. This, however, does not dis-

At a place where defendant's road crossed a ravine on a trestle, the same was filled in by substituting an embankment of earth to support the track in place of the trestle. This undertaking seems to have been carried out as a part of the work of surfacing a considerable portion of the road, wherein a gang of 35 men were working under the directions of defendant's road master. After the trestle had been filled in very nearly to the surface of the track, some 20 men of the gang were detached from the rest of the crew, and required to go upon the embankment to remove and throw the stringers upon which the ties rested over the same, evidently to make room for a further fill, surfacing other ties, and a new track. In the original construction of the trestle the ties rested upon the stringers, which were 40 feet in length, running lengthwise, and rest-

ing upon cross timbers beneath. Upon these stringers the ties had been laid transversely. At regular intervals long iron bolts or spikes were driven through the ties and stringers, extending into the timbers beneath, thereby holding secure in combination the ties, stringers, and timbers. The track had been pushed to one side, the bolts were drawn, when the stringers would be moved to the edge of the embankment, and either thrown or allowed to roll down the same. It is claimed by the plaintiff that jackscrews were used to withdraw the bolts from the stringers and timbers into which they extended, and that he was engaged in placing the jackscrews, but had nothing to do with the work of drawing the bolts. It also appears that all the bolts, some 40 in number, had been drawn, except one at the end of one of the stringers, when, by order of the road mas-

place or supersede his superior, to whom he may be required to report." *Lehigh Valley Coal Co. v. Jones* (1878) 86 Pa. 432.

"There is no room for the allegation that a mining boss under the mine ventilation act of 1870 is an agent of the mine owner or a co-employer. He is clothed with no powers of engaging and discharging miners and laborers at pleasure. He is merely a fellow servant with the miner. He is nowhere in the act designated as the agent of the owner of the mines. His duties are specified in the same manner that the duties of the engineer are specified in the 16th section, and as the duties of other employees are defined in various other sections. He has no general power of control. His duties are confined to special matters. That they are different from those of others of his fellow collaborators, or even that they are of a higher grade, does not matter." *Delaware & H. Canal Co. v. Carroll* (1879) 89 Pa. 374.

"The mining-boss is therefore a creature of the legislature, selected by the mine owner in obedience to the command of the law, and in the interest and for the protection of the miners themselves." *Redstone Coke Co. v. Roby* (1886) 115 Pa. 364, 8 Atl. 593.

"These remarks are as precisely applicable to the act of 1885 as they were to the acts of 1870 and of 1877. The fundamental idea as to all of them is that properly qualified persons, as designated in the several acts, shall be employed by mine owners with prescribed duties relative to the care and inspection of mines, and where this is done the mine owner has discharged his duty in this regard, and if, having done so, accidents occur which can be traced to the carelessness or negligence of these persons, the owners are not liable." *Lineoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577.

In this last case the court denied that there was any force in the contention that because, under act of 1885, "the miner must give notice of any apprehended danger to the mine foreman, therefore he is to be considered as the representative of the owner for all purposes, so as to charge the company with liability." "No such provision," it was said, "is found in the act, and the duty to give such information was just as great before the act as after. The act simply embodied what was already a legal duty of the miner into the provisions of the statute, making it more precise and emphatic, and bringing the performance of such duty more directly to the attention of the miner. The position of the mining foreman with relation to the owner was not changed by this provision. His duty was the same, with or without this provision, to wit, to give immediate attention to the

apprehended danger, and take all proper measures to prevent its occurrence. The effect of his negligence in not correcting the defects or dangers complained of would be precisely the same after as before the statute, and it would require a specific change of the law by statutory enactment to impose liability upon the owner for his negligence when there was no such liability at the date of the passage of the act."

In *Weaver v. Iselin* (1894) 161 Pa. 386, 29 Atl. 49, the trial judge, in a charge declared to be correct, ruled that the possession of a power to employ and discharge workmen—this not being a statutory duty of a mine boss—placed him in the position of a vice-principal, and enlarged the liability of the employer beyond that to which he is subject in the case of a mine boss employed under the provisions of the act, and performing only the duties prescribed therein.

The relation of the rule applied in these cases to that which declares a head of a department to be a vice-principal (see IV. *infra*) has apparently not been discussed, and there might seem to be some ground for considering such a foreman to be within the purview of the latter rule. But the differentiating element is clearly indicated by the remark in *Delaware & H. Canal Co. v. Carroll* (1879) 89 Pa. 374, that he "has no general power of control," and that "his duties are confined to special matters."

In other states a similar view has, on the authority of the above cases, been taken as to the capacity of foremen appointed under acts of the same tenure as that of Pennsylvania.

In West Virginia a mine boss employed according to the provisions of the Code of 1891, Append. p. 995, § 11, is held not to be a vice-principal, as his duties are not delegated to him by his employer, but prescribed by statute (*Williams v. Thacker Coal & Coke Co.* (1898) 44 W. Va. 599, 40 L. R. A. 812, 80 S. E. 107 (large fragment of rock fell from roof of drift); applying the principle that, "where a person or corporation is compelled by law to employ an individual in a given matter no liability attaches for his tortious or negligent acts.")

In Colorado a mine boss vested with no authority other than that prescribed by the coal mining act of 1885 is a fellow servant of employees in the mine. *Colorado Coal & I. Co. v. Lamb* (1895) 6 Colo. App. 255, 40 Pac. 251 (mass of rock fell in a drift). The court said: "The mine boss is an individual so designated by the statute, who must be employed by the mine owner, and put in charge, with reference

ter, plaintiff was called to take hold of this stringer at the place where there was an undrawn bolt, when he, with a number of the other men, were to roll it over the embankment; and in obeying this direction he sustained the injuries of which he complains. It appears that the upper end of the bolt protruded some inches from the surface of the stringer; and while the plaintiff was at the place where this undrawn bolt was, and in attempting, with the other men, to turn it over, he was caught by the protruding end, and in the usual movements that followed in moving the stringer was, in consequence, thrown with some violence down the embankment. The case was submitted to the jury solely upon the question whether the defendant's road master, Hess, was a vice-principal of the defendant (without defining the character of that relation),

and was negligent in not giving to the plaintiff a particular warning of the fact that the bolt in question had not been withdrawn, and was liable to injure him. It seems to have been claimed by counsel for plaintiff at the trial that it was the duty of the road master to have given him warning of the precise danger which was liable to and did cause the accident. The road master and a foreman who was present both stated that a general warning to look out for these bolts had been given to all the men at work on the embankment. Conceding that the jury had a right to disregard this testimony, the only evidence remaining to show that no warning of danger was given is that of the plaintiff himself in answer to a question of his counsel, "Did you hear him [Hess] say anything about looking out for that bolt?" referring to the bolt which caught and in-

to its safety and security. He has entire supervision of the whole system of the ventilation of the mine, likewise of its entries, drifts, and rooms, and all machinery and appliances which are used in its operations. He is bound to make his reports regularly to the mine inspector, and is subject to severe penalties for any violation of the act. Of necessity, this would include any failure on his part in the supervision, inspection, and care which the statute requires. Miners are likewise given the right to inspect the mine and machinery either in person or by committee, conjointly with the owner, or otherwise, as they may choose, and to take such steps as their prudence may dictate to secure their own safety and prevent accidents. In another section a right of action is given to certain designated parties in case they sustain damages by reason of any failure to comply with the provisions of the statute, or because of any violation of its requirements. . . . We are unable to see how it is possible to compel a company to employ a mine boss, upon whom are laid the responsibility and the duty by statute to attend to the mine and its safety as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his mining operations. The master may supervise him, and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary; but when the statute put the control of this particular matter into the hands of the boss, and left to his judgment both the question of safety and the means to be used to that end, we are unable to see how he is in any sense, either as vice-principal or otherwise, the representative of the master, or how he can stand in any other relation to his collaborator than that of a fellow servant."

15. Subordinate officers of ships.

A chief engineer on a steamer, if a fellow servant of the third engineer. *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 749, 5 L. T. N. S. 427, 10 Week. Rep. 89 (machinery out of order).

The mates of ships are not vice-principals. *The City of Alexandria* (1883) 17 Fed. Rep. 390 (hatchway left open); *The E. B. Ward* (1884) 20 Fed. Rep. 702 (hatchway left unprotected); *Malone v. Western Transp. Co.* (1873) 5 Biss. 315, Fed. Cas. No. 8,996 (same facts); *The Job T. Wilson* (1897) 84 Fed. Rep. 204 (here 51 L. R. A.

the mate was at the wheel and therefore performing the duties of a mere servant); *The Egyptian Monarch* (1888) 36 Fed. Rep. 778 (mate was superintending work of reeling in the hawser); *Carlson v. United New York Sandy Hook Pilots' Assn.* (1890) 93 Fed. Rep. 468 (navigation of pilot boat); *The Miami* (1899) 35 C. C. A. 281, 93 Fed. Rep. 218, Affirming (1898) 87 Fed. Rep. 757 (topmast fell, while the mate was attempting to cast off a turn of the chain from around the drum); *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517 (no evidence offered to take the case out of the general rule applicable to a superintendent of work and one working under his orders—accident was caused by order to slacken a rope, thus allowing a heavy object to fall on plaintiff's foot); *Olson v. Clyde* (1884) 32 Hun, 425 (ordered to other work a seaman who was assisting plaintiff to pay out a hawser, the strength of two men being necessary for the due performance of the work); *Geoghegan v. Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507 (assistant steward fell overboard through a gangway door which had been left open); *Scarff v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (assumed in this case—exception being made as regards the performance of the nonassignable duty of giving medical aid to seamen); *Livingston v. Kodiak Pkg. Co.* (1894) 103 Cal. 258, 37 Pac. 149 (injured servant was a steward waiting at table, who fell through an open hatchway).

The status of these officers is elaborately discussed in a recent Massachusetts case, where it is held that an employee of a coasting vessel is a fellow servant with the mate who is in control of the vessel, with respect to the latter's negligence in constructing and ordering the employee to use a triangle whose breaking while he was sitting thereon and scraping a mast caused the injuries in suit. *Kalleck v. Deering* (1894) 161 Mass. 469, 37 N. E. 450. Holmes, J., said: "As the case comes before us, we must take it that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate. By the common law as understood in this state, the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and therefore, if those engaged upon it were fellow servants in their general standing and occupation, the plaintiff

jured him; to which the plaintiff answered, "No, sir; I did not;" and it must be assumed, the burden being upon the plaintiff, that this evidence, under the instructions of the court, established in the minds of the jury the failure of the defendant to give warning through its vice-principal, the road master, which supported the recovery. This clearly involves a palpable misunderstanding of the duty of a vice-principal in any supposable case, for such vice-principal can only, in any event, represent the master in the performance of some general function of the work in which the employee is engaged. The logical result of this claim in behalf of plaintiff would require from the vice-principal, not only a general warning of danger in such a case, but notice of every hazard that might occur in the conduct of the work, extending through all its details, and would

took the risk of their negligence. They were not removed from the class of fellow servants for the time being by the nature of their occupation, to adopt the mode of expression which has been used. *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209. 46 Am. Rep. 458; *Moynihan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574; *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581. But if the work had been done by the defendants in person, and they had done it negligently, they would have been liable; and it is argued that they are equally liable when the work is done by the master of the vessel, or by one who for the time being stands in his place. It is said that the master is not a fellow servant with the seamen, and therefore is not within the rule as to the risks assumed by the plaintiff, but that he is nevertheless an agent and representative of the owners, and that his negligence is their negligence. Even if it be said, as it has been said in some cases, that masters are not liable to servants for the negligence of others except when the law on grounds of policy imposes a personal duty on them to see certain precautions taken or reasonable care used; and if it be admitted, therefore, that the defendants could not be liable for negligence in the construction of the triangle on the part of the master, whether a servant or not, any more than when the same work was done by the seaman (*Quinn v. New Jersey Lighterage Co.* (1885) 23 Fed. Rep. 363; *The Queen* (1889) 40 Fed. Rep. 694; *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 371; *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914); still, ordering the plaintiff to use the faulty triangle was an act belonging to the superior officer as such, and it might be that as to that a different rule would apply. Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise."

The contention that a different doctrine obtains in the admiralty, and that the court ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen was then discussed. It was pointed out that the case most relied on, *The A. Heaton* (1890) 43 Fed. Rep. 592 (followed by *The Frank and Willie* (1891) 45 Fed. Rep. 51 L. R. A.

lead to the absurd and illogical result that there must be present at all times a master or his representative for every servant. Such a claim defeats itself. It has been settled by this court that an employee becomes a vice-principal, as respects another servant, only when he is intrusted with the performance of some absolute and personal duty of the master himself, or the general management and control of the master's business, or some branch of it. *Brown v. Minneapolis & St. L. R. Co.* 31 Minn. 553, 18 N. W. 834.

It was held in an earlier case, not distinguishable in principle from this, that where the negligence of a road master occasioned serious injury to a servant under him, and the defendant had furnished sufficient machinery, and the road master was a competent and proper person for the work,

494, and the *Julia Fowler* (1892) 49 Fed. Rep. 277), did not mean that the admiralty courts had worked out a different theory of the captain's liability from their own peculiar principles, but was really rendered in deference to the *Ross Case* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (Ill. V., *infra*), which the judge himself did not agree with, and which has been explained away in later cases.

In *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517, the court said: "If we are asked to establish a special rule, applicable only to mates of vessels and common sailors, on the ground of the peculiar relations between them, the existence and particulars of those relations must be shown. The evidence in the case at bar discloses only facts which, under the decisions of this court, show that the mate and the plaintiff were fellow servants of the defendant." In this case *Peterson v. The Chandos* (1880) 4 Fed. Rep. 645, 649; *Daub v. Northern P. R. Co.* (1883) 13 Fed. Rep. 625; and *Sullivan v. The Neptune* (1887) 30 Fed. Rep. 925, were cited to sustain the contention that a common sailor and a mate are not fellow servants. The reply of the court was as follows: "The first case contains on this point *dicta* only of Deady, J.; the second case contains a report of an oral charge to a jury by the same judge, which expressly assumes the responsibility of instructions against the admitted probable weight of authority; the third case was against the owners of a vessel, one of whom was the master, for negligence of the master."

In *The Walla Walla* (1891) 46 Fed. Rep. 198, also, *Daub v. Northern P. R. Co.* (1883) 13 Fed. Rep. 625, was held to be against the weight of authority, and a first mate who superintended the loading of a ship and discharged the longshoremen was held to be a mere servant.

In one case it was held without qualification that the owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate in failing to examine the fastenings of a block which had been chafed by wear and tear (*Halverson v. Nisen* (1876) 3 Sawy. 562, Fed. Cas. No. 5,970); but in view of the late decisions as to nonassignable duties this ruling needs some modification.

In an Australian case it was laid down that the chief mate is a mere servant while superintending bumpers in discharging cargo, unless he is acting as defendant's general manager. *Sanderson v. Smith* (1882) 3 New So. Wales L. R. 31 (accident from giving way of rotten rope, —negligence of defendant as to furnishing not discussed).

that such road master was a fellow servant in the task of raising wrecked freight cars (*Brown v. Winona & St. P. R. Co.* 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484); and the distinctions which exist between a superior servant and a vice-principal are clearly designated and distinguished in a still later case, which holds that such superiority of rank in the service does not indicate the relation of vice-principal between such superior servant and the one who works under him. The relation referred to arises usually from the peculiar character of the services rendered rather than the grade of employment. *Lindvall v. Woods*, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020. And it follows that, if the evidence in this case tends to show that Hess had knowledge of the undrawn bolt, and failed to warn plaintiff of that fact, such failure was the omission of

a fellow servant; also that defendant is not chargeable where the common-law rule prevails as to the right to recover of the master for the acts of a fellow servant; and it only becomes necessary to inquire further whether the failure on the part of Hess to tell plaintiff to look out for the undrawn bolt was negligence under the so-called "fellow servants act" (Gen. Stat. 1894, § 2701). But this statute does not apply, for clearly the business in which the road master and other employees were engaged did not, under the decisions of this court, subject plaintiff distinctively to railroad hazards, since the risk he incurred was no other or different in kind than in other employments than railroading. *Lavalles v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Pearson v. Chicago*,

16. Commanding officers of ships.

A captain of a vessel is not a representative of the owner according to the following cases: *Malone v. Western Transp. Co.* (1873) 5 Biss. 315, Fed. Cas. No. 8,996 (failure to have a hatch closed or protected by a light); *The Job T. Wilson* (1897) 84 Fed. Rep. 204 (here the master was keeping a lookout, but the rule seems to be laid down in general terms, and no stress is laid on the nature of the functions they were discharging. See VI. *infra*); *The Ravensdale* (1894) 63 Fed. Rep. 624 (load which was being hoisted aboard a lighter was inadequately secured, and fell); *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458 (captain of a lighter); *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 271 (plaintiff set to work under a bank, after the captain had loosened the overhanging earth); *Scarf v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (except as regards his performance of the duty of giving medical aid to a seaman); *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 969 (a case of unquestionable personal violence); *Geoghagan v. Atlas S. S. Co.* (1895) 146 N. Y. 360, 40 N. E. 507 (the neglect of the master or mate of a vessel in failing to use iron doors supplied by the owner to bar an opening in her side, and the use, instead, of an insufficient rope, in consequence of which a member of the crew falls through the opening and is drowned); *Olson v. Oregon Coal & Nav. Co.* (1899) 96 Fed. Rep. 109 (seaman thrown by a lurch of the ship down an open hatchway); *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338 (here the captain of a tugboat belonging to an elevator company omitted to brace the yards of a ship so that they should not come into collision with the elevator building, the result being that one of them struck a piece of slate from the roof, and it fell onto a laborer,—denied partly on the ground that servants may be coemployees, though not engaged in the same particular piece of work. See note to *Bofield v. Guggenheim Smelting Co.* (N. J.) 50 L. R. A. 417); *Price v. Houston Direct Nav. Co.* (1877) 46 Tex. 537; *Mathews v. Case* (1884) 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 518 (mate injured here); *Caniff v. Blanchard Nav. Co.* (1887) 86 Mich. 638, 33 N. W. 744 (left hatchways open when the mate went on board to inspect the ship as she was lying in harbor); *Leddy v. Gibson* (1873) 11 Sc. Sess. Cas. 3d Series, 304 (sailor in complying with an order to let go a rope under a heavy strain had his leg broken).

In a recent English case it was held that the

doctrine of common employment applies to the death of a seaman falling overboard and drowning because of the neglect of the master to put in place stanchions and rails provided to raise the bulwarks to a proper height. *Hedley v. Pinkney & Sons S. S. Co.* [1894] A. C. 222, Affirming *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58, and Overruling *Ramsay v. Quinn* (1874) Ir. Rep. 8 C. L. 322, where the ground taken was that the position of captain for the purpose of securing the safety of the crew is not that of a servant, but that of a superintendent. In view of the decision in *Wilson v. Merry* (1868) L. R. 1 Sc. App. Cas. 326, 19 L. T. N. S. 30 (V. *infra*) the only question to be decided was whether the captain was a servant or an agent. This question was thus briefly answered by Lopes, L. J., in the court of appeal: "The shipowner appoints and pays him, and can dismiss him. These are the ordinary incidents of the status of a servant, and apart from authority would show that the captain is a servant of the shipowner." *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 67.

III. Doctrine that all superior servants are vice-principals as regards their subordinates.

a. General statement.

Several of the American courts have adopted what may be conveniently designated as "the doctrine of superior and subordinate." *Norfolk & W. R. Co. v. Nuckolls* (1895) 91 Va. 195, 21 S. E. 342.

Mr. McKenney's designation for the doctrine is the "superior-servant limitation" (*Fellow Servants*, chap. IV.), or more briefly still, the "superior-servant doctrine."

It should be remarked that, even by courts outside the group we are now concerned with, decisions have been rendered which, at first sight, would seem to commit them to this doctrine. The nature and scope of this doctrine is shown by the subjoined formulas extracted from the opinions in different cases. But these are explicable on special grounds. See the summary of cases in VII. d, e, Georgia, Michigan, Oregon.

Where the negligent act of one servant causes injury to another, as the result of the exercise of the authority conferred upon him by the master over the servant injured, the master is liable. *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57, 24 N. E. 627.

For other examples of the same form of expression, see *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288; *Louisville & N. R. Co. v. Lahr* (1888) 86 Tenn. 335, 6 S. W. 663; *Taylor v.*

M. & St. P. R. Co. 47 Minn. 9, 49 N. W. 302; Gen. Stat. 1894, § 2701; *Weisel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576.

The plaintiff was an experienced section man of thirty-five years. He had been engaged in the surfacing work referred to some three weeks before he was hurt, had been in the railroad service as a section man several years, and there is nothing to show that he was not fully aware of the manner in which the work was being conducted in all its varied details. He simply did not know of the protruding bolt that caused the accident, which he did not notice at the time, or he could, as he says, have easily avoided the injury he received. But the manner of conducting the work in which he was engaged was apparent to any person of ordinary intelligence. The peculiar dangers that arose from the demolition of the portion of the bridge structure which was

being taken apart and removed was obvious to anyone who could use his senses, and indicated unseen risks and dangers from protruding bolts at almost every moment, the risk of which had been clearly assumed by him in connection with the other hazards of the undertaking in which he was engaged, whether a fellow servant working with him was or was not a vice-principal. *Walsh v. St. Paul & D. R. Co.* 27 Minn. 367, 8 N. W. 145; *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318; *Borger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814; *Quick v. Minnesota Iron Co.* 47 Minn. 361, 50 N. W. 244; *Scharenbroich v. St. Cloud Fiber-Ware Co.* 59 Minn. 116, 60 N. W. 1093; *Smith v. Tromanhauser*, 63 Minn. 98, 65 N. W. 144.

Order reversed, and a new trial granted.

Brown, J., absent, took no part.

Missouri P. R. Co. (1891; Mo.) 16 S. W. 206; *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 105, 21 S. W. 916; *Hoke v. St. Louis, K. & N. R. Co.* (1895) 88 Mo. 360.

"Where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands, and direct and control their movements in and about the work, the agent . . . stands in the place of the master." *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221.

"Where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is, as to the men underneath him, a vice-principal, and it can make no difference whether he is called a superintendent, conductor, boss, or foreman. For his negligent acts and omissions in performing the duties of the master, the master is liable." *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58.

A servant "does not assume risks and dangers caused by the negligent act of another servant under whose orders he works, and who, in a legal sense, stands as the master's representative, in rendering unsafe and dangerous work which the superior servant orders the employee to perform." *Andreson v. Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 805.

"If the servant has been injured by the negligence of a superior servant having a right to control, and, while executing the order of such superior about a matter in which the superior had a right to control, then such superior servant is, as to the inferior, a vice-principal, and his negligence is that of the master." *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387.

The master is equally responsible under this doctrine, whether the injury resulted from obedience to an order by the injured servant himself, or by one of his fellow servants. *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288; *Hoke v. St. Louis, K. & N. R. Co.* (1885) 88 Mo. 360; *Spencer v. Brooks* (1895) 97 Ga. 681, 25 S. E. 480; *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124; *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161; *Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389 (conductor allowed engineer to run train at undue speed, and a section hand was struck down).

Contrast the principle, applied in the courts which reject the "superior-servant" doctrine; that the master is not the less free from responsibility for the reason that the negligent order which caused the injury was given to a 51 L. R. A.

fellow servant of the injured person. II. *supra*.

In spite of the very sweeping language used in such passages as those quoted above, some of the courts whose decisions are cited have rather inconsistently declined to carry the doctrine enunciated to its logical conclusions. How low down in the scale of controlling employees it is intended that the line between liability and nonliability should be drawn is far from being clear upon the cases as they stand, and we shall therefore content ourselves with stating the effect of the few rulings which bear upon the question.

That the delinquent was a vice-principal has been denied in the case of a "boss wiper" who directs the engine wipers when to work, and what to do (*Knox v. Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491); and of one of a small body of laborers who is merely directing their work, but has no power to compel them to work in a particular manner, and discharge them if they refuse. *Kellyville Coal Co. v. Humble* (1899) 87 Ill. App. 437; *Agnew v. Supple* (1898) 80 Ill. App. 437.

But it is not easy to see how the refusal to maintain the action in these cases can be reconciled with the rulings allowing a servant to recover where the delinquent was merely the feeder of a machine, and the injured employee a boy helping him (*Fanter v. Clark* (1884) 15 Ill. App. 470); or even where the delinquent was superintending a gang of men engaged in lifting some heavy article. *Fraser v. Hand* (1889) 33 Ill. App. 153; *Fraser v. Schroeder* (1896) 163 Ill. 459, 45 N. E. 288.

As no negligence was proved in another case, it was left undetermined whether an operator of shears was a vice-principal of his helper. *Glover v. Kansas City Bolt & Nut Co.* (1900) 153 Mo. 327, 55 S. W. 88.

Where there was normally no control exercised by the delinquent employee over the injured person, and the latter seeks to recover on the theory that the relation of superior and subordinate existed at the time of the accident, as the result of the operation of a rule of the employer providing for the contingency in question, it is held that there must be evidence of an ostensible assumption of control by the one employee, and a recognition of the changed relation by the other, before the employer can be held liable.

In a Tennessee case it was ruled that a brakeman on the forward end of a freight train which is uncoupled or broken in two, leaving the conductor on the rear end, although under the rules

of the company the right to command thereupon devolves upon the engineer, is a fellow servant of the latter until the engineer avails himself of his right to take charge of the train, and does take charge, and assume to direct and control the movements of the brakeman; and that he cannot recover where, acting without directions from the engineer, but in performance of his duty, under the rules of the company, he goes to the rear end of his fragment of the train, to act as lookout, and give signals to the engineer, and by the latter's negligence in suddenly jerking the train is thrown off and injured. *Louisville & N. R. Co. v. Martin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772. An instruction was disapproved which told the jury that the company would be liable for the engineer's negligence to the same extent as if he had actually taken charge and been at the time of the accident engaged in the exercise of his authority. Upon the assumption that both the engineer and the brakeman knew of the rule which was to govern their conduct under the circumstances, it seems impossible to sustain this case on any rational ground. It is submitted that, in the absence of proof to the contrary, the implication should be that, where servants in such a case proceed to perform their duties precisely as they would perform them if the superior had formally announced his assumption of his new functions, they were acting with reference to the rule.

The mere fact that the subordinate believed in good faith that he had been told by the employer to obey the directions of another employee will not enable the subordinate to recover for the negligence of such employee, if, as a matter of fact, no such instructions were given. (Compare *V. d. infra.*) *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 49 N. W. 743.

It need scarcely be said that the superior-servant doctrine has no application to cases in which a superior servant is injured by the negligence of a workman under his control. *Chicago & N. W. R. Co. v. Snyder* (1886) 117 Ill. 376, 7 N. E. 604 (conductor is chargeable with the negligence of his subordinates, and cannot recover for an injury partly caused by such negligence, although the negligence of an employee in another department was a co-operating cause of the accident).

6. Relation of the superior-servant doctrine to the doctrine that the head of a department is a vice-principal.

In enunciating the "superior-servant doctrine" courts have often used language which, if taken literally, would imply that there is no distinction between that doctrine and the one which denies the character of a vice-principal to any employee below the rank of the head of a department. See *V. infra.*

"When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company." *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288.

The language of this statement is followed very closely in *Wenona Coal Co. v. Holmquist* (1894) 152 Ill. 581, 38 N. E. 946; *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876; *Wabash, St. L. & P. R. Co. v. Hawk* (1887) 121 Ill. 259, 11 N. E. 263.

51 L. R. A.

"One who has charge and control of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged, is, while acting in pursuance of, and within the scope of, such authority, a vice-principal, so as to make his acts and directions the acts and directions of the principal." *Libby, McN. & L. v. Scherman* (1893) 146 Ill. 540, 84 N. E. 801 (contents of one of a pile of barrels removed, thereby weakening it, so that it could not support the weight resting on it, and the barrels consequently spread and fell on plaintiff) *Affirming* (1892) 50 Ill. App. 123. See also *Gravelle v. Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. Rep. 711, where the jury were charged that a servant invested with control over another "with respect to any particular part of the business" is not a fellow servant of the latter.

In one Texas case, *Gulz, C. & S. F. R. Co. v. Wells* (1891; Tex.) 16 S. W. 1028, a section foreman is spoken of as being in control of a department; and in another the same phrase is used as to the foreman of a railway-car repairing shop. *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835.

But the facts involved in the decisions in which liability has been imposed on the master by the courts which have expressed themselves in this fashion show quite clearly that the domains covered by the two doctrines are far from being coextensive. No more striking proof of the essential difference between them can be given than the fact that in one of the cases just cited it was declared that the master is none the less liable for the reason that the negligent employee may have an immediate superior standing between him and the master. *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288. Compare the facts as illustrating this distinction in *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298; *St. Louis, A. & T. H. R. Co. v. Holman* (1894) 53 Ill. App. 617; *McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334; *Boyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089, and the cases cited in III. *infra*, more especially those relating to section foremen.

This fundamental distinction is lost sight of in at least one case where the ground assigned for holding that a car repairer intrusted by the master workman with the duty of instructing in his duties the plaintiff, a new employee, who was to take his place, was a vice-principal, was that he was the manager of a department in which his duty was that of direction and superintendence. *Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 673, 43 N. W. 415.

This ruling is only sustainable under the "superior-servant" doctrine, pure and simple, a circumstance which is usually inconsistent with the theory that such employee is the manager of a department (see II. *e. supra*, *V. c. infra*); moreover, it is plain from the illustrative rulings given in III. *infra*, that the manager of a department, as such an official is conceived by the courts which have adopted the doctrine of departmental vice-principals, is a functionary of a much higher grade than those who are regarded as vice-principals under the "superior-servant" doctrine. See *V. infra* and the summary of Federal decisions in VII. *infra*, especially the remarks in the *Ross Case* (1884) 112 U. S. 877, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

In *Fort Worth & D. City R. Co. v. Peters* (1894) 87 Tex. 222, 27 S. W. 257, *Affirming* (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077, the court, referring to the earlier decision of *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835, where the character of vice-

principal had been ascribed to an "employee who has charge of a special department" of the business, said that this did not mean that in order to let in the superior-servant doctrine, the department controlled must be a principal one.

The difficulty of defining so essentially vague a term as "department" has, as we shall see in a later subtitle (V.), produced much conflict of opinion as to the position of certain functionaries, notably conductors; but this source of confusion is manifestly inoperative wherever the superior-servant doctrine is adopted.

c. Rationale of the doctrine.

The theoretic foundations of the superior-servant doctrine have been variously stated.

1. Unequal knowledge of superior and subordinate.

One case dwells on the presumably unequal knowledge of the superior and inferior servants.

In *Louisville & N. R. Co. v. Bowler* (1872) 9 Helsk. 866, the court remarked: "It is absurd to hold that the common manual laborer, as a general rule, understands the management of such work, its proper mode of execution, and the dangers attending it, equally with him who sets himself up as the overseer, director, and architect of it."

Compare the language in the dissenting opinion of Turney, J., in *Knoxville Iron Co. v. Dobson* (1881) 7 Lea, 367, denying that one whose duty it was to retemper the knives of a nail machine was the fellow servant of a feeder of the machine, the ground taken being that the one duty was a matter of skill, the other simply mechanical, requiring no skill.

But a presumption which must evidently be, in a large proportion of instances, contrary to fact, is neither appropriate nor adequate to support a rule which is enunciated as one of universal application. Indeed, the statement in the case just cited is directly contradicted by another in a later judgment of the same court. *Nashville, C. & St. L. R. Co. v. Wheless* (1882) 10 Lea, 741, 43 Am. Rep. 317. See the quotation under III. c, 3, *infra*.

In other cases language is used which implies that there are good grounds for admitting an exception to the doctrine of common employment, where the superior servant, "in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised." *Missouri P. R. Co. v. Perego* (1887) 36 Kan. 424, 14 Pac. 7. Compare the grounds assigned for the decisions in *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. Rep. 564; *Consolidated Coal Co. v. Wombacher* (1889) 31 Ill. App. 288 (1890) 134 Ill. 57, 24 N. E. 627; but, in the latter case at least, no stress is intended to be laid on the character and effects of the negligent order. So far as the extraordinary peril may be one outside the scope of the employment, this view is sustained by the authorities (*note to Dollemand v. Saalfeldt* (Ill.) 43 L. R. A. 753); but except in this single instance, it is believed that no disposition is, upon the whole, shown by the courts which reject the superior-servant doctrine to qualify their rejection under the circumstances thus indicated. The considerations to be discussed below may or may not be of sufficient force to warrant a departure from the doctrine of common employment, but, setting this aside, it is difficult to see on what ground it can be maintained that one particular kind of negligence which a fellow servant may commit is not assumed. The rule which prevents recovery is perfectly general in its 51 L. R. A.

scope, and the ignorance of the injured person as to the dangers of his environment at a certain conjuncture seems to be an entirely irrelevant circumstance. So far as this factor is concerned the *rationale* of the doctrine of common employment requires the conclusion that the injured servant's knowledge or lack of knowledge is not material, except so far as they have relation to his connection with the delinquent coemployee. If he knew that he was to work under the orders of another person he must necessarily have known that, in the normal course of things, he would be exposed to the risk of being injured by the latter's negligence. A general acceptance of the risk being thus imputed, it can make no difference under which of the many possible forms the breach of duty may ultimately take effect.

2. Inability of master or superior agents to supervise all details of the work.

Another consideration relied on is that the manager of an entire establishment (or the master himself) cannot be present everywhere in person to direct the employees in their work, but must, of necessity, give orders through others. See extract from *Dixon v. Ranken* (1852) 14 Dunlop, Sess. Cas. 420, 1 Am. Ry. Cas. 569, III. c, 4, *infra*; *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298. But this is a fact the significance of which depends entirely on the standpoint. There is no reason why it should not be deemed equally appropriate to serve as a justification of the theory that a servant assumes the risks of his superior's negligence, and such is actually the use made of it by the courts in which that doctrine is accepted. II. e, *supra*. It cannot be of any force unless and until the conclusion has, on other grounds, been arrived at, that the doctrine of the assumption of a co-servant's negligence shall not extend to cases in which an employee has been deputed to give orders at times and places at which it is impossible for the master or his general agent to be present. To conceive of an order of a subordinate foreman as being in effect an order of the master or his general agent, for the reason that the latter has actually or impliedly instructed the workmen to do whatever the former directs them to do, does not strengthen the theory here criticised. Such a conception, it is obvious, really begs the whole question which has to be determined, *viz.*, whether the subordinate foreman is to be regarded as standing in the place of his superior. See *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

3. Obligation of servant to obey his superior.

From the language used in some cases it would seem that a sufficient foundation for the superior-servant doctrine is by some judges supposed to be furnished by the obligation of a subordinate to obey the orders of those who are set in authority over him.

"In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288.

Where the negligent act of one servant causing injury to another is the direct result of the exercise of the authority conferred upon him by the master over the servant injured, the servant whose negligent act causes the injury stands

in the place of the master, and the servant who is injured has no discretion or independent judgment, but owes the same duty of obedience that he would if the master were himself acting. *Louisville & N. R. Co. v. Lahr* (1888) 86 Tenn. 335, 6 S. W. 663.

"In entering the service of the defendant, the plaintiff might be, and is, presumed to understand and take upon himself every risk naturally pertaining to such service; and, amongst others, that which may proceed from the possible carelessness of such fellow servants as he must know, from the very nature of the employment, he may be required to associate with in the performance of his duties. But no such presumption is, or should be, raised of his unwillingness to assume the risk growing out of the possible negligence of one who, while a servant to their common master, stands to himself in the light of a superior whose commands and directions he is bound to obey; for so to hold, in the case of a corporation like this defendant, which can only operate through its agents and employees, would be to absolve it from all responsibility to those in its employment." *Cowles v. Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620.

The test is whether the subordinates "have just reason for believing that the failure or refusal to obey the superior will, or may be, followed by a discharge." *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23.

But the language held in this state is not of a uniform tenor in this connection. See the extract from *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, in III. e, 4, *infra*.

In other cases it has been laid down that the rule is not based "upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties, that the 'inferior' is placed in the position of a servant to the 'superior.' In such cases the superior is held to represent the master." *Nashville, C. & St. L. R. Co. v. Wheelless* (1882) 10 Lea, 741, 43 Am. Rep. 317; *Illinois C. R. Co. v. Spence* (1893) 93 Tenn. 173, 23 S. W. 211.

Among the states which adopt this theory may, perhaps, be numbered Kentucky, though the following extract from the leading case of *Louisville & N. R. Co. v. Collins* (1865) 2 Duv. 114, 37 Am. Dec. 486, shows that in some respects, notably in respect to the distinction taken between the effects of gross and ordinary negligence, the views of this court placed it in a class by itself: "In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior—the corporation. They have no authority to control or resist him in his allotted sphere of service; and why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his employer and constituent, for indemnity for damage resulting from his wilful wrongs or grossly negligent omissions? When they engaged to serve under him perhaps they knew nothing of his trustworthiness or his credit; but they knew that they would serve a corporation, and probably faith in its responsibility and protection induced them to venture into its service; and this faith may be presumed to include an assurance of safety as well as of pay. Perhaps, if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law

would therefore rather seem to be that the subordinates should look to the corporation, and not to its agent alone, for indemnity for loss arising to them from his unskillfulness or culpable negligence. Nor can we perceive how public policy could be subverted by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer's conduct; but why should they be left to depend on that which could be of little, if any, avail to prevent the unskillfulness or negligence of a superior above their dictation or control? In undertaking the perilous service, they might be presumed to risk the hazards necessarily incident to their employment; and as they could not expect infallibility in the management of the locomotive and its running train, and as they knew that the most faithful and skillful managers occasionally lapse into common blunders and ordinary negligence, the law might imply an agreement to risk their possible occurrence. But the corporation being under an implied obligation to provide sound and safe cars and engines, and a competent and faithful engineer, his subordinates cannot reasonably be presumed to expect or to hazard his gross negligence, which borders on fraud and crime; and it seems to us, therefore, that while the corporation may not be responsible to them for his ordinary negligence, both justice and policy require that it should be held liable for his gross negligence as its chief and controlling agent in the management of its running train. . . . The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium facit per se*. It is therefore responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill—as to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental, but independent service, no one of them, as between himself and his coequals, is the corporation's agent, and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it." But when it is remembered that what is really wanted is some reason which will be adequate to justify introducing an exception to the general rule that the risks of a fellow servant's negligence were assumed, this conception is, it is obvious, quite irrelevant. There is no such essential incompatibility between an agreement not to hold the master liable for a fellow servant's acts and a duty to obey the same fellow servant's orders, that it is warrantable to suppose the implication of the agreement to be excluded by the existence of the duty.

4. Duty to use care in giving orders regarded as one of the nonassignable duties of the master.

Another suggested basis for the doctrine is that the duty of using reasonable care in giving orders to servants is one of those obligations which the master cannot delegate so as

to absolve himself from liability for their non-performance or improper performance. This theory seems to furnish the only really satisfactory explanation of the liability imposed, as it brings this particular exception to the co-servant rule into line with the others, which rest upon the representative character of the negligent employee. The language of the following elaborate exposition of the doctrine in the early case of *Cleveland, C. & C. R. Co. v. Keary* (1854) 3 Ohio St. 204, where a railway company was held liable for the negligence of a conductor, is unduly wide, in so far as it supposes the existence of a general obligation in the master to "superintend and control the forces he employs;" for such a principle, if carried to its logical conclusion, would make him the supervisor of every act of every servant, and thus sweep away the whole doctrine of co-service. But otherwise it is a sound and lucid presentment of the considerations by which the inference of an acceptance of the risk of a fellow servant's negligence in this particular instance may be deemed to be negatived. "No one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent and ever active superintending intelligence. Whether he undertakes it, or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case imposes the duty of making reparation for any injury that may ensue. When one enters his employment in a subordinate situation, and agrees to be subject to his orders, either directly or indirectly given, he has a right to expect that his employer will perform the duty resting upon him, to furnish suitable machinery and control it with care and prudence. Whenever the law recognizes duties it imposes corresponding obligations. It is the duty of the owner to superintend and control the forces he employs, and the duty of the servant to obey and perform under his directions: and certainly, in the absence of positive stipulations, the law will not, as between themselves, throw those which belong to the one on to the other, or refuse to enforce the obligations which either may have incurred. As corporations can act only through their agents and officers authorized to exercise the functions conferred by their charters, there is much force in the view . . . that the superintendent (and conductor when running a train) of a railroad ought to be regarded as the proper representatives of the company, and their acts considered as those of the company. But I do not think it necessary to insist upon this position. Let the company be liable only upon the maxim, *Respondet superior*, or upon the obligations arising out of the contract of service, and in either view their liability for injuries to their subordinates caused by the carelessness of the conductor they have placed over them, in charge of the train, is in our opinion sufficiently apparent. This conclusion rests wholly upon the idea that the company, from the very nature of the contract of service, is under obligations to them, as well as they to the company; and that, amongst these obligations, is that of superintending and controlling, with skill and care the dangerous force employed, upon which their safety so essentially depends. For this purpose the conductor is employed, and in this he directly represents the company. They contract for, and engage, his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the con-

tract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation; and no servants are fellow servants when one is placed in control over the other. The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travelers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness that of the company that places him in power. . . . While the principle of *respondet superior* is as old as the law itself, it is everywhere admitted that no exception to its operation as is now contended for was ever asserted until the case of *Priestley v. Fowler* [(1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987] was decided. That case and those made upon its authority in England and America have all proceeded upon the general ground of exempting the master from responsibility to one servant for injuries arising from the carelessness of another engaged in the common service, because the servant, by his contract, takes these risks upon himself. None of them have in terms declared that he is not liable for the negligent and careless conduct of him to whom he delegates the power of control and command over them. The court whose authority has been most relied on in this country has expressly refused to declare it. Even to this extent the doctrine has been resolutely resisted at every step by distinguished jurists. To speak of it, therefore, as a settled principle of the common law is to confound ideas. To adopt it without a conviction of its justice and propriety is to abuse the power with which the law has invested us. Our plain duty is to endeavor to ascertain the true nature of the relation between the parties and the inherent elements of the contract on which it is founded, and from them deduce the principle that ought to govern. . . . Tested in this manner it seems to us clear, in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise,—the one resting upon the company and the other upon the servants,—and both founded upon what each, either expressly or impliedly, has agreed to do in execution of the contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to these servants, to control it and them with prudence and care. As the necessity for this prudence and care is constant

and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they 'in effect warrant his fidelity and good conduct.' It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they may do. In such case there is no failure of the company to do what, as between them and these servants, it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

This opinion was largely based on the Scotch case of *Dixon v. Ranken* (1852) 14 Dunlop, Scas. Cas. 420, 1 Am. Ry. Cas. 569 (afterwards overruled by the House of Lords in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767), where Lord Justice Clerk reasoned thus: "The master's primary obligation in every contract of service in which his workmen are employed in a hazardous and dangerous occupation, for his interest and profit, is to provide for and attend to the safety of the men. That is his first and leading obligation, paramount even to that of paying for their labor. This obligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition,—and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make up for its defects, by the attention necessary to prevent such injury. In his obligation is equally included, as he cannot do everything himself, the duty to have all acts by others whom he employs done properly and carefully in order to avoid risk. This obligation is not less than the obligation to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he cannot do himself, but they are acting for him, and instead of himself, as his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution, by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part, if he were actually working or present. And this particularly holds as to the person he intrusts with the direction and control over any of his workmen, and who represents him in such a matter."

Other judicial statements of the same tenor are the following:

"The master, by appointing a foreman or other person to superintend work, with power to direct the men under him when and how to do it, thereby devolves upon such person the performance of those duties personal to the master." *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58.

"There seems to be no well-settled rule that classifies the agents and servants of a common employer, whether natural or artificial, first, into such as have authority to represent—act for and in the place of—the employer in respect to the persons, business matters, and things wherewith they are charged; and, secondly, such as have no such authority, but are merely fellow servants. But, without regard to 51 L. R. A.

such rule, there is no reason why such authority may not be specially conferred upon any such agent or servant. In this case the burden of proving the authority—its extent and compass—by competent evidence, would rest upon the party alleging it, unless the nature of the agency or employment implied its existence and extent. Thus, an employer might confer upon a particular laborer, charged to do a particular sort of service, but who simply by the nature of his employment would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where, and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or nonfeasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent, act for and in the place of, his employer in the business designated, and within the compass of the power conferred. And so in the case before us, although the section master or foreman might not have authority, arising from the nature of his employment, to bind the defendant for his acts toward and his commands to his fellow servants, yet, if the defendant conferred upon him power and authority to employ laborers—fellow laborers with himself—to work on the section of the road wherewith he was charged, and authority to superintend them, to give them orders and commands in the line of work to be done, which they were bound to obey, and to discharge them from such employment, in his discretion, as alleged in the complaint, and as the evidence introduced on the trial tended to prove, the defendant would be liable for his misfeasance and nonfeasance in the course of the exercise of his authority thus conferred by it. This is so upon the plainest principles of law applicable to and governing the relations of principal and agent towards each other and third persons. This case is not like the ordinary one of injury done by one fellow servant acting as foreman or leader of several or many laborers, to one of his fellow servants. The complaint expressly alleges that the section master named was agent and servant, and had 'full power and authority of the said defendant to hire and discharge hands and servants in that behalf on said section, and who was the superior of the said plaintiff in that behalf, those orders and commands in the line of said service, as the agent, foreman, and boss of the said defendant the said plaintiff was lawfully bound to obey, and there are other similar allegations to the same effect. Evidence was introduced on the trial to prove this material allegation, and the jury found by their verdict that it was true. So it appears that the section master in this case was not simply a fellow servant of the plaintiff, but as well the agent of the defendant, charged with authority to employ, control, and command the plaintiff, as to the labor he should do on the railroad of the defendant while he was so in its service, and to discharge him from such service, just as its president or other leading executive officers might have done; and the defendant must therefore be held liable for his misfeasance in the course of his agency, just as if the same had been done by its chief executive officer." *Patton v. Western N. C. R. Co.* (1887) 98 N. C. 455, 1 S. E. 868.

The following passage from a Minnesota case is also instructive in this connection, though it must be remembered that in that state the su-

perior-servant doctrine has never been accepted: "Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct and assigning them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servant shall work. . . . A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself in order to ascertain if the place assigned to him is a safe one; and therefore in obeying the order . . . he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers. Any rule or doctrine which deprives the workman of this right and protection, when the master delegates the power and duty of giving such orders to a subordinate, no matter how high or low his rank or grade, is unsupported by reason, violates all considerations of justice, and is not supported by the weight of authority." *Carlson v. Northwestern Teleph. Exch. Co.* (1896) 83 Minn. 438, 65 N. W. 914.

Strictly speaking, this reasoning is, it should be remarked, applicable in its entirety only to one particular kind of order, *viz.*, that which takes a servant to a new place of work without giving him time to examine his surroundings. But if the propositions here laid down are unreservedly accepted, it is difficult to see what logical halting place there can be short of an adoption of the superior-servant doctrine. But when tested by the earlier and later decisions in this state, the case cannot be sustained except on the narrow ground of a breach of the duty of instruction. See VII. e, *Minnesota, infra*. See also *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Crisswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31; *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916; *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58; *Blond v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089,—which all proceed more or less upon the theory that the duty of supervision is nonassignable.

Such a standpoint is fully warranted by the fact that the function of control over details is, as has been shown in another place (*Hardy v. Shedden Co.* 37 L. R. A. 33, 38 *et seq.*) the very element which serves to distinguish one who is, from one who is not, a master as regards the injured person. It is a perfectly logical and rational position to take, that where this essentially characteristic function is involved, the rule as to assumption of risks shall give way to the rule which makes certain obligations of the master nonassignable.

In discussing this particular aspect of an employer's responsibility Messrs. Shearman & Redfield, *Negligence* (vol. 1, § 233), seems to the present writer to put the case for their own side of the question much more strongly than the authorities really warrant. There is a wide distinction between the theory that the master must answer for the results of a negligent order, when it is given by a general or departmental manager, and the theory that any employee to whom the power of control is delegated is a vice-principal. This distinction, it is submitted with all deference, the learned authors have not fully appreciated; otherwise they would hardly have cited in support of their views the decisions of the Federal courts, or of Alabama, Connecticut, Georgia, Colorado, Minnesota, Oregon, Vermont, Washington, Louisiana, Wyoming, and Indiana. As the summary of decisions in VII. indicates, these are all ju-

risdictions in which responsibility cannot be fixed upon the master merely by showing that the injury was caused by complying with the orders of a controlling employee. South Carolina is a more doubtful state, but in the decisions as they stand (see VII. e, *Minnesota, infra*) it can scarcely be classed as one of those which accepts the superior-servant doctrine in the sense contended for. Virginia and West Virginia, which supported the thesis of the learned authors at the time their treatise was compiled, have now gone over to the opposite camp. See VII. e, Virginia, West Virginia, *infra*.

It is noticeable that the phraseology employed in stating the nature of the supervision exercised by a foreman often suggests his representative character from this point of view, as where he is described as an agent "who directs the manner of executing the particular work" (*Herriman v. Chicago & A. R. Co.* (1887) 27 Mo. App. 435) or one who has "control of work and authority to direct how, when, and where it should be done." *Cox v. Syenite Granite Co.* (1890) 39 Mo. App. 424.

Not the least of the merits of this mode of explaining the *rationale* of the doctrine—a merit which none of the other theories possess—is that it offers a simple, clearly defined issue upon which the controversy between the opposing schools of thought which reject and which accept the superior-servant doctrine may be concentrated. The advantages of such a situation in dialectics are as obvious as they are in pleading.

5. Summary.

Whichever of the above explanations of the doctrine may be regarded as the correct one, it seems abundantly evident that the broad question whether the master shall be held responsible for the negligence of all supervising employees; and, if so, whether the responsibility shall extend to every species of negligent act, or be circumscribed in the lines indicated by some of the cases cited in VI. *infra*,—is not susceptible of settlement on any purely juridical basis, and therefore presents a peculiarly appropriate subject for that legislative intervention which, in a large number of jurisdictions, has already enlarged the servant's right of recovery. In this connection, it is interesting to note that one of the main innovations introduced by the English employer's liability act of 1880, and the American statutes modeled upon it, embodies the following principle formulated in the report which the Parliamentary Commission of Inquiry submitted in 1877: "Where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of the masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals."

But it is not unworthy of remark that there is one specially weak point in the armor of the courts which reject the superior-servant doctrine. By none of those courts is it maintained that the duty of framing suitable regulations for the conduct of the business is assignable. Such regulations are essentially nothing but general orders, the object of which is to secure the safety of servants. Why should any distinction be made, in the present point of view,

between such general orders and the particular orders which it is the duty of controlling officials, as the work progresses, to issue in such a form that their subordinates will not be exposed to undue perils?

The essential identity of general and particular orders is noted by the supreme court of Missouri. It is a part of the personal duty of the master to give direction to the work he undertakes, and to prescribe the system or method of conducting it. In so doing he must use ordinary care for the safety of those engaged in his service. Accordingly it has been held that the omission to adopt and to enforce rules necessary for the reasonably safe management of a business as complex and as hazardous to life and limb as that here in view, may sometimes form the basis for a finding of negligence on the part of the master. *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371; *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 602, 28 N. E. 663; *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042.

Such holdings rest upon the same principle that supports the rule of liability for defects in the plant or appliances. As has lately been tersely said in a case which received very thorough consideration, "a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." *Lord Watson in Smith v. Baker* [1891] A. C. 353, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

"Rules, however, are but one means of giving direction to the master's work. Its guidance, as to details, is often necessarily intrusted to managers, foremen, and others. By whatsoever name such a superior employee may be called, his relation to the subordinates acting under his orders is not that of a fellow workman in respect to his performance of the master's function of directing them and the work in his charge." *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094. Compare the language used in *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 166, 21 S. W. 916.

The only difference between the two kinds of orders is that the one expresses the master's wishes as to the manner in which the work shall be done in default of special instructions to the contrary, while the other defines the manner in which the work is to be done under the constantly changing circumstances to meet which no permanent directions can be framed. Can it be fairly maintained that this difference is so fundamental as to justify the application of distinct rules of law with respect to the representative capacity of the two classes of employees from whom the general and the particular orders issue? If there is such a difference, it has never been explained in what it consists or on what grounds it rests. The present writer ventures to think that the only loophole by which this difficulty can be escaped is furnished by the bald theory that reasonable care requires the master to promulgate general rules, but not to give orders about details. If there is no duty in the latter respect the question whether such a duty is nonassignable becomes immaterial. This is practically the Massachusetts doctrine. See *note to Walkowski v. Penocke & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 112.

In the nature of the case, however, it is clear that the existence or nonexistence of such a duty must remain a mere matter of opinion, the inherent uncertainty of which once more suggests the need of a legislative determination of the controversy.
51 L. R. A.

d. *What constitutes the exercise of control within the meaning of the doctrine.*

It is very rarely that there can be any possible dispute as to what constitutes an exercise of control within the meaning of the superior-servant doctrine. In a few cases recovery has been sought on the theory that the signals given by employees to one another, while they are performing duties which render such means of intercommunication necessary, are in the nature of orders or commands, the argument being that, as each employee is authorized to give them, and the others are bound to obey them when given, the result is to create the relation of superior and subordinate. But this contention has not prevailed.

Evidence that the rules of a railroad company required the engineer to give specified signals as a "notice" to apply or loosen the brakes, and the brakeman to manage the brakes accordingly, and while on the train to be in subordination to the conductor, has been held not to render the brakeman a subordinate servant so as to exempt the company from liability for an injury occasioned by the negligence of the engineer. *Pittsburgh, Ft. W. & C. R. Co. v. Lewis* (1877) 33 Ohio St. 196 (*Scott and Ashburn, JJ., dissenting*). The following passage is extracted from the opinion of the majority: "To secure the management and transit of trains, and the safety of passengers, employees, and others, from the nature of the business many signals and of various kinds are required. They are required by the rules to be given by all classes of employees, conductors, engineer, brakemen, switchmen, stationmen, flagmen, trackmen. A corresponding duty of heeding signals is required of all employees, without reference to their grade of employment; and yet it was never supposed that thereby any relation of superior and subordinate was created or necessarily existed. The system of giving notice by signals is a mere mode of doing the business of the company, arising from the necessity of the case. They are to be given and heeded by both superiors and subordinates, in accordance with the nature of the thing to be done, or as circumstances may require. It is as much the duty of an engineer to be controlled by the signals of brakemen, given under the rules of the company, as it is the duty of brakemen to be governed by the signals of an engineer, given the same rules, and neither one more than the other is thereby made subordinate to the other. That relation can be created only by the act of the master conferring his authority upon one over the other; when that is done then one represents the authority of the master, and therefore may control the other, who for that reason becomes his subordinate."

The same conclusion, though again by a divided court, was arrived at in *Pittsburgh, C. & St. L. R. Co. v. Ranney* (1882) 37 Ohio St. 665 (signal given by engineer to brakeman). "These signals," it was said, "are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakeman, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakeman. The signal is a mere notice. The rule is the order of the company to the brakeman directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby became the duty of the conductor, as well as of each employee on the train, to stop for orders; and yet no one can contend that such station agent who gives the signal is the superior, and the

train crew subordinate, employees of the company within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employees of the company, to signify that an occasion exists for the performance of a particular duty, but it would be absurd to hold that in each case the employee giving the signal is a superior servant to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal or in the performance of other duties. For it must be observed that negligence or carelessness is not affirmed of the act of the engineer in giving either the signal to tighten the brakes or to loosen them. The only negligent and careless act charged against him was in forcing the engine forward violently, without giving time to the brakeman to loosen the brakes."

Compare also the doctrine that a servant who is appointed to give warning signals or to notify his coworkers as to the approach of transitory dangers is not engaged in discharging the master's nondelegable duty to maintain a safe place of work. *Hermann v. Port Blakely Mill Co.* (1896) 71 Fed. Rep. 853.

It is deserving of note that a workman who merely gives directions when to set in motion or stop machinery is not a "superintendent" within § 1, subsec. 2, of the English employers' liability act of 1880. *Shaffers v. General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 656, 47 J. P. 327.

Hunter v. Kansas City & M. R. & Bridge Co. (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. Rep. 379, a ruling as to a similar provision in the Arkansas statute of 1893, is to the same effect as this English decision, and the *Ranney Case* (1882) 37 Ohio St. 665, *supra*, is cited with approval. Compare also *Texas C. R. Co. v. Frazier* (1890) 90 Tex. 83, 86 S. W. 432, construing the Texas statute.

A mere request is not an order within the scope of the superior-servant doctrine, where it emanates from an employee who is not authorized to require the service performed in compliance with it. (Compare *V. e. infra.*) *Bradley v. Nashville, C. & St. L. R. Co.* (1884) 14 Lea, 374 (yardmaster coupled cars at request of engineer).

e. Existence or absence of a power to hire and discharge subordinates; significance of.

(Contrast with the doctrines discussed in this subdivision those noticed in II. d, *supra*.)

The possession of the power to hire and discharge his subordinates is normally possessed by a large proportion of those employees who are held under the superior-servant doctrine to be vice-principals, and is frequently mentioned by the courts in the enumeration of their attributes. *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Logan v. North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959; *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. Rep. 67; *Chicago Dredging & Dock Co. v. McMahon* (1888) 30 Ill. App. 358; *Chicago, B. & Q. R. Co. v. Blank* (1887) 24 Ill. App. 438; *Mason v. Edison Mach. Works* (1886) 28 Fed. Rep. 228; *Kansas P. R. Co. v. Little* (1877) 19 Kan. 267; *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213; *Rowland v. Missouri P. R. Co.* (1880) 20 Mo. App. 463; *Hoke v. St. Louis, K. & N. R. Co.* (1882) 11 Mo. App. 574; *Claybaugh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630; and other cases cited in III. f, *infra*, see 51 L. R. A.

pecially those relating to section foremen. As the cases stand, however, the precise, evidential significance of this power, as an actually determinative element, is somewhat obscure.

If it were of any importance to determine the character of a servant who should possess the power of discharge without the power of control, there is apparently some authority for the principle that the fact of an employee having authority from the master to discharge his fellow servants does not alone constitute him more than a fellow servant himself. *Webb v. Richmond & D. R. Co.* (1887) 97 N. C. 387, 2 S. E. 440; *Hamilton v. Iron Mountain Co.* (1877) 4 Mo. App. 504, Appx.

But the latter case is a mere memorandum of the conclusion of the court, and the opinion in the former mentions no precedents, and does not state the grounds on which the conclusion is supposed to rest. It is therefore impossible to say exactly what were the precise limits of the doctrine intended to be laid down,—especially as the superior servant in both cases was, so far as appears, in control of the work, as well as invested with the power of discharge. In any event, the mere fact that the negligent servant may have the right to employ other servants, but not the complainant, will not invest him with the character of vice-principal as respects the latter. *Lincoln Coal Min. Co. v. McNally* (1884) 15 Ill. App. 181.

The correct rule in regard to the situation supposed is, however, of very small moment, inasmuch as the only instances of the separation of powers likely to occur in practice are those in which the power of discharge is wielded by a servant superior to the one who actually controls the workmen while actually engaged in their work; and this official would of necessity always be a vice-principal by virtue of that potential power of control which is implied by his higher rank, and which is susceptible of being called into active exercise whenever he chooses to assume the personal management of any servants who may be normally supervised by a subordinate foreman.

As regards the cases in which the superior servants possess the power of control without the power of discharge, the obvious inference from the theory that such servants are vice-principals for the reason that the exercise of control involves the discharge of a nondelegable duty is that they are none the less representatives of the master because they are not invested with the power of discharge. *Dayharsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 (*arguendo*); *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Glover v. Kansas City Bolt & Nut Co.* (1900) 153 Mo. 320, 55 S. W. 88; *Hall v. St. Joseph Water Co.* (1892) 48 Mo. App. 356.

The fact that an assistant superintendent of a sawmill reports to the superintendent in regard to the hiring and discharge of his subordinates does not make him the less a vice-principal as respects any nondelegable duties imposed on him. *Zintek v. Stimson Mill Co.* (1894) 9 Wash. 305, 37 Pac. 340.

In *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 105, 21 S. W. 916, the court said: "Defendant's contention is that the master should not be held answerable for negligent directions unless the managing employee is intrusted with the authority to hire and discharge and thereby to enforce obedience to his orders. But that contention ignores the principle on which the master's liability in such circumstances rests. It is part of his personal duty to direct the work he has in hand, and, where it is complex (as that of railroad), to provide and enforce reasonable and necessary regulations of the labor engaged therein. But the master's

function of directing a large enterprise must of necessity be intrusted, as to many details, to subordinate employees. In exerting that function they perform the master's part, and for their action (within the scope of that delegated authority, and as to those placed under their orders) the master is responsible whether the superintending employee has or has not power to hire and discharge, and whatever may be the title by which he is designated."

Especially must the nonpossession of this power be immaterial, where the superior servant is of sufficiently high rank to control the employee who actually possesses the power; though, perhaps, it would be more correct to describe such a case as one in which the power is not exercised directly, rather than one in which it is wanting. *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916, from which an extract is given in the preceding paragraph, was a case of a roadmaster whose negligence injured a section hand hired by a foreman subject to the roadmaster.

The doctrine that an employee without the power of discharge cannot be a vice-principal would be a natural deduction from the theory which refers the superior-servant doctrine to the obligation of the subordinate to obey duly authorized commands. But the deduction is not a necessary one, and the decisions of the courts which have placed most stress upon this aspect of the master's responsibility may be taken to indicate conclusions not materially different from those arrived at in the jurisdictions under the other theory just noticed.

In Illinois, one of the states where this theory has been enunciated (III. c. 3, *supra*), the contrary view has been taken, and the capacity of the controlling official is still for the jury, though it is shown that he had no power of discharge. *Fraser v. Schroeder* (1896) 163 Ill. 459, 45 N. E. 288; *Fanter v. Clark* (1894) 15 Ill. App. 470.

The contrary seems to be laid down by the same court in *Illinois C. R. Co. v. Meyer* (1895) 65 Ill. App. 531. This decision was affirmed in (1899) 177 Ill. 591, 52 N. E. 848, but this particular point was not touched upon.

From the decisions in another of those states, North Carolina, it is extremely difficult to extract any clear rule on this point, but possibly it is the same as in Illinois. In *Dobbin v. Richmond & D. R. Co.* (1879) 81 N. C. 448, 31 Am. Rep. 512, it was declared that the power of discharge was one of the essential elements of vice-principalship. But that decision was distinctly rested on the ground that the delinquent was a head of a department, and as already stated (II. d, *supra*) the conception of such a functional deposed of the power of discharge would involve a logical contradiction. The case of *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, throws no light upon the question, the power being merely enumerated among the foreman's attributes. See extract in III. c. 4, *supra*. Where the particular point to which the inquiry is directed is whether the subordinate was justified in obeying the order which led to his injury, it is not essential in this state to show that the superior had the power of discharge. Here, however, a special reason is operative, for, if the rule were otherwise, the master would be enabled to evade responsibility by the colorable expedient of arranging that the power of discharge should be lodged in some other agent than the immediate superior, though, as a matter of fact, the latter's recommendations as to dismissal would always be acted upon. See *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23. There the court cites the *Patton Case* (see III. c. 4, *supra*), so that it is possibly a legiti-

mate inference that the rule is considered to be the same when, as in the earlier case, the question was simply whether the superior servant was a vice-principal. But its attention does not seem to have been specially directed to the different character of the questions involved, and for this reason the real import of the *Patton Case* in the present connection may still be regarded as doubtful.

In Texas the doctrine is that a superior servant is not a vice-principal unless he has the power of hiring and discharging the class of servants to which the injured person belongs. *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835; *Galveston, H. & S. A. R. Co. v. Smith* (1890) 70 Tex. 611, 13 S. W. 562; *Gulf, C. & S. F. R. Co. v. Wells* (1891; Tex.) 16 S. W. 1025; *Nix v. Texas P. R. Co.* (1891) 82 Tex. 473, 13 S. W. 571; *Campbell v. Cook* (1894) 86 Tex. 630, 26 S. W. 488; *Texas C. R. Co. v. Frasier* (1896) 90 Tex. 33, 36 S. W. 432; *Fort Worth & D. C. R. Co. v. Peters* (1894) 87 Tex. 222, 27 S. W. 257, *Affirming* (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077; *Sanner v. Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 337, 43 S. W. 533 (fireman of switch engine not a vice-principal as to brakeman of freight train); *San Antonio & A. P. R. Co. v. Reynolds* (1895; Tex. Civ. App.) 30 S. W. 846; *Maughmer v. Behring* (1898) 19 Tex. Civ. App. 290, 46 S. W. 917.

It also seems to be held in one of these cases, though the language of the court is somewhat obscure, that the master is not liable unless, at the time of the injury, the injured servant was working under the immediate supervision and control of the servant who had the power to discharge. *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835.

Galveston, H. & S. A. R. Co. v. Farmer (1889) 73 Tex. 85, 11 S. W. 156, seems to declare that the power of discharge is not a test of vice-principalship, except where the duty of selecting competent servants is in question. But if this is its effect, it is clearly contrary to the weight of authority in Texas.

But even in this state the master cannot escape liability on the ground that the superior servant, through whose negligence in sending an incompetent workman to work with the plaintiff the injury was received, had no power to discharge that workman. Here the only essential question is whether the superior servant had the power to assign the workman to the duties which he was performing. *Missouri P. R. Co. v. Patton* (1894; Tex.) 26 S. W. 978, *Affirming* (1894; Tex. Civ. App.) 25 S. W. 339.

Under any theory of the import of the power of hiring and discharging, the character of the superior servant as vice-principal will not be taken away by the fact that the power can only be exercised subject to the approval of a higher officer. *International & G. N. R. Co. v. Hinzie* (1891) 82 Tex. 623, 13 S. W. 681 (foreman of paint shop could only discharge with the consent of the superintendent of the car department); *Fort Worth & D. C. R. Co. v. Peters* (1894) 87 Tex. 222, 27 S. W. 257 (immaterial by whom power of discharge was conferred); *Zintek v. Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 340 (power exercised by foreman of mill lumber yard subject to sanction of general superintendent). "The first and most important question is, When the foreman commands must the workman obey or be discharged by the foreman, or by some other authority to whom the foreman may report the act of disobedience? In such case the effect is the same whether the foreman discharges the workman at once, or only after consultation with his own superior. In either case the procuring cause of the discharge is disobedience to the foreman, which is

taken by the railroad authorities as disobedience to the principal." St. Louis, A. & T. H. R. Co. v. Holman (1894) 53 Ill. App. 617.

There is, of course, no room for doubt that the possession of the power renders an employee a vice-principal as respects the discharge of the correlative duty which it imposes on him of selecting competent and careful servants (Chapman v. Erie R. Co. (1874) 55 N. Y. 579; Horgan v. New York C. & H. R. Co. (1874) 55 N. Y. 608; Stoddard v. St. Louis, K. C. & N. R. Co. (1877) 65 Mo. 514; Huntington & B. T. Mountain R. & Coal Co. v. Decker (1876) 82 Pa. 119); and it is worth noting that the courts in estimating the significance of the power so far as it bears upon the status of a superior servant, have not always been mindful of the distinction which the nonassignable quality of this duty creates between cases where the question is whether that duty has been fulfilled, and the cases where the question is merely whether a superior servant shall be regarded as the representative of the master for general purposes.

See, for example, the arguments in Chicago, B. & Q. R. Co. v. Sullivan (1889) 27 Neb. 673, 43 N. W. 413; Harrison v. Detroit, L. & N. R. Co. (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

f. Illustrative cases.

Below are tabulated, under headings calculated to facilitate comparison with the cases collected under the preceding subdivision, the decisions already cited above in the present subtitle, as well as others in which the general principles above discussed have been applied with the result of imposing liability on the master, for the acts of the employees referred to.

Some of the cases in which damages have been recovered for an injury received in obeying the order of a superior to do work outside the scope of the original employment have the practical effect of extending the domain of the superior-servant doctrine, under these particular circumstances, to courts whose decisions have been reviewed in II. *supra*. These cases stand in a class of their own, and depend upon special considerations which are explained in a note to Olson v. Minneapolis & St. L. R. Co. (Minn.) 48 L. R. A. 796.

In another class of cases a doctrine not distinguishable from that of superior and subordinate has been applied for the benefit of minor employees. These decisions also turn upon a special principle of a narrow scope, the boundaries of which are not very clearly defined as yet, except where the gravamen of the action is a default in respect to the duty of instruction. See note to James v. Rapides Lumber Co. (La.) 44 L. R. A. 33. In VII. e, *infra*, are cited some Georgia cases illustrating the more general principle that a higher degree of care is owed to minor employees than to adults, and showing how this principle sometimes produces decisions which, if the employee had been of full age, could only be justified on the theory that any superior servant is a vice-principal.

In regard to some of the courts, the writer has felt considerable doubt whether the decisions should be cited in this subdivision or among those relating to departmental managers (V. *infra*). To avoid misunderstanding, it will be proper to explain the plan upon which these doubtful cases have been distributed. The position of each state with respect to the superior-servant doctrine is assumed to have been fixed by the decision in which its supreme court, when holding a delinquent to be a representative of the master, has gone the furthest down in the scale of supervising employees. Accordingly, if by any decision still in force, or in cases

where the common law has been superseded by a statute in force up to the time of the enactment of that statute, a court has predicated liability in respect to acts done by an employee of a lower grade than departmental vice-principals, in the sense in which that term is used in the best-considered judgments, every ruling by that court has been included in the subjoined list, although in many instances the delinquent may have been of sufficiently high rank to be possibly, or even certainly, departmental principal. If such decision has been rendered, but was discarded, independently of statutory provisions, no ruling in that particular state is here mentioned, and the discredited decisions are noted under other subtitles.

Such an arrangement necessarily excludes from this subdivision all the Federal decisions which embody the superior-servant doctrine. These will be found reviewed in V. and VII. *infra*.

The Kansas decisions are tabulated under the present subdivision, for the reason that the most recent of them have unmistakably committed the supreme court of that state to the superior-servant doctrine, thus superseding, if there is really a conflict, one or two rulings of a different, or at least doubtful, tenor in the earlier volumes of the reports.

The Georgia decisions, which hold a master to be liable for the negligence of superior employees are reserved for V. *infra*. The reasons for this arrangement will be apparent from VII. e, Georgia, *infra*, where some cases are noted which are apparently, but not really, applications of the superior-servant doctrine.

The cases in Arkansas, North Carolina, and Louisiana are included in this subdivision for the reason that they predicate vice-principals as to lower grades of employees than is justifiable under the best-considered of the decisions which turn upon the doctrine of departmental control. See those states under VII. e, *infra*. But it has been found convenient to mention some of the decisions in these states under that subtitle also which relates to departmental managers. See V. d, *infra*.

Virginia and West Virginia, which might perhaps, for some years have been classed among the states which applied that doctrine, have now abandoned it definitely. See Summary, VII. *infra*.

In Missouri a recent case seems to foreshadow a complete change of front as regards the doctrine of superior and subordinate, but for the present it must be numbered among the states which accept that doctrine. Grattis v. Kansas City, P. & G. R. Co. (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108. See VII. e, Missouri, *infra*.

As to the peculiar limitation on the superior-servant doctrine which prevails in Kentucky, see the summary of the decisions in that state. VII. *infra*.

In this list no decision is mentioned except those in which the injury was received by a subordinate under the control of the delinquent employee, for the effect of the general rule stated in I. *supra*, is that, as to persons not under their control, they are mere fellow servants, unless in so far as they may be discharging some nonassignable duty owed by the master to those persons.

For brevity's sake only the designation of the delinquent employee is mentioned, it being understood that, unless otherwise stated, the employee was held to be a vice-principal.

1. General managing agents.

See the cases cited as to the vice-principals of general managers under IV. b, 2, f. a.

infra, and also the general remarks in IV. a. as to the alternative theories by which the status of these officials as the master's agents may be conceived to be supported.

2. Employees controlling the movements of trains which they do not assist in operating.

Under the rule in Tennessee a telegraph operator at a way station, who has no control of, or connection with, the running of railway trains, except as a medium through which orders from the superintendent's office are communicated to servants of the company in charge of its trains, is not the fellow servant of a train conductor. *East Tennessee, V. & G. R. Co. v. De Armond* (1887) 86 Tenn. 73, 5 S. W. 600 (said to be the conductor's superior as a helper of the superintendent—accident was caused by omission of the operator to display a signal to stop an expected train, the result being a collision).

In *West Chicago Street R. Co. v. Dwyer* (1894) 57 Ill. App. 440, it was held that, on the evidence, the "starter" of a street-railway company was probably a "superior servant" (plaintiff ordered into position where he was injured owing to grip machinery being out of order.)

3. Employees in control of railway trains.

In the courts which apply the superior-servant doctrine there is no difference of opinion as to the responsibility of a railway company for the negligence of a conductor of a regular freight or passenger train. *Meyer v. Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 848, affirming (1895) 65 Ill. App. 531 (here, however, recovery was denied on the ground that the negligent act was nonofficial. See VI. *infra*); *Mobile & O. R. Co. v. Godfrey* (1895) 155 Ill. 78, 39 N. E. 590 (here, held not to be a vice-principal for all purposes. See VI. *infra*); *Walker v. Gillett* (1898) 59 Kan. 214, 52 Pac. 442 (car driven without warning against a stationary one the coupling of which a brakeman was examining); *Louisville & N. R. Co. v. Robinson* (1891; Ky.) 16 S. W. 707 (conductor in failing to notify a brakeman that a car had been rendered dangerous to couple by reason of the slipping of lumber on it, at the time he sent him to make such coupling, when he knew of such danger, is guilty of wilful negligence); *Louisville & N. R. Co. v. Moore* (1886) 83 Ky. 675 (conductor allowed inexperienced fireman to operate an engine while plaintiff was coupling); *Louisville & N. R. Co. v. Mitchell* (1888) 87 Ky. 327, 8 S. W. 706 (vice-principalship assumed in argument); *Newport News & M. Valley Co. v. Dentsel* (1890) 91 Ky. 42, 14 S. W. 958 (conductor failed to stop the rear section of a broken train, the result being that the plaintiff, a brakeman on the forward section, was killed by a collision between the two sections); *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649 (speed dangerously increased while brakeman was attempting to uncouple two cars from a moving train—brakeman lost his footing and fell under the cars); *Cincinnati, N. O. & T. P. R. Co. v. Palmer* (1895) 98 Ky. 382, 33 S. W. 190 (charge held erroneous which allowed jury to find for the plaintiff in the case of ordinary negligence—see summary of Kentucky decisions in VII. e. *infra*); *Newport News & M. Valley R. Co. v. Carroll* (1895) 17 Ky. L. Rep. 374, 31 S. W. 132 (minor injured in coupling cars under orders of conductor); *Louisville & N. R. Co. v. Wallingford* (1893) 15 Ky. L. Rep. 170, 22 S. W. 439 (fireman of construction train or-

dered a train to move back while a switchman was coupling without waiting for a signal from the latter); *Van Amburg v. Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517 (undue speed of train on a bridge under construction); *Willson v. Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961 (excessive on rough track); *Clark v. Hughes* (1897) 51 Neb. 780, 71 N. W. 776 (signaled to back cars while brakeman was coupling); *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; (1894) 114 N. C. 718, 19 S. E. 362 (brakeman obeyed order to couple with his hands when the stick required by the rules proved ineffective—here the actual point decided that the brakeman was not negligent in complying with the order); *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554 (conductor prematurely ordered movement of cars, without ascertaining whether coupling was complete—same point as in last case); *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161 (sudden starting of train threw brakeman to the ground); *Little Miami R. Co. v. Stevens* (1851) 20 Ohio, 415 (engineer was injured in a collision resulting from the omission of the conductor to observe his time card); *Cleveland, C. & C. R. Co. v. Keary* (1854) 3 Ohio St. 201 (similar accident); *Lake Shore & M. S. R. Co. v. Spangler* (1886) 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467 (assumed in opinion); *Lake Shore & M. S. R. Co. v. Knittel* (1878) 33 Ohio St. 468 (flying switch negligently made); *Illinois C. R. Co. v. Spence* (1893) 93 Tenn. 173, 23 S. W. 211 (collision caused by conductor's allowing freight train to pass a certain station in violation of the time-card rules injured fireman); *Openshaw v. Utah & N. R. Co.* (1889) 6 Utah, 132 (negligent loading of car—piece of timber fell on brakeman).

Upon principle the liability of the company in the case of conductors of construction or work trains would also seem to be indisputable under the superior-servant doctrine, but the authorities are conflicting. The servant was allowed to recover in *Chicago, St. P. M. & O. R. Co. v. Lundstrom* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198 (conductor of construction train sent a laborer into a cut when a train was known to be due); *Burlington & M. River R. Co. v. Crockett* (1886) 19 Neb. 138, 26 N. W. 921 (conductor of gravel train neglected to station a watchman to give notice of danger from a bank caving in, and the under boss of the train was killed by an earthslide); *Louisville & N. R. Co. v. Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426 (foreman of gravel train was negligent in signaling for the movement of a train); *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58 (conductor of material train without warning gave signal to start train, the result being that a laborer, who was stepping from one car to another, was jerked off and run over. See, however, summary of Missouri cases, VII. e. *infra*); *Dobbin v. Richmond & D. R. Co.* (1879) 81 N. C. 448, 31 Am. Rep. 512 (injury caused by fall of gravel bank); *Chicago, B. & Q. R. Co. v. Blank* (1887) 24 Ill. App. 438 (conductor of gravel train ordered air brakes to be set suddenly, thereby causing a jerk which threw a laborer off). This case does not refer to the Illinois decisions *infra*.

But such conductors were held to be mere fellow servants of their subordinates in *Abend v. Terre Haute & I. R. Co.* (1884) 111 Ill. 202, 53 Am. Rep. 618 (collision caused by the negligence of the conductor of a wrecking train in disregarding his running orders); followed in *Chicago & A. R. Co. v. McDonald* (1887) 21 Ill. App. 409 (distinguishing *Ross Case* and other cases of conductors of regular trains—collision

caused by disregard of running regulations—said to be “acting under special order at all times in the movement of his train”).

Under the Texas rule (III. e. *supra*), a conductor, not being invested with the power of discharge, is a mere coservant of the other train men. *Campbell v. Cook* (1894) 86 Tex. 630, 26 S. W. 486 (negligent management of cars while brakeman was coupling).

To employees whose services a conductor is authorized to command temporarily he bears the same relation as to employees regularly under his control, so far as the liability of the company under this doctrine is concerned. *Bitt v. Louisville & N. R. Co.* (1887; Ky.) 4 S. W. 796 (train, started without warning, injured car repairer).

An engineer, though not a vice-principal (except in Kentucky, I. *supra*), while he is acting under a conductor becomes, according to some decisions, a vice-principal when he is in charge of a train. *East Tennessee & W. N. C. R. Co. v. Collins* (1886) 85 Tenn. 227, 1 S. W. 883 (cars negligently backed against each other); *Cowles v. Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620 (but case really turned on proved negligence of defendant as to defective appliances).

He is therefore a vice-principal after he has taken charge of the forward section of a train which has separated, where it is his duty to do so under the rules of the company. *Louisville & N. R. Co. v. Martin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772 (here held, however, to be a mere fellow servant of brakeman, as he had not actually taken charge); *Newport News & M. Valley Co. v. Howe* (1892) 8 C. C. A. 121, 6 U. S. App. 172, 52 Fed. Rep. 362 (assumed in opinion 1; but such a doctrine is hardly law in Federal courts since the *Baugh Case*. See V. *infra*).

The decisions as to conductors in South Carolina, Virginia, West Virginia, and the Federal courts will be noticed in V. and VII. *infra*.

As to whether a conductor is under the superior-servant doctrine, as to employees not controlled by him, see I. *supra*; and compare V. d, 2, *infra*.

4. Supervising employees in railway yards and depots.

Yardmaster having charge of making up trains, handling cars in the yard, and control of the switchmen. *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (ran cars against the car which injured servant was repairing); *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206 (improvised a coupling by the use of a piece of a brakebeam rod, and inserted it in such a manner that it fell out when the cars were in motion); *Chicago, R. I. & P. R. Co. v. Touhy* (1887) 26 Ill. App. 99 (but negligence was held to be nonofficial here); *Norris v. Illinois C. R. Co.* (1899) 88 Ill. App. 614 (negligence as to order not to put out a signal caused collision).

An assistant yardmaster. *Gravelle v. Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. Rep. 711 (in charge to jury—but this case is no longer law under the more recent decisions of the supreme court denying vice-principals to any lower grade than heads of departments).

A yard foreman. *San Antonio & A. P. R. Co. v. Reynolds* (1895; Tex. Civ. App.) 30 S. W. 846 (charge erroneous which failed to state differentiating significance of the power or want of power to discharge).

A foreman of one of several switching crews. *Armstrong v. Oregon Short Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693 (cars backed 51 L. R. A.

violently against one which one of the switchmen was coupling in the night-time).

A foreman of a switching crew. *Louisville & N. R. Co. v. Hurst* (1892; Ky.) 20 S. W. 817 (negligence *per se* so to station himself, when he knows that a member of the crew is between the cars attempting to uncouple them, that signals of danger can be given by him to the engineer only through the fireman of the engine).

The foreman of a railway lumber yard. *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288 (a car the bumper of which supported some planks projecting over the end of a push car being removed by the foreman's orders, the push car was tilted up and thrust onward so as to crush the plaintiff's interstate against the other car).

An official similarly described was held to be a departmental manager in *Baldwin v. St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507.

A foreman of car-repairers. *Hannibal & St. J. R. Co. v. Fox* (1884) 31 Kan. 586, 3 Pac. 320 (failed to protect subordinate from moving cars); *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588 (same breach of duty); *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (same breach of duty); *St. Louis, A. & T. H. R. Co. v. Holman* (1894) 53 Ill. App. 617 (allowed car under repair to stand where it was so close to an adjoining track that a car moving thereon struck it); *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342 (failed to secure a servant repairing a car against the approach of other cars); *Lake Shore & M. S. R. Co. v. Lavalley* (1880) 36 Ohio St. 221 (car allowed to strike the one under which the plaintiff was working).

A car repairer deputed by the master workman to instruct, as to his duties, the plaintiff, a new employee who was to take his place. *Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 679, 43 N. W. 415 (failed to protect new employee against moving cars).

On the other hand, a “boss wiper,” who is the foreman of a gang of wipers employed by a railroad company to wipe its locomotives, and directs them when to work and what to do, is their fellow servant, and not a vice-principal. *Knox v. Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491 (wiper injured by engine moved under the orders of the foreman). This case seems to indicate some change of view in this state as to the scope of the “superior-servant” doctrine. See summary of decisions in VII. *infra*.

The foreman of an electric railway company at its car shed is a vice-principal. *Metropolitan West Side Elev. R. Co. v. Skola* (1900) 183 Ill. 454, 56 N. E. 171 (ran cars himself on to the repair track, and injured a repairer).

5. Employees supervising the loading of railway cars.

A foreman in charge of gang loading or unloading cars, and giving orders as to the manner of unloading. *Higgins v. Missouri P. R. Co.* (1890) 43 Mo. App. 547 (failure to furnish chain to prevent tipping of car); *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124 (foreman without warning ordered workmen to throw to the ground a rail which plaintiff was helping to raise to the side of a car to serve as a skid, and which he supposed was about to be placed, as other rails had been).

6. Employees supervising track work on railways.

The general roadmaster of a line. *Hoke v. St. Louis, K. & N. W. R. Co.* (1885) 88 Mo. 360, *Reversing* (1882) 11 Mo. App. 574 (road mas-

ter carelessly gave a wrong signal to engineer, the result being that he started his engine in the wrong direction and drew a car from under the wrecked car, allowing it to fall on plaintiff, a laborer).

A roadmaster. *Stoddard v. St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 514 (failure to employ another man where force was inadequate—possibly decided on the ground of a breach of a nondelegable duty rather than under the superior-servant doctrine); *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916 (sectionman injured by a rail thrown on to the car where he was, by the orders of the roadmaster); *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 5 McCrary, 542, 18 Fed. Rep. 239 (assumed in charge to jury—not law under recent supreme court decisions—question was whether the failure to protect laborers from a bank which fell was due to the want of care).

A division roadmaster. *Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, 27 S. W. 644 (removal of brakestaffs caused engineer's death).

As to *Rains v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459 (brakeman killed by low overhead bridge), which denied a roadmaster to be a vice-principal, see VII. e, *Missouri, infra*.

A section boss or track foreman. *Chattanooga Electric R. Co. v. Lawson* (1898) 101 Tenn. 406, 47 S. W. 489 (order to board a moving car held to be an official act, as it was done in the discharge of his function of controlling the cars); *Gann v. Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493 (non-official negligence in this case); *Illinois C. R. Co. v. Bolton* (1897) 99 Tenn. 273, 41 S. W. 442 (except when engaged in manual labor, as in this case); *Louisville & N. R. Co. v. Bowler* (1872) 9 Helsk. 866 (nature of negligent act not stated); *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094 (laborer injured by a hand-car which was struck by a train while the section gang were attempting to get it off the track); *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285 (same facts); *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221, second appeal (1888) 96 Mo. 207, 9 S. W. 589 (laborer injured in complying with an order to get a large stone off the track when a train was approaching); *Russ v. Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472 (water keg rolled off hand-car owing to carelessness of foreman, who had used it for a while as a seat, and then jumped up and left it unsecured); *Rowland v. Missouri P. R. Co.* (1886) 20 Mo. App. 463 (assured laborer that the end of a rail about to be thrown on a car was free—not being so, it rebounded and struck the laborer); *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (foreman, knowing hand-car was defective, failed to report it); *Banks v. Wabash Western R. Co.* (1890) 40 Mo. App. 458 (hand-car allowed to become unsafe); *Herriman v. Chicago & A. R. Co.* (1887) 27 Mo. App. 435 (rail which plaintiff was ordered to remove from the track caught under another rail and flew back and struck plaintiff—foreman not assisting); *Claybaugh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630 (dangerous method of loading ties on cars); *Hutson v. Missouri P. R. Co.* (1892) 50 Mo. App. 300 (injury caused by foreman's use of pick); *Louisville & N. R. Co. v. Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463, No Off. Rep. (deemed here to be negligent in management of hand-car); *Chicago & A. R. Co. v. Goltz* (1897) 71 Ill. App. 414 (injury received in getting hand-car off the track); *Chicago, St. L. & P. R. Co. v. Gross* (1889) 35 Ill. App. 178, Affirmed in (1890) 133 Ill. 37, 24 N. 51 L. R. A.

E. 563 (gave no warning of the approach of a train); *Patton v. Western N. C. R. Co.* (1887) 98 N. C. 455, 1 S. E. 863 (track man injured by jumping from a moving hand-car in obedience to the orders of his foreman); *Logan v. North Carolina R. Co.* (1895) 118 N. C. 940, 21 S. E. 959 (injury caused by obedience to order to remove a hand-car from the track when a train was approaching); *Johnson v. Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784 (hand-car was started on a curve where an expected train could not be seen); *Missouri P. R. Co. v. James* (1888; Tex.) 10 S. W. 332 (derailment caused by defective hand-car and defective track, which foreman had promised to repair); *Sweeney v. Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555 (threw switch prematurely while hand-car was moving on to the main line, the result being a derailment); *Gulf, C. & S. F. R. Co. v. Wells* (1891; Tex.) 16 S. W. 1025 (derailment of defective hand-car); *Torlan v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339 (did not signal the approach of a train); *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31 (foreman disregarded rules promulgated for the purpose of securing the safe running of hand-cars). It is probable that neither of these last two decisions is good law in the states where they were rendered. See summary in VII. *infra*.

As to the status of section foreman in South Carolina, see that state in VII. e, *infra*.

7. Employees supervising various kinds of construction work.

A superintendent of construction on a railway. *Kansas P. R. Co. v. Little* (1877) 19 Kan. 267 (defective machinery furnished).

Under the more recent decisions in some states, such an employee would be regarded as a departmental manager. See V. d, 3, *infra*.

A jury is justified in ascribing, as regards an employee engaged in loading bridge materials, the character of a vice-principal to another employee spoken of as assistant superintendent, or as foreman in charge of the structural iron work of a bridge company with authority to direct the foreman of the yard, where the material is stored, to get it out, and load it for transportation. *Pittsburg Bridge Co. v. Walker* (1897) 70 Ill. App. 55, Affirmed in (1897) 170 Ill. 550, 48 N. E. 915 (dispensed with a tag line which should have been used to steady a piece of the framework of the bridge while being transported to its place, and attempted to steady it with his hands).

A foreman of bridge builders. *Bloyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089 (as to this case, see that state under VII. e, *infra*); *St. Louis, A. & T. R. Co. v. Torrey* (1893) 58 Ark. 217, 24 S. W. 244 (case went off on point that negligent act was one done as a mere servant. See VI. *infra*).

A foreman of a gang of carpenters. *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. Rep. 67 (assumed in charge to jury, in a case where the injury resulted from an order to use a hand-car for transporting the gang—not law under recent decisions of the supreme court. See VII. *infra*); *Leiter v. Kinnare* (1896) 68 Ill. App. 558 (improper order).

A foreman of a gang engaged in the business of repairing bridges, water tanks, and telegraph lines along a railway. *Sloux City & P. R. Co. v. Smith* (1888) 22 Neb. 775, 36 N. W. 285 (sudden application of brake to hand-car by the foreman threw plaintiff off).

A foreman in charge of the construction of a telegraph line. *Postal Teleg. Cable Co. v. Coote* (1900; Tex. Civ. App.) 57 S. W. 912

(hiring of incompetent fellow servant was the negligence alleged).

A foreman in full control of the work of constructing a line of telegraph, with power to discharge the workmen. *Vicars v. Cumberland Teleph. & Teleg. Co.* (1900) 52 La. Ann. 2153, 23 So. 367 (too much power was, by the foreman's order, brought to bear upon a pole which was being braced and straightened).

An employee supervising the work of taking down a building. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363 (unsafe method of demolition adopted).

A foreman of a gang of carpenters engaged in erecting a new floor in a building. *Pullman's Palace Car Co. v. Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. Rep. 932 (inexperienced workmen set to work in a dangerous place—not law according to the late decisions of the supreme court. See VII. *infra*).

A foreman in charge of the construction of a building. *Heckman v. Mackey* (1888) 35 Fed. Rep. 353 (pitfall created in the absence of the plaintiff by an order to a coemployee to remove a securely fastened plank in a staging, and substitute another which was left loose—hardly law under recent decisions of the supreme court, unless, which the report does not show, the foreman was a general agent).

A foreman of carpenters putting in car scales. *Kansas City Car & Foundry Co. v. Sechrist* (1898) 59 Kan. 778, Appx. (beam fell owing to removal of props).

An assistant foreman in charge of the drilling of a well. *Nix v. Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571 (engineer managing stationary engine was injured by the sudden application of steam to the machinery without any warning).

A foreman of a crew engaged in the construction of a turntable. *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (1885) 88 Mo. 293 (inexperienced boy was ordered to stop an engine, and was injured by a set screw while attempting to step over a revolving shaft).

A foreman in charge of the removal of the roof of a building. *Sullivan v. Hannibal & St. J. R. Co.* (1891) 107 Mo. 66, 17 S. W. 748 (staging which foreman had assured plaintiff was safe gave way—here, as plaintiff had nothing to do with its construction, the case is also covered by the principle that the duty to provide a safe place of work is nondelegable).

A railroad foreman in a gravel pit, having full charge of the work, with power to hire and discharge men and to direct and control their work. *Andreson v. Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305 (plaintiff crushed by caving of bank, owing to fact that he did not receive customary warning).

The foreman in charge of the removal of an embankment. *Bradley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763 (laborer sent to work on a place where there was danger of the earth falling).

A foreman of a water company supervising the excavation of a reservoir. *Hall v. St. Joseph Water Co.* (1892) 48 Mo. App. 356 (walls of trench fell in).

8. Foremen in the mechanical departments of railway companies.

A master mechanic in railway repair shops. *Douglas v. Texas Mexican R. Co.* (1885) 63 Tex. 564 (negligent order).

That a wrecking train was under the supervision of a conductor will not render the master mechanic travelling upon the train a fellow servant with a bridge carpenter of whom he has the full control. *Tabler v. Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810. In any or

ders given within the scope of his authority, as in directing the material of which a coupling shall be made, where there is no drawhead, he represents the company.

Master mechanics are by some courts regarded as departmental vice-principals. See V. d, 5, *infra*.

A foreman in a machine shop. *Missouri P. R. Co. v. Peregrin* (1887) 36 Kan. 424, 14 Pac. 7 (ignorant apprentice set, without notice or instruction, to do work which was dangerous to anyone but a skilled mechanic—here, be it observed, the duty violated was a nondelegable one).

The foreman of a railway car-repairing shop. *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835 (foreman broke his promise to protect car repairer from moving cars).

An employee in charge of a round house, the engines, and men necessary to care for them. *Dayharsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 (moved engine upon plaintiff without warning).

A foreman of a wrecking crew (here spoken of as being in charge of a gang carrying on a particular branch of the business). *Wabash, St. L. & P. R. Co. v. Hawk* (1887) 121 Ill. 259, 12 N. E. 253 (floor of wrecked car fell, owing to inadequacy of propping).

A "wreck master" has also been considered to be a vice-principal, as being the head of a department. *Borgman v. Omaha & St. L. R. Co.* (1890) 41 Fed. Rep. 667. See, however, VII. d, *infra*, as to the authority of this case in Federal courts.

The foreman of the paint shop of a railway company. *International & G. N. R. Co. v. Hinzle* (1891) 82 Tex. 623, 18 S. W. 681 (plaintiff set to work painting cars without having been instructed as to a rule requiring men working on side tracks to set out signal flags).

An engineer is a vice-principal as regards a common laborer subject to his directions. *Baltimore & O. R. Co. v. Sutherland* (1894; Ohio C. C.) 1 Toledo Leg. News, 388.

9. Employees in charge of machinery.

A feeder of a planing-machine as regards a boy under his orders. *Fanter v. Clark* (1884) 15 Ill. App. 470 (boy injured in obeying an order to pull a silver out of a planing machine).

A foreman supervising a gang hoisting stone with a derrick. *Union P. R. Co. v. Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (defective machinery).

The foreman of a dredger. *Chicago Dredging & Dock Co. v. McMahon* (1888) 30 Ill. App. 358 (injury caused by compliance with a negligent order).

A foreman of a machine factory. *Mason v. Edison Mach. Works* (1886) 24 Blatchf. 93, 28 Fed. Rep. 228 (accident occurred in the moving of heavy machinery which plaintiff was left to hold up alone—not law since recent decisions of the supreme court, unless foreman was a general agent, which the report does not show. See *Summary*, VII. *infra*).

10. Supervising employees in manufacturing establishments.

A foreman of a foundry. *Fitzgerald v. Honkomp* (1892) 44 Ill. App. 365 (negligence as regards order denied upon the evidence).

The foreman of a steel company (apparently not the general manager). *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876 (foreman struck the side of a loose pile of ore, thereby causing a large piece to fall on plaintiff).

A foreman in charge of a mill, and vested

with power to employ and discharge employees. Sulphur Lumber Co. v. Kelley (1895; Tex. Civ. App.) 30 S. W. 696 (machinery not stopped to make necessary repairs).

A foreman of a sawmill. Sulphur Lumber Co. v. Kelley (1895; Tex. Civ. App.) 30 S. W. 696 (did not stop machinery to examine it, when there were indications that something had gone wrong); Lawrence v. Hagemeyer & Co. (1892) 93 Ky. 591, 20 S. W. 704 (omitted to have machinery repaired as he had promised).

A foreman of a fertilizer company's business. National Fertilizer Co. v. Travis (1899) 102 Tenn. 16, 49 S. W. 832 (started machinery without warning).

The foreman of a meat-packing establishment. Libby, McN. & L. v. Scherman (1893) 146 Ill. 540, 34 N. E. 801, Affirming (1892) 50 Ill. App. 123 (barrels carelessly piled fell).

Some of the above employees, it will be observed, were of a grade which placed them nearly, if not quite, in the class of general managers; but whether they were really such was a question not necessary to be considered, the superior-servant doctrine being decisive in fixing their position.

In Arkansas the foreman of the oil department of a compress company's establishment has been held to be a vice-principal. Fort Smith Oil Co. v. Slover (1893) 58 Ark. 168, 24 S. W. 106; but this is, perhaps, intended as an explicit adoption of the doctrine of departmental control. See that state under VII. e, *infra*. In any event the default alleged was in respect to the nondelegable duty of instruction, and might be rested on that ground alone.

11. Supervising employees in smelting works.

See the Kansas case cited under V. d, 8, *infra*.

12. Employees supervising the moving of heavy articles.

An employee supervising the hoisting of a heavy box. Fraser v. Hand (1880) 33 Ill. App. 153 (unsafe method adopted for hoisting).

A foreman of a gang of men engaged in lifting heavy pieces of machinery. Fraser v. Schroeder (1896) 163 Ill. 459, 45 N. E. 288 (manner of incompetent servant's obedience to order to stop machinery caused injury).

13. Employees supervising the loading of vessels.

An employee superintending the entire work of unloading coal barges at the wharf of a foundry. Derany v. Vulcan Iron Works (1877) 4 Mo. App. 236 (scaffold so defectively constructed that when a laborer stepped on it, it fell and crushed plaintiff). Possibly this case is intended as an application of the "head of department" theory, as the phraseology appropriate to that theory is employed. But see III. b, *supra*.

14. Foremen in quarries.

A foreman of a quarry belonging to a railway company. Kansas City, Ft. S. & M. R. Co. v. Hammond (1894) 58 Ark. 324, 24 S. W. 723 (laborer allowed to remain on the track when a train was known to be approaching).

The foreman of a quarry. Berea Stone Co. v. Kraft (1877) 31 Ohio St. 287, 27 Am. Rep. 510 (foreman himself attached the hooks of a hoisting apparatus to a large stone which was so soft that chains should have been used). This is another official who is in some cases treated as a general manager. See IV. b, 2, *infra*.

51 L. R. A.

One of three subordinate foremen in a quarry. Cox v. Syenite Granite Co. (1890) 39 Mo. App. 424 (plaintiff was ordered back to work from place where he had gone for safety while a boat load of stone was being swung to the top of the quarry cliff by a derrick, and was struck by a stone which rolled back over the cliff after the boat had passed the edge. Contention of defendant was that the foreman was not the defendant's vice-principal in signaling the plaintiff to return to work, because a motion of the hand could not be construed into an order).

15. Foremen in mines.

A pit boss in a mine having authority to command the workmen in respect to what work they shall do, and when they shall discontinue. Consolidated Coal Co. v. Wombacher (1890) 134 Ill. 57, 24 N. E. 627, Affirming (1889) 31 Ill. App. 288 (order to work under a dangerous portion of the roof).

An underground manager. Somerville v. Gray (1863) 1 Sc. Sess. Cas. 3d Series, 768; Hardie v. Addie (1858) 20 Sc. Sess. Cas. 2d Series, 553 (roof fell in), inconsistent with later cases, especially Wilson v. Merry (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. See IV. d, *infra*.

A foreman in full charge of a coal mine underground. Cunningham v. Union P. R. Co. (1886) 4 Utah, 206, 7 Pac. 795 (overhanging piece of coal fell); Trihay v. Brooklyn Lead Min. Co. (1886) 4 Utah, 468, 11 Pac. 612 (plaintiff injured by fall of roof of untimbered slope).

16. Officers of ships.

Several cases decided in the lower Federal courts before the date of the Ross Case (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, proceed upon or countenance the theory that the officers of a ship are vice-principals. These are clearly contrary to the weight of authority in the Federal courts. See II. f, 15, *supra*, and VII. d, *infra*.

IV. Relation of a general managing agent to his subordinates.

a. Introductory.

From a very early period in the development of the doctrine of common employment one of the currents of judicial authority has set strongly towards the theory that a master ought not to be allowed to escape the consequences of the rule which fastens liability upon him for his personal negligence by transferring the entire control of his business to an agent. See cases referred to below for examples of this trend of opinion not many years after the establishment of that doctrine in the Priestley and Farwell Cases, in 1837 and 1842 respectively.

Such a theory obviously involves the practical result that, as we ascend the scale of supervising employees, a grade is at length reached at which the representative character of the employee becomes the controlling element in the case, superseding *pro tanto* the operation of the doctrine that the defense of common employment is none the less available to the master for the reason that the negligent servant was of higher rank than the one injured. Whether the corresponding situation should, under the so-called "superior-servant" doctrine, be regarded as one of substitution or merger, is not very material, since in either case the master's responsibility, so far as appears, will be precisely the same.

In another line of decisions may be traced

the influence of the opposite view that the principle by which a servant is charged with an assumption of the risks of a fellow servant's negligence on the ground that such negligence is one of the ordinary and known incidents of his relations to his master, is universal in its application, and must prevail, even when it comes into conflict with the principle of accountability for the defaults of a general agent.

Before we proceed to the examination of the cases which support each of these two views, it is proper to remark that the only kind of functionary with which we are properly concerned in this and the following subtleties is an employee who may be described as being "retained generally to represent the principal in his absence" (*Murphy v. Smith* (1865) 19 C. B. N. S. 861, 12 L. T. N. S. 605. Compare *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, where the court laid stress on the fact that the master gave no personal attention to the business. In *Conway v. Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 345, it was suggested that a servant should not be deemed the *alter ego* of the employer, unless he has been invested with such authority that, as between him and the employee, nothing done by him in relation to the business of which he has control will be an unauthorized act. Plainly the directors of a corporation must, at all events, be its representatives in all respects where the safety of the employee is concerned. *Rose v. Boston & A. R. Co.* (1874) 53 N. Y. 217; or as one whom the master substitutes for himself in the superintendence of his business (*O'Brien v. American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 824); or as agents in whose hands the master "has placed the entire charge of the business or a distinct branch of it, exercising no authority and superintendence of his own therein" (*Lehigh Valley Coal Co. v. Jones* (1878) 86 Pa. 439. Compare the language employed by this court in *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 150; *Mullan v. Philadelphia & S. Mall S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2; *Lewis v. Seifert* (1887) 116 Pa. 628, 11 Atl. 514; *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50); or as one "employed to superintend the employer's entire business" (*Coulson v. Leonard* (1896) 77 Fed. Rep. 538 (*arguendo*)); or as one to whom "full power to manage a business and employ and discharge servants, without interference," has been delegated by an employer. *Shumway v. Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251.

Obviously these descriptions are not fulfilled, where the evidence fails to show that the alleged vice-principal was vested with the whole power and authority of the master in the conduct of the business (*Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399; *Hoth v. Peters* (1882) 55 Wis. 405, 13 N. W. 219. In the latter case recovery was sought on the sole ground that one of the several foremen of a nonresident defendant's lumber yard directed a car to be started when he knew that the plaintiff occupied a dangerous position on the car; but the court considered that such an allegation did not bring the case within the rule applicable, where the whole power and authority of the master are invested in the employee who gives the order), either as a whole, or as regards a single department of it, which is so distinct from and independent of the other that the authority delegated to the employee supervising it resembles in its nature and extent that which

is wielded by a manager of an entire establishment. See *V. infra*.

At least one case, which, at first sight, would seem to commit the court to a total rejection of the doctrine that a master is responsible for the acts of a general manager, may be explained on the ground that the test thus indicated was, under the circumstances, not satisfied. See *Feltham v. England* (1866) L. R. 2 Q. B. 33, 7 Beat & S. 676, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151 (several freshly built piers collapsed), setting aside verdict in (1865) 4 Fost. & F. 460, where the master, though he was not present when the accident occurred, had retained a general control over the work.

Other cases in which recovery was denied present facts which place them near the border line, and the functions of the negligent employee, and the precise grounds on which the court proceeded, are not stated with sufficient fulness to indicate whether they really embody the principle that even general agents are not vice-principals, or are simply intended as affirmations of the rule that all controlling employees, however high their rank, are mere fellow servants until the level of general agents is attained.

Some of the Massachusetts cases cited in the general list are of this doubtful color. But the recent case of *Meehan v. Spels Mfg. Co.* (1899) 172 Mass. 376, 52 N. E. 518, as well as others noted in IV. d. 2, *infra*, leave no doubt as to the real position of this court.

Indeed it is often impossible, in perusing some of the opinions, to avoid the suspicion that judges have not always realized adequately the extreme importance of marking and allowing for the fundamental distinction which may fairly be said to exist on strictly logical grounds, as it certainly does according to many authorities, between the situations in which there is or is not an entire abdication by the master of the management of his business.

Another source of difficulty for the commentator is that the courts frequently do not make it entirely clear whether their decisions were based upon the general agency of the delinquent, as a deputy master, for all purposes, or upon the narrower ground that his delinquency involved the breach of some specific non-delegable duty, for which the employer would be responsible quite irrespective of the rank of the delinquent. In a large number of instances this question is of no practical importance so far as regards the servant's right of recovery. But as long as there is so wide a difference of opinion respecting the limits of the so-called "official acts" of supervising employees for which the master should be held responsible, there must remain a considerable residuum of cases in which the distinction between the consequences of a general agency and of an agency in regard to the particular duty shown to have been violated will always be material.

In view of the uncertainties by which an exact classification of the authorities is, under these circumstances, embarrassed, it has been deemed advisable to note below a considerable number of rulings which might possibly be assigned with equal propriety to other divisions of the treatise.

b. Doctrine that a general manager is a vice-principal.

1. English and colonial cases.

In the earlier periods of the development of the doctrine of common employment in England, we find several more or less distinct recogni-

tions of the principle that the case of general managers constituted an exception to the rule which precluded recovery for the negligence of a coservant.

In *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748, the point actually determined by the House of Lords was that the trial judge was not justified in holding, as matter of law, that the plaintiff, a miner, was guilty of contributory negligence in continuing to work at a place where he knew that the roof of a drift was rendered dangerous by a large stone which ultimately fell upon him after the underground manager had given orders to have it removed. The real scope of the decision is therefore narrow, but the remarks made by two of the members of the house are only intelligible upon the hypothesis that they regarded the mine-owner as responsible for the negligence of his manager. Lord Brougham said that the defendants were beyond all doubt answerable for the negligence of the manager. Lord Cranworth in one part of his opinion was equally emphatic on the same side, declaring it to be good law, "that if . . . the defenders' manager had failed in his duty in timeously directing the stone in question to be removed, it would afford no defense that Paterson [the plaintiff, had] continued to work after the orders for the removal of the stone had been ultimately given." In another passage he seems inclined to go even farther, though the language used was more guarded. In commenting upon the point made by plaintiff's counsel in his exception to the action of the judge in withdrawing the case from the jury, that if the plaintiff "continued so to work in consequence of the directions of the roadsman, the defenders are responsible for such directions," said: "That may be right or wrong: for we have no evidence to show what is the character of a 'roadsman.' This, therefore, would require further explanation. If a 'roadsman' is, according to the rules and regulations of Scotch mines, a person whose province is to direct the workmen whether they may safely work or not, the law stated in the exception may be correct." These expressions of opinion are peculiarly interesting, when it is remembered that the same noble lord concurred fourteen years afterwards in the decision in *Wilson v. Merry*, IV. d. 1, *infra*. Still more remarkable is the fact that the clear recognitions of the doctrine of vice-principals in *Paterson v. Wallace* should have been so completely ignored in the later case.

In *Potts v. Plunkett* (1859) 9 Ir. C. L. Rep. 290, Lefroy, Ch. J., construed *Paterson v. Wallace* as being a decision based on the broad principle that a master "is liable . . . for the acts and default of those whom he places in his stead, and to whom he deposes his authority." Beven's comment on this gloss (1 Neg. 738) is that it is "manifestly an inaccurate statement of the law." Too broad and sweeping undoubtedly it is, for under such a principle, taken literally, even a mere foreman of subordinate rank would be a vice-principal. But the remarks of Lord Brougham and Lord Cranworth referred to certainly justify the inference that they considered some classes of supervising employees to be deputies of the master in such a sense that he must answer for at least a portion of their acts. And this is all that Chief Justice Lefroy seems to mean.

In the same year that *Paterson v. Wallace* was decided Lord Cranworth, in expressing a qualified approval of the Scotch case of *O'Byrne v. Burn* (1854) 16 Ct. of Sess. Cas. 2d Series, 1025, where a young girl was injured while she

was working on a machine of the peculiar dangers of which she was not aware, remarked: "It may be that, if a master employs inexperienced workmen, and directs them to act under the superintendence, and to obey the orders, of a deputy whom he puts in his place, they are not, within the meaning of the rule, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences." *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. C. 266, 295, 4 Jur. N. S. 767.

This amounts to a recognition, albeit rather a halting one, of the principle that where young persons are concerned, the obligation of the master to protect them from perils which they do not understand is one of which he cannot divest himself by intrusting the superintendence of his business to an employee. The particular form in which this principle is applied by the American courts is that the duty to instruct such persons is nonassignable. See *note* to *James v. Rapides Lumber Co.* (La.) 44 L. R. A. 38.

A few years later, in a case where the plaintiff was injured by unfenced machinery, the theory that there may be an *alter ego* of the master was thus distinctly adopted by Byles, J.: "I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced, though I do not presume to intimate any disagreement with the court of exchequer. But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. . . . Why may not the master be guilty of negligence by his manager or agent whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable." *Clarke v. Holmes* (1862) 7 Hurlst & N. 987, 947, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 406.

In *Gallagher v. Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, all of the judges reasoned upon the assumption that under an appropriate showing of facts a managing employee might be held to be a vice-principal, but the majority of the court were of opinion that there was no such evidence set out on the record. The ground upon which the plaintiff rested his claim was this: One Phear was the defendants' foreman or manager at the work in question, a large building. One Mahoney was employed under him as a foreman of the scaffolders; and the plaintiff worked at the raising of the scaffolding under the orders of Mahoney. It was Phear's duty to supply the materials, consisting of poles, putlogs, and boards, for the rearing of the scaffolding. He had notice through Mahoney that the supply of these materials for the due and safe performance of the work was insufficient; and the cause of the injury sustained by the plaintiff was Phear's omission to supply proper and sufficient materials upon Mahoney's requisition. Chief Justice Erie said: "The only matter upon which I pause, is whether or not Phear was such a general manager as to make him stand in the place of Messrs. Piper, so that what was said to Phear may be considered as having been said to them. Is there anything to show that Phear, the foreman or manager, more represented his

employers here than the foreman did in *Wigmore v. Jay* (1850) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837? In each case the defendants were engaged in very extensive works, and in each a foreman or manager was employed to direct them, and to whom the workmen looked for their instructions. In this case, beyond a doubt, Phear, the manager, was guilty of negligence in the performance of his duty; he had repeated notices that there were not sufficient materials for the erection of the scaffolding, but failed to supply them. But I think Phear and the plaintiff were fellow workmen within the principle laid down in the cases I have referred to. There was no evidence of any default on the part of the defendants themselves, either as to the supply of sufficient materials, or in the selection of Phear to be their foreman or manager; and the neglect of Phear imposes no responsibility upon them. The rule in this case, therefore, will be absolute to enter a nonsuit." To the same effect is the reasoning of Willes, J.: "Here the notice was given, not to the masters, but to the foreman. If Phear had been a partner with the defendants, notice to him would have rendered them liable; for the case would not then have fallen within the rule illustrated by *Priestley v. Fowler* (1837) 8 Mees. & W. L. Murph. & H. 306, 1 Jur. 987, and that class of cases. But here we are dealing with a case where the person whose negligence caused the injury is a servant of the persons sought to be charged. It is true, he filled a superior position; but still he was a servant; and I am unable to draw any distinction in this respect between one description of servant and another, so long as the relation of master and servant exists, and the party injured and the person whose negligence caused the injury are employed under one common master. If this had been the case of a person who might be said to have authority to act for the master as a kind of universal agent, I should have been prepared to consider the suggestions thrown out by my brother Byles in his judgment in *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 949, 31 L. J. Exch. N. S. 358, 8 Jur. N. S. 992, 10 Week. Rep. 405, and see whether he could come within the denomination of servant at all. But, before I could bring myself to say that such an agent did not come within the rule, I should take time to look into the subject, and especially to consider the position of that most authoritative of all agents, the master of a ship. I should like to consider whether, if the master of a ship, without the knowledge of his owners, were to start from an intermediate port with the vessel in a damaged and unseaworthy condition, and she was in consequence driven on shore or upon a rock, and some of the crew thereby sustained personal injury, it would be just or reasonable to hold the owners to be liable to the sailors, as they would undoubtedly be to third persons. But it is unnecessary to discuss that here; for it is plain that Phear was as much a servant of the defendants as was any one of the laborers employed under his direction and control." In a strong dissenting opinion, Byles, J., whose opinion in *Clarke v. Holmes* has just been noticed, thus discussed the position of the foreman: "As I understood the evidence, he was not merely the foreman or manager *pro hac vice*, but had been the general manager of the defendants' work for many years.—about twenty-four or twenty-five years. He had the entire management of the men employed under him, engaging them and dismissing them as he thought fit; Mahoney being employed under him as foreman of the scaffolders. It is said that Phear stood in the relation of fellow servant to the plaintiff. I am bound to say that I think otherwise. He was

acting master. At all events there was evidence for the jury that such was his position. Take the case of a large builder, who is never seen near his works, but who intrusts the entire conduct of his business to a foreman or manager, who is eyes, ears, tongue, brains, and everything to him. Is not the master liable for acts of negligence of his employee,—for I will not use the term 'servant' which, like that of 'foreman,' is susceptible of many meanings,—whilst acting thus for him? If these defendants had been a corporation aggregate they must have employed somebody to represent them. Take the case of a railway company employing a general traffic manager, and through his negligence an accident happens to a servant of the company,—is it to be said that the party injured is without remedy because the corporation is incapable of personal misconduct? If the rule here relied on be found so inconvenient that it cannot be applied to a case like that, ought it to be applied here? That depends very much upon the position of Phear. If he had been a servant, though a superior one, I should have entertained some doubt. But I do not think he stood in the position of a servant at all. He stood rather in the position of a general agent for the defendants. It is true he was called the foreman, but that is a word the meaning of which is extremely various. The case of *Wigmore v. Jay* (1850) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837, is distinguishable in this, that there it does not appear that the person whose negligence caused the accident was anything more than foreman for the particular work. For these reasons, I think notice to Phear and negligent misconduct of Phear would be notice to the defendants and negligence or misconduct of the defendants. Personal knowledge is not indispensable; for it has been held that notice to one of two partners is notice to both. So here, I cannot help thinking that notice to Phear was notice to the defendants." The charges of Cockburn, Ch. J., in *Feltham v. England* (1865) 4 Fost. & F. 460, and in *Webb v. Rennie* (1865) 4 Fost. & F. 608, may perhaps also be taken to indicate that this eminent judge had accepted the doctrine that, under certain circumstances, a managing employee might be a vice-principal.

In *Murphy v. Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605, the court set aside a verdict for the plaintiff solely on the ground that there was no evidence to show that the negligent workman was, as contended, a general manager of a lucifer factory *pro hac vice*. But it must be admitted that the case is deprived of a part of its significance by the fact that the injured servant was an inexperienced boy, and this may have been considered a differentiating factor, so far as regards the remarks of the judges conceding that the master might have been held liable under a different state of the evidence.

In Scotland also the courts adopted still more unequivocally the same view.

In one case it was held that a master does not discharge the duty of keeping dangerous machinery fenced by the appointment of an overseer. *Darby v. Duncan* (1861) 23 Dunlop, 529.

In another a complaint alleging that a defect in a scaffolding had been pointed out to the manager was held not demurrable. *Lynch v. Haggart* (1857) 19 Dunlop, 399.

In another it was ruled that a complaint alleging that the injury was due to the negligence of one of the defendant's foremen in giving an order to lift an excessive weight is not demurrable, as the liability depends on the particular charge which the foreman had in the business.

M'Millan v. M'Millan (1861) 23 Sc. Sess. Cas. 3d Series, 1082.

In McAuley v. Brownlie (1860) 22 Sc. Sess. Cas. 2d Series, 975, it was held that a contractor's foreman superintending the erection of a building was a vice-principal of the master in regard to providing the laborers with a safe scaffold. This duty was assumed by the court (see especially the opinion of Ld. Deas), to be nonassignable. No allusion was made to the American doctrine based on the theory that the building of a scaffold is in some cases a mere detail of the work.

So far as these decisions embody the theory that a master can be liable for the negligent acts of any official, however high, which he commits in the course of his superintendence of a going concern, they are no longer law in any jurisdiction where the authority of the House of Lords is paramount.

Curiously enough, however, the doctrine of an *alter ego* does not seem to be quite extinct in at least one of the British colonies. Thus, there has been held to be a liability for the negligence of the manager of a mine, conducting the business in a manner as complete as an individual owner would or could have done on the spot. *Band of Hope Consols v. Mackay* (1871) 2 Victoria Rep. (L.) 158 (ladder insecurely fastened—Wilson v. Merry was cited by counsel, but not commented on by court).

In *Sanderson v. Smith* (1882) 3 New So. Wales L. R. 31 it was suggested, but not directly decided, that a general manager was a vice-principal. The actual point ruled was that a mate of a ship was not a representative of the shipowner.

The same view is taken in *Quebec. Hall v. Canadian Co.* (Quebec, 1879) 2 Legal N. 245 (foreman ordered use of drill which caused the accident). Here the case was considered as one of personal interference by the master, so far as such interference was possible in the case of a company. But in this province the doctrine of common employment, as a whole, is rejected (see *Canadian P. R. Co. v. Robinson* (1887) 14 Can. S. C. 105); so that such a decision is of no importance to common lawyers.

2. American cases.

It has been deemed advisable to comment at some length upon the decisions embodying a doctrine thus finally repudiated in the mother country, not merely because they are interesting to the student of historical jurisprudence, as indicating the tendencies of opinion among a considerable number of very distinguished judges, but because the doctrine which they recognize is that which has finally prevailed in nearly every court of the United States. The cases *contra* are noted under the next subdivision.

Possibly the earliest American case in which there is a suggestion of the principle that a master is liable for the acts of a general agent is to be found in *Honner v. Illinois C. R. Co.* (1854) 15 Ill. 550, where the court leaned to the opinion that there might be "cases of carelessness or misconduct on the part of those to whom a corporation may intrust the management of its concerns, producing injury to the employees of the company for which it would be liable," but said that the declaration of the plaintiff did not raise this point.

In 1859, the doctrine was fully recognized as to the superintendent of a railway, in *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784. The significance of this decision is, however, diminished by the fact that it was rendered in a state in which the superior-servant doctrine is applied (III. *supra*). Even seven years later it would appear from the re-

port of a Pennsylvania decision that the master's liability under such circumstances was not then established in that state. In *Caldwell v. Brown* (1866) 53 Pa. 453, where the trial court, at the request of the plaintiff, instructed the jury that the acts and knowledge of the manager of a rolling mill were the acts and knowledge of the proprietor himself. The supreme court said that this charge was perhaps not warranted by (*Albro v. Agawam Canal Co.* (1850) 6 Cush. 75) the authorities, but that, if it was, it was not an error of which the plaintiff could complain. After 1870, the cases illustrating the doctrine become quite numerous in the reports.

How widely that doctrine prevails is apparent from the decisions cited below, though it must be remembered that many of them, inasmuch as they emanate from courts which have accorded more or less recognition to the superior-servant doctrine, cannot with entire certainty be cited as being authorities for the particular rule with which we are now concerned, viz., that the case of a general managing agent constitutes an exception to the principle that the exercise of a power of control does not make the controlling employee the *alter ego* of the master. That principle has been thus formally stated in a leading New York case. Where the "principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of the other servants in employing and selecting such servants and in the general conduct of the business committed to his care." *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573. Following *Murphy v. Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605.

Most of the decisions illustrating this rule relate to agents bearing designations indicative of positions which suggest the conduct of a permanent business and a tenure of office extending over an indefinite period.

Thus, a railway company must answer for the negligence of its general manager or superintendent. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (*arguendo*); *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467 (error to reject evidence that he knew of incompetency of delinquent); *Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412 (defective construction of siding known); *Huntingdon & B. T. Road & Coal Co. v. Decker* (1877) 84 Pa. 419 (unfit servant employed); *Hoover v. Carbon County Electric R. Co.* (1899) 191 Pa. 146, 43 Atl. 74 (assumed—but proximate cause of the injury was the act of a fellow servant); *Lasky v. Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367 (despatch of trains); *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143 (conceded *arguendo*; but see IV. d. 2, *infra*); *Cumberland & P. R. Co. v. State use of Moran* (1875) 44 Md. 233 (as regards the purchase of defective machinery. See IV. d. 2, *infra*); *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034 (*arguendo*); *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202 (defective track caused derailment); *Buteman v. Peninsular R. Co.* (1898) 20 Wash. 183, 54 Pac. 996 (not taking steps to stop trains upon learning that a forest fire is raging along the road); *Washburn v. Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784 (collision caused by failure to give proper running orders); *Haynes v. East Tennessee & G. R. Co.* (1866) 3 Coldw. 222 (train started at an unusual hour); *Galveston, H. & S. A. R. Co. v.*

Smith (1890) 76 Tex. 611, 13 S. W. 562 (failure to give such information and orders to the company's servants in charge of its trains as will enable them to avoid collision is the neglect of the company); Pittsburgh, C. & St. L. R. Co. v. Henderson (1882) 37 Ohio St. 552 (negligent orders with respect to the management of a train); Cleveland, C. & C. R. Co. v. Keary (1854) 3 Ohio St. 201 (negligent operation of trains); Reddon v. Union P. R. Co. (1887) 5 Utah, 344, 15 Pac. 262 (workmen ordered to help in clearing gangway of the mine, in which superintendent had temporarily ceased to put up timbering, although he knew that pieces of coal were constantly falling); Hyatt v. Hannibal & St. J. R. Co. (1885) 10 Mo. App. 294 (breach of agreement to provide means to keep men warm while they were shoveling snow at night in very cold weather—plaintiff was frost-bitten).

In one case it was not decided, but said to be at least open to question, whether the superintendent of a short-branch line leading to coal mines was a fellow servant of the conductor of a train in giving an order (*Moules v. Delaware & H. Canal Co.* (1891) 141 Pa. 632, 21 Atl. 733); but it is difficult to see why the smallness of a concern should have any qualifying effect. The only proper question is whether the superior servant is in a real sense the master's substitute in the management of the concern.

The same doctrine holds good where the negligence is that of the general manager or superintendent of other concerns,—as of a steel-mill (*Duffy v. Oliver Bros.* (1890) 131 Pa. 203, 18 Atl. 872 (*arguendo*)); of a saw-mill (*Sulphur Lumber Co. v. Kelley* (1895); Tex. Civ. App. 30 S. W. 696 (negligent order to start saw when there were indications of the existence of a defect); *Shumway v. Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251); of a manufacturing establishment (*Griffin v. Glen Mfg. Co.* (1892) 67 N. H. 287, 30 Atl. 344 (orders); *State use of Hamelin v. Malster* (1881) 57 Md. 287, *arguendo* (at all events so far as regards his function of employing servants and procuring the instrumentalities necessary for the service. See IV. d, 2, *infra*); *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369 (elevator suffered to get into bad repair—owner was nonresident, and gave no personal attention to the business; but see VI. f, 2, h, *infra*); *Northwestern Fuel Co. v. Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. Rep. 915 (gave orders increasing danger for workmen not directly affected by them and failed to warn them); *Kewanee Boiler Co. v. Erickson* (1898) 78 Ill. App. 35 (steam allowed to enter boiler which plaintiff was repairing); *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774 (assumed in the opinion); *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400 (here the negligent employee had "succeeded" the superintendent in his function—the negligence alleged was failing to keep a boiler in repair); *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298; (orders); *Cole Bros. v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074 (orders); *Foster v. Pusey* (1888) 8 Houst. (Del.) 163, 14 Atl. 545 (defective machinery); *Strange v. McCormick* (1849) 1 Phila. 156; *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521 (but case went off on the point that the negligent act was nonofficial. See V. *infra*. Owner was nonresident here); *Gormly v. Vulcan Iron Works* (1876) 61 Mo. 492 (fire ordered to be applied to a furnace in ironworks, so as to produce an explosion); *Martin v. Cook* (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329 (seems to assume that the foreman was a vice-principal; but the negligence was a breach of a nondelegable duty in not discarding a de-

fective appliance); of a hog-slaughtering establishment (*Mitchell v. Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812 (defective boiler); of a lumber company (*Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (conceded); *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143 (*arguendo*); *Klochinaki v. Shores Lumber Co.* (1836) 93 Wis. 417, 67 N. W. 934; (but act here was nonofficial. See VI. *infra*); *Lund v. Hersey Lumber Co.* (1890) 41 Fed. Rep. 202 (defective rope and tackle furnished; proprietors were a foreign corporation); of a brick company (*Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1894) 148 Ill. 573, 36 N. E. 572, Affirming (1892) 45 Ill. App. 317 (assurance that overhanging bank was not dangerous—the question of coservice was not raised in the court of appeals at the place cited, but was discussed on former hearing (1889) 34 Ill. App. 312)); of a quarry (*Hoosier Stone Co. v. McCain* (1892) 133 Ind. 231, 31 N. E. 956 (cars being insufficiently blocked on an incline were started by impact of another car, and injured a servant who was loading one of them); *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874 (defective holisting gear broke under a load); *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232 (superintendent disregarded a rule made by himself as to giving a warning signal before the cable which drew the cars up an incline was drawn taut); *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186 (orders as regards the kind of work to do); *Lantry v. Silverman* (1892) 1 Colo. App. 404, 29 Pac. 180 (slab thrown down towards place where foreman has sent plaintiff to remove some tools without proper precautions being taken to see that he had reached a place of safety); *Cullen v. Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 221 (employee ordered into place of danger. Reversed in (1891) 126 N. Y. 1, 26 N. E. 905, on the ground that the danger was solely the result of the manner in which the foreman performed or directed the work); of an ice company (*Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235 (omission to notify engineer that servant was in a position where he would be endangered by the starting of machinery, and breach of a rule requiring the posting of an employee to see that the machinery is not started without a signal); *Crystal Ice Co. v. Sherlock* (1893) 37 Neb. 19, 55 N. W. 294 (piece of ice sent down a chute); of a mine (*Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24 (knew that a cliff was in danger of falling, and failed to safeguard plaintiff. Here, however, the court relies rather on the nondelegable character of the duty violated than on the general agency of the superintendent); *What Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. Rep. 810 (assumed); *Northern P. Coal Co. v. Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. Rep. 756 (negligence alleged was ordering boy to do dangerous work outside scope of employment); *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; (cut a hole in a platform creating secret pitfall); *Quincy Min. Co. v. Kitts* (1879) 42 Mich. 34, 3 N. W. 240 (*arguendo*); *Dessant v. Cerrillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290 (seems to be assumed in opinion, though case did not require a decision on this point).

Other supervising officials in mines, who have been held to be vice-principals, have been described as follows:

A foreman on the entire work at a mine with power to employ and discharge hands. *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255 (plaintiff not notified that a blast was about to be fired).

A mining captain who has the entire management of the mine, without interference by the owner, a nonresident. *Ryan v. Bagaley* (1883) 50 Mich. 179, 15 N. W. 72, 45 Am. Rep. 35 (defendant argued that, as the captain had been appointed by the owner's agent, he was "a mere foreman, or department leader, or sub-chief;" but it was pointed out that the agent, not being an expert himself, took no part in the management, and that the essential question was, "What, as matter of fact, was his position? not by what directness or circuitry he got it").

The foreman of a gang of men, to whom a stevedore delegates the entire management of the work of unloading a vessel, with "full discretion to control and supervise it," is a vice-principal as to his subordinates. *Brown v. Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (failure to signal for stoppage of engine when an overloaded bucket of coal was swinging dangerously). This ruling was criticised in *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175, as being hard to reconcile with some other rulings, particularly *Collier v. Steinhart* (1875) 51 Cal. 116 (complaint alleging the negligent employment of an engineer by the superintendent of a mine held demurrable). It was also suggested that *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, went no further than to hold that the duty of providing suitable appliances was non-assignable. The decision may doubtless stand on this footing, but that it was not founded on any such theory is apparent from the report.

A recent decision of this court seems to indicate that, whatever doubt it may at one time have entertained as to the vice-principals of general agents is now abandoned, as the master has been held liable for the negligence of an engineer in charge of a refrigerating machine under the direction of the superintendent and general manager of a corporation when he is present, and in sole charge during his absence. *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471 (allowing inexperienced men to do work for which they were unfitted).

See, further, the summary of California decisions in VII. *infra*. As to the position of captains of ships, see V. d. *infra*.

Upon purely logical grounds the same rule is, it would seem, equally applicable to employees superintending a specific piece of work, whose controlling functions have relation only to that work, and will cease when it is finished. The situation in such cases, so far as the completeness of the transfer of the master's powers and obligations is concerned, may well be, and often is, the same as in the case of the general managing agents of a continuing business. A few decisions have recognized this identity, and imposed liability, upon employers for the negligence of agents in charge of important works of construction.

Recovery has been allowed for the negligence of the following employees:

One having full control of the erection of a building. *Slater v. Chapman* (1887) 67 Mich. 523, 85 N. W. 106 (foreman removed cleat which kept a temporary staircase in position, and subsequently ordered plaintiff to ascend it).

A person in full control of the construction of a tunnel. *Anderson v. Bennett* (1888) 16 Or. 515, 19 Pac. 765 (workman set to drilling holes without any steps being taken to ascertain whether there were any unexploded blasts).

An employee in full charge of the construction of a bridge. *Brothers v. Carter* (1878) 32 Mo. 372, 14 Am. Rep. 424 (false work gave way).

As employee in full charge of the construction of a building. *Whalen v. Centenary Church* (1876) 62 Mo. 326 (defective scaffold).

A general foreman of construction work in full charge of work with power to hire and discharge. *Eagan v. Tucker* (1879) 18 Hun, 347 (plaintiff injured while executing order to excavate under a pier the lower part of which, below the beam on which the upper section rested, was left without any support except that given by the force of cohesion), possibly a case merely of a breach of nondelegable duty.

A superintendent in entire control of the work of constructing a bridge. *Fort v. Whipple* (1877) 11 Hun, 586 (scaffold collapsed in consequence of the superintendent's directing the removal of the stay-laths); but perhaps the remark made as to the last case applies to this one also.

See also *Gallagher v. Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, discussed under the preceding subdivision.

With the above decisions should be compared those cited in V. *infra*, in regard to departmental managers; especially those relating to the masters of ships, who, according to circumstances, may sometimes be general, and sometimes departmental, managers.

The value of the two Missouri decisions referred to above is, so far as other jurisdictions are concerned, somewhat diminished by the fact that this court has become an uncompromising adherent of the superior-servant doctrine (III. *supra*). But they seem to date from the earlier period during which that doctrine was not accepted. See *Summary*, VII. *infra*.

A ruling of the supreme court of New York, that the superintendent of repairs to a ship was a vice-principal (*Hussey v. Coger* (1886) 39 Hun, 639), was reversed by the court of appeals on the ground that he was merely a special agent in regard to some of his duties. (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

Whether a foreman in charge of the construction of a bridge is a vice-principal was left undecided in *Ross v. Walker* (1890) 139 Pa. 42, 21 Atl. 157, 159, the court denying recovery on the special ground that the mere selection of materials from a mass is the act of a mere servant.

But the tendency of the courts is to treat employees of this class as mere foremen. This tendency is not confined to courts which, like those of Massachusetts and Maryland, construe the doctrine of common employment most rigorously against the servant, but is equally apparent in states in which general managers of a continuing business are conceded to be vice-principals. This inconsistency is doubtless one of the many embarrassing consequences of the haphazard fashion in which the doctrine of vice-principals has been evolved; and it must be admitted that there is also a real difficulty in separating the cases of this description which really involve the exercise of the functions of a general agent from those in which the supervising employee is a mere foreman exercising no larger discretion than those who, in a complicated concern, like a railway, are intrusted with certain well-defined duties of a simple character.

It has been expressly held that a servant appointed to supervise a little job, such as raising a piece of timber by a derrick for a building under erection, cannot be placed in the category of general superintendents. *McDonald v. Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 844.

But neither in justice, nor in reason, can a court which treats a general manager of a continuing business as a vice-principal decline to indemnify a servant for the negligence of an

official occupying a position which actually involves the discharge of functions differing in no essential respect from those which are characteristic of a general manager.

That the above rule of liability is considered to be applicable to corporations is shown by the large number of cases in which such bodies were held responsible without any suggestion that a distinction could be raised on this ground. Any other doctrine, in fact, would involve the absurd and unjust consequence that, as all the business of corporations is necessarily transacted by agents, they would be virtually absolved from all liability. *Lehigh Valley Coal Co. v. Jones* (1878) 86 Pa. 439.

In *Washburn v. Nashville & C. R. Co.* (1859) 3 Head. 638, 75 Am. Dec. 784, the trial judge ruled that the superintendent, and even the president, of a railway company stood upon exactly the same footing as any other employee, however subordinate his position; and that the board of directors only was to be regarded as the principal. The criticism of the supreme court was as follows: "If this be correct, it will inevitably follow that the company cannot be held liable, in a case like the present, unless it can be shown that the injury resulted from the direct action of the company, in its corporate capacity. This is absurd. The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as it may be necessary to effect the purposes of its creation. It must act in this mode, or not act at all. The superintendent may be said to be, as respects this particular company, from the power shown to have been given him by the board, the immediate representative of the company—the corporate executive officer—intrusted for the time with the power and authority of the board of directors, so far as regards the control and management of the trains, and all the arrangements connected therewith. In this view, the company must be held liable for an injury resulting from the negligence, or improper order, of the superintendent, just as much as if it had emanated directly from an act of the company in its corporate capacity."

Where the corporation is a foreign one, the propriety of not admitting any exception on such a ground is especially obvious, as in *Lund v. Hersey Lumber Co.* (1890) 41 Fed. Rep. 202; *Crispin v. Babbitt* (1880) 81 N. Y. 516, 87 Am. Rep. 521.

c. Rationale of the doctrine.

The language used by the judges in discussing the responsibility of the master for the negligence of a general manager shows that such an employee is conceived to be a vice-principal for the reason that, as a necessary consequence of the essential incidents of the position which he occupies, he must be regarded as the agent appointed by the master to see that the subordinate workmen are as fully guarded against unnecessary perils as if the master himself were conducting his business in person.

In a case decided by the supreme court of New York, the reasoning of which was indorsed by the court of appeals, the following lucid argument is found: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. 51 L. R. A.

The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointees equally with themselves represent the corporation as master in all those respects. And though in the performance of these executive duties he may be, and is, a servant of the corporation, he is not in those respects a coservant, a collaborer, a coemployee, in the common acceptation of those terms, any more than is a director, who exercises the same authority. Though such superintendent may also labor like other collaborators and he may be in that respect a collaborer, and his negligence as such collaborer, when acting only as a laborer, may be likened to that of any other, yet, when by appointment of the master, he exercises the executive duties of master, as in the employment of servants, in the selection for adoption of the machinery, apparatus, tools, structures, appliances, and means suitable and proper for the use of other and subordinate servants, then his acts are executive acts, are the acts of a master; and then the corporation are responsible that he shall act with a reasonable degree of care for the safety, security, and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues their orders to their operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow workman or collaborer. The corporation can speak and act in no other way. His executive acts are their acts. His negligence is their negligence. He control their control. He has in this executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common collaborer or coservant." *Brickner v. New York C. R. Co.* (1870) 2 Lans. 506, *affirmed* in (1872) 49 N. Y. 672.

In *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, the following language is used: "The defendants, who operated the mill at the time of the injury, gave no personal attention to conducting the mill, but it was managed by a general agent who had general charge of the mill, machinery, and operatives, with power to purchase all supplies and hire and discharge operatives. It is evident that this general agent was not a mere fellow servant of the plaintiff, who was a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and the defendants could not, by absenting themselves from the mill and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences of a failure to perform them."

Compare also the following extracts:

"So far as the corporate directors are concerned, no question can be made that for all purposes they represent the corporation, and their acts as a board are the acts of the principal; but, in the management of its affairs, certain powers are and must be delegated to agents or servants who are clothed with certain discretionary powers. If the master places the entire charge of his business, or a distinct

branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of the ordinary care in the exercise of the business of the master thus intrusted to him is a breach of duty for which the master is held liable." *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034. "To the general rule [that a foreman is a fellow servant of his subordinates], there is this qualification or exception, that where the middleman or superintendent is intrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, the master may be liable for the omissions or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and intrusts, not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials, machinery, and other instrumentalities necessary for the service, to the judgment and discretion of a manager or superintendent, in such case the latter becomes a vice-principal and for his omissions or negligence in the discharge of those duties the principal will be liable." *State use of Hamelin v. Maister* (1881) 57 Md. 287.

"If the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondet superior* applies." *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 603.

"The servant on entering upon the employment is supposed to know and assume this risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery, and the appliances incident to the employment? He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors. If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs. If the master deposes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials, to an agent, then the master acts through the agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a coservant, a collaborer, a coemployee, in the common acceptance of those terms. He is an agent, and stands instead of the principal, and is not a fellow servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus, or appliances he may see fit to provide for them." *Brothers v. Carter* (1873) 52 Mo. 372, 14 Am. Rep. 424, quoted with approval in *Gormly v. Vulcan Iron Works* (1876) 61 Mo. 492.

In another case the court speaks of a general agent employed to represent the master in his absence, and "charged with the duties which it could be incumbent on the master to perform

if he were present." *Mitchell v. Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812.

"It is not the mere fact that the chief engineer had control over the fireman and the coal passer that destroys the relation of fellow servants, between him and the servants, but the additional fact that he succeeded the superintendent and vice-principal, George Smith; that he had full authority to provide for the safety of the servants, and had the management of the factory, and in view of the further fact that it is the duty of the master to supply machinery and tools and to see to their repair, and that they are kept in good repair." *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400.

"For the purposes of managing the business, determining what machinery should be used and how placed, what men should be employed, and how much paid, he was the defendant. He was its mouthpiece and hand. He selected the materials of which the pipe was to be constructed; knew, or ought to have known, whether it was sufficient for the purposes for which it was intended (except as to the latent defects in the material); knew, or ought to have known, whether it was safe to be placed within an inch or two of wood." *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20. See also *Minneapolis v. Lundin* (1893) 7 C. C. A. 844, 19 U. S. App. 245, 58 Fed. Rep. 525; *Quincy Min. Co. v. Kitts* (1879) 42 Mich. 34, 3 N. W. 240.

In the large majority of instances the discharge of these protective functions will be measured by, and coextensive with, the performance of those obligations which are treated as nondelegable by very nearly all the American courts. The few exceptions are discussed in IV. d, 1, 2, *infra*.

But it is impossible, as the authorities stand, to say that the conceptions of general agency and nondelegability of duties can be treated as interchangeable tests of vice-principalship. Most of the courts which have adopted the doctrine of nondelegability of duties have refused to construe it in such a sense that the master would be subjected to responsibility, for any superior servant's lack of care in giving orders (see III. *supra*); and yet a large number of the decisions in jurisdictions where this position is taken proceed upon the hypothesis that a master must answer for injuries caused by complying with the negligent direction of a general manager (see VI. d, *infra*). In some of the states, notably New York, general managers are persons for the purpose of gauging the extent of the master's liability, viewed merely as employees intrusted with the performance of the obligations which are most commonly known as nondelegable, and the theory of a representative capacity existing independently of, and disconnected from, such duties, has, in theory, been entirely discarded. But it has yet to be settled whether all these courts will go to the same length as some of them have already done, and hold that the doctrine thus adopted requires them to absolve the master from responsibility where a general manager's negligent order in respect to the details of the work results in injury (see VI. f, *infra*). The statement that the agent, "in the general arrangement and management of the business, is in the discharge of the duty pertaining to the principal" (*Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 553, 13 Am. Rep. 545), does not solve this question as regards New York, for such a principle still leaves open the possibility of a distinction being drawn between the "general arrangement" and particular orders as to details, a distinction not obscurely suggested by the reasoning in *Brick v. Rochester, N. Y. & P. R. Co.* (1885)

98 N. Y. 211. In *Rose v. Boston & A. R. Co.* (1874) 58 N. Y. 217, Johnson, J., while recognizing the doctrine that a railway company must, at its peril, see that certain functions are discharged, suggests that "its responsibility may be extended to other particulars by the direct exercise of the authority of its managing body, or, perhaps, of its general agents." But what a "general agent" in this sense was conceived to be was not explained.

d. Doctrine that a general manager is not a vice-principal.

1. English and colonial cases.

The strength of the trend of English judicial opinion in the earlier cases toward the doctrine now accepted by most American courts is strikingly indicated by ten cases cited under IV. b. 1, *supra*. Although the courts had undoubtedly rendered some decisions inconsistent with the theory that an employee might be converted into a vice-principal merely by virtue of his being intrusted with certain duties having relation to the protection of the servants (as that of inspection and repair of appliances. *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89; *Hall v. Johnson* (1865) 8 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411), they had never committed themselves to the theory that a master who had completely abdicated his functions of control was not responsible for the negligence of the employee to whom he intrusted the discharge of those functions.

The strongest case is *Feltham v. England* (1806) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676,—but there the decision only goes to the extent of holding that a manager is not the master's *alter ego* where the master retains control of the business himself, the bodily absence of the master at the time of the injury not being enough to override the effect of this principle.

Of course under any theory except the superior-servant doctrine, properly so called, the question whether a foreman is a vice-principal or not is immaterial where the master himself superintends the work. The question of delegation of authority cannot then arise. *Scott v. Cray* (1862) 24 Dunlop, 2d Series, 789.

The whole question therefore was still an open one up to 1868, when the House of Lords decided it in the master's favor by the famous case of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. There the essential facts were as follows: By the faulty construction of a scaffold in a Scotch mine the ventilation was obstructed, and the fire-damp accumulated and blew up the scaffold, thus killing the plaintiff's son. The erection of the scaffold was ordered by one Neish, the manager of the pit, and the persons who actually constructed it were the underground manager, one Bryce, and a miner. Over these employees was the general manager of the defendant's mines. The scaffold had been completed before the deceased was employed, and was blown up immediately after he began to work. There was a verdict for the plaintiff, but the court of sessions granted a new trial on the ground of misdirection, in that the jury were charged that, if they were satisfied that the system of ventilation in the pit at the time of the accident had been designed and completed by the manager before the deceased was engaged to work, and that the defendants had delegated their whole power, authority, and duty in regard to that matter, and also in regard generally to under-

ground operations, without control or interference on their part, the deceased and the pit manager did not stand in the relation of fellow workmen in the same common employment. The House of Lords upheld the ruling of the court of sessions. Those parts of the opinions which relate more particularly to the form of the instruction are as follows. After expressing his opinion as to the substantive law of the case in the passage quoted in the text, Lord Cairns proceeded thus: "Applying these observations to the direction of the learned judge to the jury in this case, I think the first error in that direction is, that it is pregnant with the suggestion to the jury that if they found the scaffold to have been finished by Neish before the deceased was engaged to work in the pit, a liability for the accident was thrown upon the respondents, which would not have existed if the deceased had been engaged before the scaffold was finished. This, my lords, was calculated, as I think, to mislead, and it appears to have misled the jury. But, my lords, I think there is another objection to the charge of the learned judge. He asks the jury to consider whether the respondents had delegated to Neish their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also in regard generally to all the underground operations, without control or interference on their part. My lords, I think there is nothing in the evidence which would warrant a question being left to the jury in these terms. The respondents had delegated no power, authority, or duty to Neish, except in the sense in which a master who employs a skilled workman to superintend a portion of his business delegates power, authority, and duty to the workman for that purpose. It was admitted that the respondents gave no specific directions to Neish as to the manner or form in which the scaffold was to be arranged. They told him that the Pyotshaw seam was to be opened, and they left to him the arrangements underground for opening and working it. And the learned judge ought not, as I think, to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the respondents of a sub-manager or foreman. I think the learned judge ought to have told the jury that, if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident." Lord Chelmsford said: "Although the learned judge, in the course of his summing up, distinguished 'between keeping clear and in good working order the ventilation arrangement or system when completed, and a defect or fault in the arrangement or system itself,' yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation, or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from that 'system of ventilation and putting the mine into a safe and proper condition for working,' which, according to the opinion of the lord justice clerk, in *Dixon v. Ranken* (1), 14 Dunlop, 420, 'it was the duty of the master for whose benefit the work is being carried on to provide.' In the course of working the Haughhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This

must be considered as part of the mining operations, and therefore, even if the accident happened in consequence of the scaffold in the Fyotshaw seam having, under Nelsh's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Nelsh and the deceased were fellow servants, it would have been one of the risks incident to the employment in which the deceased was engaged." Lord Colonsay said: "Now, the direction of the learned judge with reference to the circumstances of this case appears to me to have been objectionable for these reasons: First. It deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of Nelsh for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Nelsh. But the distinction does not appear to have been adverted to. Secondly. It suggests to the jury that if the faulty scaffold was completed before Wilson entered into the employ of the defenders, a liability was imposed on the defenders which would not otherwise have existed, inasmuch as in that case Wilson and Nelsh could in no view have been fellow workmen at the time when the fault was committed by Nelsh. But if it was the duty of Nelsh to provide for the passage of air upwards in the shaft, that duty did not cease with the erection of the scaffold, but continued while the scaffold remained, and he was in fault so long as that duty was not performed. It was not merely the erection of the scaffold on Saturday, but the maintenance of it in a defective state until Tuesday morning, that caused the injury, if it was really caused by the defective construction of the scaffold; and consequently there was no room for the suggested disconnection of Wilson and Nelsh as fellow workmen. Thirdly. The direction points the attention of the jury to the question, whether Wilson and Nelsh stood in the relation of fellow workmen engaged in the same common employment, as the test of nonliability, without sufficient explanation of what constituted that relation; and, in particular without explaining that diversity of duties and gradation of authority are not inconsistent with that relation, and without referring to the effect which might be produced on the liability of the master by a careful selection of proper persons to take charge of different departments in the working of the mine."

In its essential effect, this decision amounts to a declaration that the principle under which each servant is deemed to assume the risks arising from the negligent acts of other servants is not subject to any exception based on the master's abdication of his function of superintendence, and the propriety of regarding the employee to whom this function is transferred as a representative for whose acts the master must answer. But the actual ground upon which Lord Cairns denied the right of recovery is, as will be seen from the subjoined extract from his opinion, that it is not one of the implied terms of a contract of service that the master should supervise the operations incident to his business: "I do not think the liability or nonliability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow workman or collaborateur 51 L. R. A.

of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As said by a distinguished jurist, *Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus* (Donellus, de Jure Civ. L. 9, c. 2, n.). The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master, personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants; for the master might be incompetent personally to perform the work. At all events a servant may choose for himself, between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master, and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow workmen."

In later cases it has been considered that the language of Lord Cairns was to be read as meaning that a fellow servant who is the *alter ego* of the master, who directs but does not labor, is a collaborateur for the purposes of the rule of law on the subject (Johnson v. Lindsay [1891] A. C. 371, 65 L. T. N. S. 97; Hedley v. Pinkney & Sons S. S. Co. [1892] 1 Q. B. 58), and in one of them the ground was distinctly taken that the doctrine of vice-principalship had been "exploded" by Wilson v. Merry. The owners of a colliery within the coal mines regulations act 1872 (35 & 36 Vict. chap. 76), appointed a certificated manager, as required by § 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager. It was held that the fact that the manager was appointed pursuant to the act which placed him "in control" of the mine did not put him in any different position than that he would have held had he been simply appointed manager. Howells v. Landore Siemens Steel Co. (1874) L. R. 10 Q. B. 62, 44 L. J. Q. B. N. S. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335.

This statement, however, is possibly too broad, unless the term *alter ego* is to be taken in a very narrow sense. See IV. e. *infra*.

The decision in Wilson v. Merry has been followed in numerous cases, both in the United Kingdom and in the colonies:

England.

See last preceding citations.

Scotland.

A master was held not liable for the negligence of the manager of a mine. Sneddon v. Moss End (1876) 3 Sc. Sess. Cas. 4th Series, 868 (roof of adit, insufficiently supported, gave way), where Lord Ardmillan, who strongly pro-

tested against this extreme extension of the doctrine, took the view that *Wilson v. Merry* rests on the broad ground that, "in a question of damages for injury inflicted by the fault of one servant on another, down through the whole gradation of servants, the employer is not responsible, unless personal fault is instructed."

Of the general manager and secretary of a limited liability mining company. *Wright v. Dunlop* (1893) 20 Sc. Sess. Cas. 4th Series, 363 (no difference between such an official and a mere certificated manager); *Stewart v. Coltness I. Co.* (1877) 4 Sc. Sess. Cas. 952.

Here the question was left in a somewhat peculiar position by *Conway v. Belfast & N. Counties R. Co.* (1875) Ir. Rep. 9 C. L. 498 (1877) Ir. Rep. 11 C. L. 345. The court of common pleas ruled, on the authority of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30; and *Howells v. Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62, 44 L. J. Q. B. N. S. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335, *supra*, that a traffic manager was not a vice-principal as regards a trackman. The Irish exchequer chamber, ignoring these decisions, laid it down that a master may so depute to an employee the entire control of his establishment as to constitute that employee his *alter ego*; and virtually held that, while all those in the employment of a railway company are *prima facie* fellow servants, this inference may be rebutted by showing that the status of the negligent person was that of a representative or vice-principal. But the ruling of the lower court was not disturbed. Upon the facts, therefore, the decision is not open to exception, even in England; but no court which is bound by the principles formulated in *Wilson v. Merry* can accept the theory of the exchequer chamber as to the possibility of an employee being invested with functions which will put him in the position of a vice-principal.

Canada.

The master is not liable, unless the manager is incompetent. *Smith v. Intercolonial M. Co.* 2 R. & C. (Nov. Scot.) 556 (defective plan of working caused explosion of gas); *Campbell v. General, etc., Asso.* (1863) 1 Geid. & Ox. (Nov. Scot.) 415; *Rudd v. Bell* (1887) 13 Ont. Rep. 47; *Matthews v. Hamilton Powder Co.* (1887) 14 Ont. App. Rep. 261; *Fairweather v. Owen Sound Stone Quarry Co.* (1895) 26 Ont. Rep. 604, where the principle was broadly laid down that where the negligence complained of is that the manager of a quarry prepared a charge so that it failed to explode, and also that the plaintiff was ordered to remove the charge without the proper implements therefor, the action cannot be sustained so far as the liability of the employer depends upon the acts of the manager.

The reeve of a municipality, who takes service as the foreman of a pile-driver under a councillor who undertakes the repair of a bridge, is considered, with respect to anything which he does in that capacity, to be, not the representative of the municipality, but a fellow servant of the workmen whom he directs. *Drew v. East Whithy Twp.* (1881) 46 U. C. Q. B. 107 (hammer of pile-driver fell on workman, owing to its being insufficiently blocked).

In *McInnis v. Malaga Min. Co.* (1893) 25 N. S. 345, the system in vogue at a mine, with respect to the keeping of a quantity of dynamite in the shaft house, was, so far as the evidence disclosed, established by defendants' manager or foreman, and there was no proof that defendants interfered in any way, or directed the mode of working or the system in operation in any particular, before or at the time of the accident; and it was held that if the explosion which caused the injury arose from a defect in 51 L. R. A.

the system of management it could not entitle plaintiff to recover, in the absence of proof that such system was due to the acts or invention of the defendants themselves directly.

In an action for a death caused by a defective boiler, the jury should be specifically charged that the duty of a master, in the event of his not personally superintending the work of repairing his machinery, is to select competent persons for this purpose, and to furnish them with all adequate materials required for the work. *Baird v. Dunn* (1895) 33 N. B. 156 (new trial ordered because this duty was not properly explained).

Australia.

The "running foreman" of a locomotive shed, charged with the duty of looking after the condition of the engines, is not a vice-principal. *Brown v. Board of Works* (1882) 8 Victorian L. Rep. 414, following *Wilson v. Merry*. *Higginbotham, J.*, dissented on the ground that the board could not delegate the statutory duty of supervision which was imposed on them, and that the question whether an employee was a vice-principal was a mixed question of law and fact.

See, however, IV. b, 1, *supra*.

The fact that the employer is a corporation, and can, therefore, act only through a manager, does not affect the operation of the doctrine laid down by the House of Lords. *Howells v. Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62, 44 L. J. Q. B. N. S. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335; s. p. *Wright v. Dunlop* (1893) 20 Sc. Sess. Cas. 4th Series, 363; *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541.

2. American cases.

In the American reports are to be found a considerable number of decisions and *dicta* which, in any reasonable construction, must be regarded as embodying a doctrine not materially different from that formulated by the House of Lords. Some of these are explicitly overruled or discredited by later decisions of the same court; but, after every possible deduction under this head has been made, there is still some authority in favor of the English rule. The cases which seem to require comment in this connection are collected below.

Undoubtedly, however, the great weight of authority in this country sustains the doctrine that the master is responsible for the negligence of general managers and other employees intrusted with similar functions, so far, at least, as such negligence may occur in the exercise of what may be called their official duties (see IV. b, 2, *supra*, and VI. *infra*).

In *Mobile & M. R. Co. v. Smith* (1877) 59 Ala. 245, the company was absolved on the ground that the superintendent of a railroad, when he sends out a repair train to put the road in proper condition after a storm, is not exercising a function of the company itself, but merely performing a duty incumbent on him as one of the company's skilled servants. "He was possessed of a much larger authority than O'Brien [roadmaster] and more directly represented the company. But he was also in its service. If it authorized him to exercise the functions which properly belonged to the company itself, and which it, by its board of directors or president, might perform,—as the selection and employment of the persons who were to do the work of building, equipping, keeping in repair, and operating its railroad,—and through want of care and due diligence he should employ incompetent and unfit persons, whereby injury is done to others of its employees, the company would be liable therefor

to them. He would be its substitute in the performance of such an office. So, perhaps he would be when intrusted with the duty of procuring the materials for the work. But a railroad company, or the stockholders and directors thereof, are not supposed to be civil engineers, or to possess the scientific or mechanical skill necessary to the building, repairing, and operating of a railroad. The company is expected to employ—and must rely on—other persons who possess such skill to do such work; while its duty further is to procure and furnish the requisite and proper materials and to pay the wages of the numerous employees."

Commenting on the functions of the superintendent, the court said: The instruction of the trial judge that the defendant was absolutely liable for any negligence of the superintendent was expressly disapproved. The earlier case of *Walker v. Bolling* (1853) 22 Ala. 294, simply decides that a general manager (here the captain of a steamer), is the agent of the master as regards the proper performance of his duty to employ competent servants, and is therefore not necessarily in conflict with the general principle formulated in *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672.

Most of the cases which came before the courts in this state since 1885 are naturally controlled by the provisions of the employer's liability act passed in that year; but there is nothing in the later decisions which can be said to indicate that, so far as the rights of the parties may be governed by the common law, the views expressed in this ruling have undergone any modification. In *Postal Teleg. Cable Co. v. Hulse* (1898) 115 Ala. 193, 22 So. 854, the supervising employee was merely the foreman of a gang of men employed in the construction of a telegraph, and therefore the position of a general manager did not directly come into question. But the decision in *Mobile & M. R. Co. v. Smith* was thought, in *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252, to have gone to the "extreme verge of soundness." *California*.

In one case the supreme court went so far as to hold that a complaint which counts on the negligence of a fellow servant, alleging that the defendant did not use ordinary skill in selecting him, is demurrable where the recital of facts also shows that the fellow servant was employed by the defendant's superintendent, and there is no averment that such superintendent was negligently selected. *Coiller v. Steinhart* (1875) 51 Cal. 116.

But this ruling is decidedly inconsistent with other decisions in this state. See IV. b, 2, *supra*, and *Summary*, VII. *infra*. *Indiana*.

Wilson v. Merry was also relied upon in *Columbus & I. C. R. Co. v. Arnold* (1869) 31 Ind. 174, 90 Am. Dec. 615, to support a decision that a master machinist was not a vice-principal; but this ruling is inconsistent with several later cases in the same court. See II. f, 6, *supra*, and *Summary*, VII. *infra*. *Maine*.

In 1860 the supreme court regarded it as well settled that, "if a company exercise ordinary care to employ servants of good habits, and of competent skill and experience, in their various departments, and to furnish them with machinery and apparatus of approved construction and material, their responsibility extends no further." *Beaulieu v. Portland Co.* (1860) 48 Me. 201.

But the principle, though verbally it is hardly distinguishable from that laid down by the House of Lords, is not deemed, in this state, to preclude recovery for the negligence of a general

superintendent. See *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100. *Maryland*.

The doctrine that a railway company would be responsible for an injury caused by defective appliances if the defect should be known to an employee occupying the position of a superintendent, is recognized, *arguendo*, in *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

But in that case it was held that an inspector of machinery and rolling stock was not a vice-principal, and the same ruling was subsequently made as to a master of machinery who sent out a defective engine, in *Shauck v. Northern C. R. Co.* (1866) 25 Md. 462.

In later cases the position of the court was still further defined by the defendants that vice-principalship cannot be predicated as to one who merely exercises supervision, but only as to one to whom is also given the selection of subordinate servants, and the procuring of the instrumentalities necessary for the service. State use of *Hamelin v. Maister* (1881) 57 Md. 287.

That a railway company was liable for the negligence of its superintendent in purchasing a defective engine. *Cumberland & P. R. Co. v. State use of Moran* (1875) 44 Md. 283.

And that the chief manager of charcoal works, who works at charging the retorts, etc., with no direct charge over the machinery, but with the right to repair it, and with the duty to see whether it is out of repair, but with no authority to buy, alter, or change machinery, where the works and machinery are inspected once or twice a week by different officers of the company, is a fellow servant with a man employed in such works in using an apparatus consisting of a large bucket hanging from a yoke, which runs on a wheel on an overhead track, and is not a vice-principal whose negligence as to such workman will make the employer liable. *Yates v. McCullough Iron Co.* (1868) 69 Md. 370, 16 Atl. 280.

A comparison of these cases might seem to indicate that the position of a superintendent in this state is determined by an assumed distinction between the duty of furnishing instrumentalities, including servants, and the supervision of those instrumentalities in the ordinary operation of the establishment, with a view to securing that they shall be in an efficient condition. So far as he or any other official may be intrusted with the former duty, he will be a vice-principal. So far as he may be merely discharging the latter duty, he will be a mere servant.

But in *Yates v. McCullough Iron Co.* there was the very material circumstance that the master must have been retaining a general control over the business, as he used frequently to inspect his works, and in State use of *Hamelin v. Maister* the language used is fairly open to the construction that an employee who is a "universal agent" in the management of the business as a going concern is a vice-principal.

It cannot, therefore, be affirmed with certainty that the doctrine in this state is absolutely identical with that of *Wilson v. Merry*. Probably, however, this court would not be prepared to go to the same length as that case; for, although a train dispatcher has been denied to be a vice-principal in the still more recent case of *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994, the default there alleged consisted, not in controlling the movements of trains improperly, but in sending out unfit brakemen, who were not employed by him, but by the division superintendent. The reasoning of the court seems, at all events, to assume that such a superintendent might have been held a vice-principal if the question had

presented itself, and the opinion certainly leans towards the view that, if the delinquency had been in connection with the moving of trains, the servant would have been entitled to recover. *Massachusetts*.

In *Albro v. Agawam Canal Co.* (1850) 6 Cush. 75, the master was held not liable where the superintendent in charge of a large manufacturing establishment was alleged to have negligently directed a person employed in the manufacture of gas to throw all the weights off a gas meter, the result being that the gas was forced into the mill and induced spasmodic fits in the servant.

In the next year the same court defined its position still further in *King v. Boston & W. R. Corp.* (1851) 9 Cush. 112: "As a corporation can act only through the agency of some individual person or persons, a question has sometimes been made as to what particular officers or persons should be considered as the corporation itself, as distinct from the servants of the corporation, for the purpose of settling what should be considered as the neglect of the corporation itself, and not of its servants. I am not aware that there has been any direct adjudication on this point. But, assuming that it is correct, as a general principle, that the responsibility as to the sufficiency of the road rests on the defendants themselves, still, their obligation, so far as respects those in their employment, would not extend beyond the use of ordinary care and diligence, and they would be held responsible only for the want of ordinary care and diligence. If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants or laborers, as much as any other part of the business of the corporation."

Unless it is assumed that the case last cited had escaped the notice of the writer of this passage, he would seem to have supposed that the responsibility of an employer for the defaults of a general manager was left by it an open question in *Massachusetts*. But whether his language is to receive this construction or not, that question can no longer be regarded as doubtful since the decision in *Floyd v. Sugden* (1883) 134 Mass. 563. There the purchaser of a mill property hired one Gilman to take the entire charge of the premises, and make all repairs that in his judgment might be necessary to put them into a proper condition for use or for sale. Gilman, in accordance with these instructions, assumed the entire control of the premises, collecting the rents, selecting, hiring, and discharging the employees, purchasing and providing whatever tools, appliances, and machinery he deemed necessary, and paying all bills, including the wages of the employees, with money furnished for that purpose by the defendant, who withdrew entirely from the management of the repairs, and did not undertake to exercise any discretion or control over the acts of Gilman or the employees. It was held that the following instruction was rightly refused: "If the defendant withdrew from the management of the work, and intrusted to Gilman the entire charge of it, exercising no discretion and no oversight, than the defendant is liable for the neglect by Gilman to cause the trench to be shored up, and to construct a platform in the bottom of the trench over the penstock for the plaintiff to stand upon, if in the exercise of reasonable care such appliances were necessary for the safe performance of the service."

If the circumstances specified in this instruction do not constitute a "universal agent" (see *Gallagher v. Piper*, IV. b, 1, *supra*), it is difficult for the court to say that it is not.

cult to see how any degree of independence in the control of a business can ever be sufficient for that purpose.

Taking this decision in connection with the fact, as has been shown in *note* to *Walkowski v. Penokee & G. Consol. Mines* (Mich.) 41 L. R. A. 38, XI. c, that doctrine of nonassignability of duties is not accepted in *Massachusetts* in the sense in which it is understood by most American courts, it is apparent that there is no material difference between the law in this state and in England.

The recent case of *McGuerty v. Hale* (1894) 161 Mass. 51, 36 N. E. 682, where the master was held not liable for the omission of a foreman of a factory to ventilate a workroom properly, is of neutral import as respects the present subject, as it need not necessarily be considered to raise the question of the position of a general agent.

But in the still later decision in *Meehan v. Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518, the delinquent employee is described as a superintendent in full control of a factory, and would therefore have been regarded as the master's representative in most states.

The passage of the employer's liability act in 1887 has naturally had the effect of diminishing the number of decisions in *Massachusetts* which could throw light on the subject. *Mississippi*.

The doctrine of the House of Lords in *Wilson v. Merry* has been explicitly followed, the court laying it down that, "in order to hold the railroad company responsible to an employee (as conductor on its train) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants, or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road, or in chargeable with negligence for not knowing." *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178. See also *New Orleans, J. & G. N. E. Co. v. Hughes* (1873) 49 Miss. 258.

This principle requires the conclusion that a general manager is not a vice-principal, though no specific ruling to that effect has been made. It has been held, however, that the train dispatcher of a railway company is a co-servant of a fireman. *Millsaps v. Louisville, N. O. & T. R. Co.* (1891) 69 Miss. 423, 13 So. 696,—a doctrine contrary to that now held in most jurisdictions.

But in this state the superior-servant doctrine has been introduced by the Constitution of 1890, § 193, and § 3559 of the Code of 1892. *Missouri*.

In *McDermott v. Pacific R. Co.* (1860) 80 Mo. 115 (defective bridge) the superintendent of a railway was denied to be a vice-principal, and the master's nonliability was distinctly put upon the ground that there was no allegation that the defendant had failed to exercise ordinary care in the selection of servants. But, so far as Missouri itself is concerned, this is no longer the law, since that state has not only adopted the superior-servant doctrine (see III. *supra*), which, of course, imports liability under the supposed circumstances, but also the doctrine of the nonassignability of duties such as the superintendent was charged with not performing (see, for example, *Herdler v. Buck's Stove & Range Co.* (1896) 136 Mo. 8, 37 S. W. 115).

New Jersey.

In one case it was laid down that the president of a corporation so far represented it that it was liable for his acts of negligence, but declined to go into the question whether the lia-

bility extended to any of the employees properly so called. *Smith v. Oxford Iron Co.* (1880) 42 N. J. L. 467, 36 Am. Rep. 535.

Quite recently, however, in deciding that a foreman of the entire work of constructing a sewer was not a vice-principal (*Curley v. Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731), this court relied on *Wilson v. Merry*, a citation which seems to place it in the same class as that of Massachusetts; especially as it had previously used language which implied that even employees who have full charge of a business, or a distinct department of it, are fellow servants of their subordinates (*O'Brien v. American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324), and has explicitly laid down the rule that the master sufficiently discharges his duty as to the inspection and repair of appliances by employing competent persons to make the inspection and repairs. *Harrison v. Central R. Co.* (1865) 31 N. J. L. 293; *Rogers Locomotive & Mach. Works v. Hand* (1888) 50 N. J. L. 464, 14 Atl. 766; *Essex County Electric Co. v. Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427; *McAndrews v. Burns* (1876) 39 N. J. L. 117.

It must be admitted, however, that it is extremely difficult to say what view is really predominant in this state, as in other cases the court distinctly recognizes the doctrine that a master may be liable for the negligence of a foreman in failing to keep the place of work safe. *Van Steenburgh v. Thornton* (1895) 58 N. J. L. 160, 38 Atl. 380 (trench caved in); and distinguishes, *arguendo*, a foreman who is simply supervising the building of a boat and working with his subordinates from an agent in full control and acting as middleman exclusively. *Olsen v. Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694.

It has also applied the doctrine that, where the duty of inspecting and repairing appliances is cast upon an employee not actually engaged in the work which the plaintiff is doing, such employee is the master's representative. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten* (1894) 57 N. J. L. 400, 31 Atl. 619 (a storekeeper in this case furnished a worn cable for use in unloading a vessel).

The distinction suggested by these last two cases as compared with the others, is, to say the least, extremely subtle, and does not appear to be recognized by any other court, at least in the form in which it is here stated. Nor is it apparent how the decision in *Van Steenburgh v. Thornton* can be reconciled, or the facts, with *Curley v. Hoff* (1898) 62 N. J. L. 758, 42 Atl. 731, *supra*.

The doctrine of *Van Steenburgh v. Thornton*, however, was approved in a case decided the year before *Curley v. Hoff*, the court holding that the existence of the duty to provide a safe place of work implied the nonassignability of the duty to warn workmen in time to get out of danger when a blast was about to be set off. *Belleville Stone Co. v. Mooney* (1897) 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764, affirming (1897) 60 N. J. L. 323, 38 Atl. 835.

Coming from a court which had previously gone so far in the direction of absolving the master for the negligence of the supervising agents, this ruling is quite remarkable, as it extends the doctrine of nondelegable duties to circumstances which by most courts are regarded as being outside its operation.

New York.

In *Brown v. Maxwell* (1844) 6 Hill, 592, 41 Am. Dec. 771, the earliest case in New York in which the doctrine of common employment was applied, the court assumed that the principle of the decision in *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, required the conclusion that the foreman of a stone-cutter's

establishment was a fellow servant of the workmen under him; but it is not certain, from the report, what the precise functions of the foreman were. The master may have retained a general supervision over the work, and, if so, the case is not inconsistent with later ones in the same state.

In *Warner v. Erie R. Co.* (1867) 49 Barb. 558, the supreme court held a superintendent of bridges to be a vice-principal, but the decision was reversed by the court of appeals (1868) 39 N. Y. 408. *Wilson v. Merry* and *Hard v. Vermont & C. R. Co.* (see below under Vermont decisions) were expressly approved.

The language used in the opinion embodies doctrines wholly inconsistent with later decisions in New York, and to this extent it is not law; but the decision itself may be supported on the facts, as the supervising employee was really not proved to have been culpable in the performance of his duties. It should be remembered that this case dates from a period at which the theory of nondelegability of duties was not as yet established in this state. That theory was first enunciated in its modern form by Chief Justice Church in *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, and the authority of *Wilson v. Merry* was still recognized, even in 1876, when it was held that a master could not be held liable for the negligence of an employee who constructed a wash-tub with defective supports. *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573. Church, Ch. J., dissented, considering the decision to be inconsistent, not only with the *Flike* Case (1873) 53 N. Y. 549, 13 Am. Rep. 545, *supra*, but with *Laning v. New York C. R. Co.* (1872) 49 N. Y. 522, 10 Am. Rep. 417, which proceeded on the theory that the duty of hiring fit servants could not be delegated.

Vermont.

In *Hard v. Vermont & C. R. Co.* (1860) 32 Vt. 473, the principle was laid down in broad terms that the master "does not warrant that the servants shall faithfully discharge their duties in keeping the machinery in its original safe condition," a doctrine which, although it was here applied with the effect of absolving the employer from responsibility for the negligence of a master mechanic, possibly implies that even a general manager would not have been regarded as a vice-principal by this court. But this decision, whatever its import, was overruled in *Davis v. Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, and the doctrine of *Wilson v. Merry* was expressly repudiated in favor of that of the nonassignability of certain duties.

e. Opposing theories reviewed.

The foregoing review of the cases turning upon the relation of general managers to their subordinates would seem, at first sight, to indicate that the inquirer has once more reached one of those logical *impasses* which so often confront him in this department of law,—that is to say, an antagonism of opposing theories which are dialectically unassailable, provided the postulates on which they are founded are granted. It must be admitted, however, that the arguments in *Wilson v. Merry* involve some grave difficulties which need clearing up before it can be admitted that, even supposing the postulate which it lays down is sound, the proper inference from that postulate has been drawn.

With all deference, it is submitted that the eminent judges who took part in this famous case were guilty of a complete *petitio principii* when they assumed that, because the master must sometimes intrust his business wholly to

the management of others, and is even under the obligation of doing so whenever he does not possess that degree of technical skill which would qualify him to conduct the business in person, his duties to his servants, "in the event of his not personally superintending the work," are limited to selecting "proper and competent persons to do so, and to furnish them with adequate materials and resources for the work." Per Lord Cairns.

It is quite possible to concede that large industrial establishments could not, and, in many instances, ought not to, be conducted upon any other footing than that of control and supervision by competent experts hired for that purpose (as was remarked by Lord Ormrod in *Stewart v. Coltness I. Co.* (1877) 4 Sc. Sess. Cas. 4th Series, 952), and at the same time to deny that the situation thus regarded as inevitable, or most conducive to the interests of all parties, necessarily implies that the servant should be deemed to accept the risks which are incident to the master's delegation of his functions of control. The logical propriety of such a deduction depends altogether upon whether any special considerations can be suggested which are of sufficient force to override the effect of the universal principle of jurisprudence, *Qui sentit commodum sentire debet et onus*, and with this aspect of the question the House of Lords has made no attempt to deal. The bearing of this maxim upon the extent of an employer's responsibility has been far too much slighted in judicial discussions of the subject; but its importance has been duly recognized by some courts. See, for example, the following passage from a very recent case: "A master choosing to have a scattered or diversified business which he cannot personally look after must needs have a representative on the ground, and hence, taking the benefits of such an extended business, he must bear the burdens necessarily incident to its transaction." *Grattis v. Kansas City, P. & G. R. Co.* (1899) 153 Mo. 380, 48 L. R. A. 309, 55 S. W. 108.

If a concern is set into operation which it is impossible or improper for the owner to supervise in person, whether because it is too extensive or because he lacks the necessary skill and knowledge, or, as happens in an even increasing number of instances, because it is the property of a corporation which can act only by agents, it is certainly by no means self-evident that the law ought not to require the owner of the concern to bear, among the other drawbacks of such an arrangement, any which may arise from using the services of others to represent him in the control of the work and the workmen. Granting that it was settled by the authorities preceding *Wilson v. Merry* that, so long as the master maintains a general supervision over his business the negligence of all employees, whatever their rank, must be regarded as one of the ordinary risks of a service, it may fairly be urged that neither by these decisions themselves, nor by the principle which they embody, is the conclusion required, that a master who abdicates all his functions is not answerable for the negligence of the employee to whom those functions are transferred. It may be that there are some great considerations of public policy involved which would justify the application of the doctrine of common employment to this extreme case, but in none of the opinions delivered in the House of Lords is it intimated what those considerations are. The necessity for strengthening the argument at this point becomes still more imperative when it is remembered that, even from a purely juridical standpoint, it is, to say the least, doubtful whether there is a preponderance

of abstract equity on the side of the rule adopted.

It has already been mentioned (IV. b. *supra*) that several of the most distinguished English judges have declined to concede the justice of a rule which entails the anomalous consequence that masters who do not interfere at all in the conduct of their business incur a smaller measure of responsibility than those who act as their own managers. Lord Cockburn, one of the Scotch judges who accepted under protest the English doctrine that a master is not liable for the negligence of a supervising employee, considered that, although this doctrine was supposed to be recommended by its own inherent justice, "the justice of the case is exactly in the opposite direction." See reporter's note to *Searle v. Lindsay* (1861) 11 C. B. N. S. 429.

In *Davis v. Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, the court, after noting that the view taken by the House of Lords "places the liability of the master upon the duty he owes the workman arising from their relations to each other," and "implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman," he is liable therefore, proceeded thus: "The question is naturally suggested, Why should he not also be liable for the negligence of the agent or servant, whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skillful? Is such an agent or servant, while performing the duty cast by the relation upon the master, a fellow workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty as this defendant and all corporations must, by agents and servants, secure an immunity from liability which the master, who personally enters the service to manage and direct the performance of the work, does not enjoy."

If the employer's liability act of 1880 is to be taken as embodying the opinion of the majority of nonprofessional Englishmen on this question, the justice of the rule, when referred to the more general ethical tests, which laymen are quite as competent to apply as lawyers, is even less clearly beyond controversy.

It would appear, therefore, that the decision in *Wilson v. Merry* is open to exception in this respect at all events, that no attempt is made to bridge over the logical hiatus indicated by the fact that in view of that decision having extended the doctrine of common employment to a point at which its antagonism to a general maxim of jurisprudence becomes especially manifest and direct, and its justice particularly questionable, the fundamental principle relied upon by the House of Lords cannot be conceded to involve, as a necessary corollary, the conclusion deduced from it.

But this is not the only weak point in the arguments. The doctrine propounded amounts, as the present writer ventures to think, to a logically untenable compromise between the admission and rejection of the nondelegability of certain obligations imposed by the law upon the master. From the opinion of Lord Cairns it seems impossible to draw any other inference than that the duties of the master to "select proper and competent persons to superintend the work, and to furnish them with adequate resources and materials for the work," are regarded by him as absolute; and this seems to be also the view, not only of the other law

lords, but of the judges who in subsequent cases have followed *Wilson v. Merry*.

Lord Chelmsford and Lord Colonsay both admitted that a mine owner may be liable for defects in the general arrangement or system of ventilation, and contrasted such a cause of injury with that under discussion. The latter said (1 L. R. 1 H. L. Sc. App. Cas. 344, 19 L. T. N. S. 30): "I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself,—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials,—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible."

In a later appeal from Scotland the House of Lords held that a complaint alleging an injury from the defective splicing of a ship's tackle is demurrable unless, at all events, it also avers that the splicing was defective at the time the vessel was equipped. *Gordon v. Pyper* (H. L. 1892) 20 Sc. Sess. Cas. 4th Series, 23. Lord Watson's position was that a mere defect in the splicing of a ship's tackle, which is obvious, does not constitute any default of duty on the part of the shipowner, if he provides the master and crew with the proper materials for correcting the defect in the course of the voyage.

In *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541, Huddleston, B., after referring to the opinion of Lord Cairns in *Wilson v. Merry*, proceeded thus: "To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The *onus* is upon him, and failing to do so he fails to establish negligence. . . . By suitable means and resources, we think must be meant all that was necessary to carry on the business, including premises reasonably safe for that purpose, as, for instance, in case of a mine, of a proper system of ventilation as pointed out by Lord Colonsay in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30; but there was no evidence to show that the premises of the defendants were dangerous, that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to show that such persons were not proper and competent for the defendants to employ."

In one Scotch case a part of the judges, while denying that negligence was established by the evidence admitted that the failure of a mining company to supply timber for the support of the roofs imported a breach of duty. *Stewart v. Coltness I. Co.* (1877) 4 Sc. Sess. Cas. 4th Series, 952.

In another it was held that a master is not relieved of his responsibility for defects in the permanent equipment of his premises by the 51 L. R. A.

mere fact that the work of equipment was intrusted to a competent manager. *M'Killop v. North British R. Co.* (1890) 23 Sc. Sess. Cas. 4th Series, 768 (water tank placed so as to obstruct the view of engine drivers at a critical point of the line).

In *Le May v. Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 203, Hagarty, C. J. O., said: "I look upon the duty of seeing that a track is fit for use and properly safeguarded as required by law before its being used as a duty which the company must perform at its peril, and that it will not excuse them to prove that they gave directions to have everything done rightly and legally. It might present a different aspect if the portion of road had been all right at its opening,—the frog duly packed,—and that by some servant's neglect it had not been repacked. The original omission to pack the frog cannot, as I think, be properly excusable as the negligent act of a servant in a common employment with plaintiff."

The line which the reasoning took in *Wilson v. Merry*, and the weight of judicial opinion, evidenced by the above cases, in favor of making a distinction between the quality of the duties of a master in respect to original construction and subsequent maintenance, has cast doubt upon the correctness of some earlier decisions which seem to ignore that distinction.

In one it was broadly laid down that, in order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine. *Potts v. Port Carlisle Dock & R. Co.* (1860) 8 Week. Rep. 524, 2 L. T. N. S. 283.

In another it was held that a workman cannot recover damages from his employers for injuries sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly intrusted the execution of the work to an incompetent person. *Brown v. Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94. There the accident was caused by the negligence of one Dean, the clerk of the works employed by the defendant to supervise the contractors for the construction of the several parts of the building. The position of the judges is apparent from the following extracts. At one stage of the argument Martin, B., observed: "It is necessary to show either personal negligence on the part of the defendants or the workmen acting under their orders, or that the defendants employed workmen whom they knew to be unskilful. The plaintiff must establish this, that if persons building a house employ a man to superintend the works, and allow them to be completed without their personal superintendence, and many months after the negligent act is done, the owners not being aware of it, the house falls and injures a person whom they employed to work there, they are responsible. That cannot be done without showing some contract or warranty to the person employed that the state of the house was such that it was safe for him to work in it." The case of *Barton's Hill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 288, 4 Jur. N. S. 767, being cited by counsel, the same learned judge remarked: "The question in that case was whether a master was liable for injury to a servant caused by the negligence of a fellow

servant. In all the cases in which a master has been held liable for injury to a servant there has been a want of reasonable care at the very time the accident happened, and which immediately and directly caused it; here it is sought to go far back, and I do not see the limit; it might be fifty years after the house was improperly built." In the opinion delivered for the whole court it was said: "It is enough to say that our judgment is founded on this, that there was no evidence of personal negligence on the part of the company or any of the members of it: nor was it shown that there was negligence on the part of any person acting as their servant or under their orders, for which they are responsible, either by having given specific directions as to the mode in which the work should be done, or by having any reason to suppose that the person to whom they intrusted the duty of seeing that it was properly performed, was not a person of ordinary competence."

In Massachusetts, the state which has most closely followed the English decisions, the non-delegability of the duty of furnishing appliances, as distinguished from that of repairing them, has always been recognized. See, for example, *Seaver v. Boston & M. R. Co.* (1860) 14 Gray, 466; *King v. Boston & W. R. Corp.* (1851) 9 Cush. 112; *Moynihan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574.

Compare also the Maryland cases cited in IV. d, 2, *supra*.

The decision in *Wilson v. Merry*, therefore, really goes no further than to deny that there is such a functionary as a vice-principal in matters connected with the operation of a going concern, and leaves the obligations of the master absolute, so far as regards the original condition of the plant and the capacity of the employees at the time when they are hired.

From the conclusion that the master's duty to select proper superintendents and furnish proper materials is absolute it seems impossible to escape without involving ourselves in the self-contradictory proposition that one may be subject to a positive duty, and at the same time not liable for the defaults of the agent appointed to discharge that duty.

This fallacy, it may be remarked in passing, underlies the reasoning of Mr. Beven (1 Neg. 738), by which he seeks to establish that the remarks of the law lords in *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748, do not support the doctrine of vice-principalship. See IV. b, 1, *supra*.

That the adoption of any such distinction as that suggested involves some consequences sufficiently anomalous to throw doubt upon its validity may, we think, be shown without any difficulty.

If the duty of furnishing proper instrumentalities at the inception or extension of a business is absolute, there is no rational ground upon which it can be denied that the duty of replacing those instrumentalities, when they are no longer fit for use, is also absolute. This proposition is too self-evident and elementary to need, or to have been embodied in many specific authorities. See, however, *Moynihan v. Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574.

And if the duty of replacement is absolute, it seems to be a natural, if not necessary, deduction, that the same absolute quality should be ascribed to the duty of seeing that the instrumentalities do not fall below the obligatory standard of efficiency and safety, while they are in use. The maintenance or restoration of that standard being the essential objects to which both duties have reference, it is a mere scholastic refinement to differentiate them in the present connection.

The conclusion, therefore, seems to be irre-
51 L. R. A.

sistible that the qualified concessions made in *Wilson v. Merry*, to the theory that there are certain nondelegable duties, have the effect of rendering the arguments deficient in logical symmetry, if not actually self-destructive, and that the doctrine of vice-principalship ought either to be wholly rejected or extended so as to cover the cases which the House of Lords excludes from its domain.

V. Relation of employees in charge of departments to their subordinates.

a. General statement.

As the greater includes the less, the rejection of the doctrine that the manager of an entire business is a vice-principal necessarily involves the consequence that the master is not responsible for the negligence of the manager of a single department of a business.

The decision of the House of Lords in *Wilson v. Merry* (IV. d, 1, *supra*) though rendered in terms which are broad enough to cover the case of managers of a whole business, really dealt with the negligence of an employee who, under the theory of the cases to be cited below, would possibly be a manager of a department. That it was the intention of the trial judge to propound a theory not materially different from the one embodied in those cases is apparent from the terms of his instruction, as well as from the following remarks by Lord Chelmsford on the propriety of putting to the jury the question whether the defenders had delegated to Nelsh (the underground manager) their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also generally in regard to all the underground operations, without control or interference on their part. The words "delegated," and "without interference or control," are ambiguous, or, at all events, misleading, expressions. Every master may be said to delegate to his servant the power, authority, and duty of his particular department in the service, without his interference and control, and yet he would be responsible to third persons for the consequences arising from the negligence of that servant in the performance of the duties so intrusted to him. What the learned judge meant to tell the jury was, that if Nelsh "had the complete power of engaging and dismissing workmen as he pleased, and the ventilation process was entirely left to him without the direction or control of the defenders, he was a superintendent, and not a fellow workman with the deceased." But if the learned judge had so directed the jury, it would, in my opinion, have been a misdirection.

On the other hand, no court which treats a general manager as a vice-principal can, without disregarding logical considerations of imperative force, decline to hold the master liable for the negligence of at least some classes of supervising employees of lower grade than managers of an entire business.

The control of a single important branch of an extensive and complicated business, notably that of transportation, often involves the management of what is virtually a separate industrial concern, and implies that the controlling agent is left as completely to the exercise of his own discretion as if he were actually conducting an entire concern of a similar description for an independent proprietor. Of such an agent it would be wholly illogical to affirm that, so far as the master's liability is concerned, he should not be placed on the same footing as the general manager, which to all intents and purposes he is.

See the extract from the opinion in the Baugh Case, as set out in V. c. *infra*.

What may be regarded as the leading case on the subject of departmental vice-principals is Chicago, M. & St. P. R. Co. v. Ross (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (conductor held a vice-principal), which was made to turn upon the principle that there is "a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." Chicago, M. & St. P. R. Co. v. Ross (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

This celebrated decision, as we are informed by an eminent Federal judge, was a surprise to the profession, and was regarded as carrying the doctrine of departmental control to an extreme (Brewer, J., in Howard v. Denver & R. G. R. Co. (1886) 26 Fed. Rep. 837), and by the later decisions of the Supreme Court the range of positions to which the general principle enunciated was at first supposed to be applicable has been considerably narrowed. See VII. d. *infra*.

"The reason of the rule of the liability of the master for the servant's negligence, as declared in the Ross Case and interpreted in the Baugh Case, does not consist in the fact that the conductor of the train was the superior officer of the injured servant, but rather in the fact that the latter was in the department of the former; and the conductor was held to be a vice-principal, not because he could enforce the obedience of subordinate servants placed under his charge, but because he was clothed with the power to govern the movements of the train which constituted his department." Northern P. R. Co. v. Beaton (1894) 12 C. C. A. 301, 29 U. S. App. 88, 64 Fed. Rep. 563.

The doctrine formulated by the supreme court of Georgia on the authority of the Ross Case is as follows: An agent or employee of a corporation, who, in the discharge of his general duties, has charge of a particular branch of the corporation's business, as to which he acts in the capacity of a vice-principal, and as such employs and has control of all the subordinate servants who are at work under him, is, as to one of the latter whose duty it is to obey his order and who takes his orders from no other source, a quasi-master, and not a fellow servant, in the sense that such subordinate servant will have no right of action against the corporation for personal injuries caused, without fault on his part, by the negligence of the superior. Taylor v. Georgia Marble Co. (1895) 99 Ga. 512, 27 S. E. 768.

There is, however, some want of precision in the recent statements of one of the Federal circuit courts of appeal, that "the Ross Case . . . has been so limited to its peculiar facts as to make it of no force as authority in any case where those facts are not exactly presented." Grady v. Southern R. Co. (1899) 34 C. C. A. 494, 92 Fed. Rep. 491.

It is true that since the Conroy Case (see V. d, 2, *infra*) the specific ruling as to the relation of a conductor to his subordinates is discredited, but a decision declaring a principle to be wrongly applied under the particular facts as evidence in an earlier case cannot properly be spoken of in the terms used by the court of appeals. On the contrary, the correct way of describing its present status as a precedent would rather be to say that it has been overruled as a decision on the facts, but still stands unshaken in so far as it enunciates a general principle. 51 L. R. A.

But the general principle itself has been steadily adhered to, and, as the cases to be cited in this subtitle clearly show, is now fully recognized as a test of representative capacity, not only by Federal judges, but also by a large and increasing number of the state courts. Considered in its relation to the superior-servant doctrine, the vice-principalship of departmental, like that of general, manager may be viewed as the result either of merger or of substitution, operating as regards all employees above a certain grade. Compare IV. a, *supra*. In this connection, however, it will seldom be material where the division line between departmental managers and other superior servants should be drawn. If it is once admitted that all servants exercising control are vice-principals as regards their subordinates, the only theory upon which the plaintiff's right of recovery can possibly be enlarged by fixing the character of departmental manager upon the delinquent employee is that the range of official acts for which the master is responsible is wider in the case of a general agent like a departmental manager than in the case of a superior servant of lower rank. Whether such a distinction is recognized in any of the courts is quite doubtful. See VI. *infra*, where it will be shown that the difference of opinion which prevails as to the liability of a master for the manual acts of a vice-principal is illustrated by cases decided both in states where the superior-servant doctrine is rejected and in states where that doctrine is applied.

This is a convenient place to refer to several examples of a use of the term "department" which, if the doctrine of departmental control is to form an integral well-defined division of the law of employer's liability, must be pronounced inaccurate.

Thus, one court lays it down that, as long as a mere foreman of a department of a business keeps within the line of his duties as such he is a mere fellow servant of one of his subordinates. Indiana Car Co. v. Parker (1885) 100 Ind. 181.

Another denies that the foreman of the "silver-room department" of smelting works is a vice-principal. Nixon v. Selby Smelting & Lead Co. (1894) 102 Cal. 458, 36 Pac. 803.

Another was guilty of a double verbal inaccuracy when, on the one hand, it refused to predicate vice-principalship in the case of the foreman of the "carpenter department" under a corporation (Dewey v. Parke, D. & Co. (1889) 76 Mich. 631, 43 N. W. 644), and spoke of a mere foreman of a room in a factory as a "foreman of a department" (Findlay v. Russell Wheel & Foundry Co. (1896) 108 Mich. 286, 66 N. W. 50); and, on the other hand, declared a certain employee to be a vice-principal, and not a mere "department leader." Ryan v. Bagaley (1883) 50 Mich. 179, 45 Am. Rep. 35, 15 N. W. 72.

In all these instances it is clear that the "department" intended is not such a subdivision of the business as is contemplated in the decisions to be reviewed below.

The same loose use of the term sometimes produces the converse result of seemingly committing a court to an adoption of the doctrine of departmental vice-principalship, when there was probably no intention of applying that doctrine, as where it was ruled that a jury was rightly instructed that if a fireman was placed under an engineer as his superior, and this superior had a right to give orders in his department, the engineer was to be regarded as the representative of the employer. Mann v. Oriental Print Works (1875) 11 R. I. 152.

The true *rationalis* of this decision is that the doctrine which denies that the power of control

constitutes a servant a vice-principal ceases to be operative, where the exercise of that power takes a subordinate outside the scope of his employment. See *note* to *Olson v. Minneapolis & St. L. R. Co.* (Minn.) 48 L. R. A. 796.

On the other hand, the words "department" or "branch of business" are frequently used (as already noted III. b, *supra*) where the superior-servant doctrine is adopted to describe the functions of a class of employees who would certainly not be regarded as heads of departments in jurisdictions where the mere power of control does not imply vice-principalship.

In some of the Missouri cases in which an employee in charge of a department of the business is regarded as representing the master, the officials are higher than those just mentioned, but yet lower than most courts include in the category of vice-principals, and it is difficult to say whether the use of this phraseology is to be taken as implying an adoption of the doctrine now under discussion, or mere verbal laxity. *Dayharsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 (foreman of railway roundhouse); *Devany v. Vulcan Iron Works* (1877) 4 Mo. App. 236 (foreman in charge of the entire work of loading barges at the wharf of a foundry); *Hoke v. St. Louis, K. & N. R. Co.* (1882) 11 Mo. App. 574 (a road-master).

In Michigan, where an employee must certainly be a head of a department to be a vice-principal, the master has been held liable for the acts of agents of no higher grade than these. (See next Subdivision, and *Summary*, VII. *infra*.) But the *rationale* of the liability in states where the superior-servant doctrine is applied is of no importance, except possibly in the connection adverted to in the preceding subdivision, when reference was made to the relation between that doctrine and the one now under discussion.

b. *Rationale of the master's liability for the negligence of a departmental manager.*

The parallelism which, as remarked in the preceding subdivision, exists between the characteristic functions of general and departmental managers, seems to indicate that, so far at least as the courts which reject the superior-servant doctrine are concerned, the doctrine of departmental control is an offshoot of the doctrine which makes general managers vice-principals. But whether it was or was not evolved along this line, the authorities, at all events, show clearly that there is no material difference between the grounds upon which general and departmental managers are held to be vice-principals. This will be sufficiently apparent if we compare with the passages quoted in IV. c, *supra*, the extract quoted in the following subdivision from Mr. Justice Brewer's opinion in the *Baugh* Case, and with such statements as these: Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master should be held answerable. The negligence of the agents with such powers becomes the negligence of the master. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

It is not unusual in formal statements of the doctrine that a master is liable for the negligence of an agent managing his entire business, to introduce a supplementary declaration that he is under a liability of a like character and extent with respect to the defaults of an agent

in whose hands he places the control of a distinct branch of his business.

A vice-principal for whose negligence an employer will be liable to other employees must be one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him, not mere authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or oversight of his own. *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 150; *Lewis v. Selfert* (1887) 116 Pa. 628, 11 Atl. 514; *Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129; *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525; *Coulson v. Leonard* (1896) 77 Fed. Rep. 538.

c. *Limits of the doctrine of departmental control.*

The *rationale* of the doctrine which declares the master to be responsible for the negligence of a departmental manager indicates that no employee can properly be placed in this category, unless he is exercising all the functions which the master himself would exercise, if he were personally supervising the same section of his business. That is to say, his representative character is not established by any evidence which fails to show that there has been that complete transfer of the master's characteristic functions which implies that the transferee is invested with the right and duty, not of merely seeing that his subordinates perform some definite routine work in the manner prescribed, and with the appliances furnished, but of providing the appliances themselves, and of making such a disposition of the workmen in regard to those appliances as will most effectually secure the general results for the attainment of which the branch of the business under his control has been organized.

Two years after the decision in the *Ross* Case, *Brewer, J.*, laid down the law as follows: "To make one, as the controller of a department, properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery; he should have subordinates over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery. He should have control over an entire department of service, and not simply of a single machine in that service. He should be so lifted up, in the grade and extent of his duties, as to be fairly regarded as the *alter ego*—the other self—of the master." *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. Rep. 837.

In *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, the same distinguished jurist wrote the opinion of the majority of the court, and had an opportunity to explain at greater length his views as to the proper scope and meaning of the doctrine by which the head of a department is a vice-principal: "Where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So, when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent,

is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the *Ross Case*, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department. These two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. . . . It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employee the master is exempt from liability."

The doctrine established by this case has been stated thus: "The test as to whether one employee of a corporation is or is not a vice-principal as regards another employee is not the control exercised by him over the other, but he must 'stand for and represent the corporation as the superintending and commanding head of one of the separate and distinct departments of 61 L. R. A.

its service." *Harley v. Louisville & N. R. Co.* (1893) 57 Fed. Rep. 144.

The theory of the supreme court of Indiana is similar. "Ordinarily the duties pertaining to a given employment are clearly defined. When one speaks of employment as a section-hand, a brakeman, or an engineer on a railroad, or as a farm hand, or as a puddler in an iron furnace, or a molder in a foundry, the general character of the duties such employee will be required to perform are at once understood by those initiated into the mysteries of the particular calling. As a rule, also, the mention of a given employment suggests the character of the appliances to be used, and the place and manner of using them. One who is placed in charge of a force of men engaged in any of those occupations, whose duties are limited to carrying on the work, or directing it, whether actively assisting therein or not, and who is invested with no authority, or charged with no duty, in furnishing places or appliances for the work, or in the employment or retention of employees, is himself usually a mere coemployee. His duties require him to use, or superintend and direct the using of, places and appliances, and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work and appliances for the work, and is authorized to employ and discharge operatives, he is, as to such things, not a coemployee, but speaks and acts as the master. One who is placed in unrestricted control of a given department by his master, and is clothed with the power to command the services of the other employees, not simply to see that they faithfully discharge the duties ordinarily pertaining to their employment, and in the usual places, with the usual appliances provided therefor, but has authority to require of them the performance of other duties, in other places, and with other appliances, . . . is certainly in such matter more than a mere fellow servant with those thus subject to his control." *Nail v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 269, 28 N. E. 188, 611.

In another case a foreman was considered to be a departmental vice-principal, because he had absolute control of employees working under him, and authority to direct them from one kind of employment to another, without any immediate directions or supervision. *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673. The characteristic function of a departmental vice-principal which is here referred to recalls the rule already noticed (*III. supra*), that when an order takes a servant outside the scope of his employment the directing employee is treated as a vice-principal with respect to the order and its results, whether he would or would not accede to that relation to the master under the doctrine of the court in which the case presents itself.

In *Doughty v. Penobscot Log Driving Co.* (1884) 70 Me. 143, the court contrasts the position of a general or departmental manager with that of "a foreman in a particular special job of work."

Compare also the language used in *Mullan v. Philadelphia & S. Mall S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2; *Ryan v. Bagaley* (1883) 50 Mich. 179, 45 Am. Rep. 35; *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668.

A jury may deduce vice-principalship from evidence that the delinquent employee was placed by a railway company in charge of a quarry, with authority to employ, control, and discharge the workmen, his control and management being referred to his discretion and judg-

ment, and not governed by detailed rules known to his subordinates as well as to himself. *Kansas City, M. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324, 23 S. W. 723.

The circumstance that "neither exercise the discretion or the judgment or the control of the master, but each contributes his part to the safe running of the train," had been adverted to as one of the reasons for holding telegraph operators and trainmen to be fellow servants. *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. Rep. 952. Compare *Monaghan v. New York C. & H. R. R. Co.* (1887) 45 Hun, 113, where it was said that an operator was not a vice-principal, as he merely had to exercise some discretion within a department.

It is not altogether clear what precise evidential weight the courts consider to be due to the official designations which may have been bestowed upon the delinquents by the masters themselves. Those designations are certainly not conclusive, but, in the absence of some special reason for inferring that a descriptive title which ordinarily imports a general agency as regards a certain branch of a business is wrongly applied, a court will, it may be surmised, always accept such a title as a declaration by the master that his characteristic functions have, within the area indicated by it, been transferred to the employee bearing it. In recent cases it has been admitted that "in approaching the line of separation between a fellow workman and a superintendent of a particular and separate department, there may be embarrassment" in determining the character of the delinquent (*Northern P. R. Co. v. Peterson* (1896) 162 U. S. 846, 40 L. ed. 994, 16 Sup. Ct. Rep. 843); and also intimated that the scope of the doctrine of departmental control is in all probability quite limited.

"The *Baugh* Case has set such limits to the vice-principal doctrine that it is exceedingly difficult to suggest a position, outside of the superintendent or acting superintendent of the various great departments of the road, which will not be filled by fellow servants of all the other employees." *Grady v. Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. Rep. 491.

The building of a bridge is a single undertaking, not varied or extensive enough to admit of distinct departments." *Kelly v. Jutte & F. Co.* (1890) 98 Fed. Rep. 380.

In *Muhlman v. Union P. R. Co.* (1889) 2 L. R. A. 192, 37 Fed. Rep. 189, it was held that a complaint alleging an injury caused by the other, the master mechanic, having sole control of the yard, was demurrable for reasons thus explained: "Whether it was a yard with one switch or two, a side track or two; whether it was a trifling matter or a large and extensive responsibility; whether this sole control was limited to the repairs of engines or things of that kind; or whether it went to the entire business of a yard of such size and with so extensive works and duties, that the company is bound to put in charge some man of experience, information, and character,—one for whose acts in all respects it should be held responsible,—is not sufficiently disclosed by a mere statement that the party was a master mechanic, having sole control of this yard. The size of the yard, amount of responsibility or vastness of the business intrusted to him, the extent of his control, is not disclosed. I do not mean to say that he does occupy such a position that he cannot properly be considered as in control of a department, so that the company may be responsible. I simply hold that the complaint as it stands is defective in that respect, and the demurrer will be sustained."

The descriptive titles and functions of the 61 L. R. A.

employees mentioned in the cases tabulated under the following section show that the master is not usually held liable for the negligence of any employees of lower grade than those who in the ordinary course of business would be subject to the immediate control of the master himself or his general manager. But there is some authority for including within the scope of the doctrine of departmental control a class of officials who, for want of a better term, may be termed deputy vice-principals, as being the real representatives of the master, in the absence of their own superiors, so far as regards a portion of the official domain controlled by those superiors.

An assistant roadmaster having general charge of a portion of a railroad, with control of all the section gangs along that line, is not a fellow servant with a section hand so as to prevent recovery by the latter for an injury caused by the negligence of the former in ordering him to continue his work of adjusting a load of poles on a car while an engine is approaching, thus throwing him off his guard and then failing to take care to prevent injury by the approach of the engine. *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034. Discussing the position of the negligent servant, the court said: "He had general charge of the entire length of about 150 miles of defendant's road, and had under his control all the section gangs along that line; and there is nothing in the record showing that Doyle, the general roadmaster, in any way interfered with him in the manner in which the work of that division was being conducted. He in fact controlled that entire division absolutely, so far as employing and discharging the men was concerned. The order came from Doyle to remove these poles, because they were to be taken to another division or branch of the same road. Doyle was not present at the time of the injury, and the fair inference is that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care and management of it. It is apparent that the business of the railroad could not be carried forward without this division of labor and responsibility. It was necessary that these heads of departments and divisions should be made, and power delegated to each head. Under such circumstances, and well-settled rules of law, it must be held that Light represented the company; and for his negligence, while in the line of the duties so assigned and delegated to him, the company must be held responsible. . . . Any other rule than this would enable the master to escape all liability, by parceling out his work to different heads of departments or divisions, and retiring from any management or control of it; and the more he abandoned it to others,—the more he neglected it,—the less would he be liable. When the master appoints a middleman with such powers as were delegated to Light in this case, or where the business is of such a nature that it is necessarily committed to agents, with full power to employ and discharge those acting under them, and with full and absolute control of the work, the principal is liable."

The same view was taken in a later case, where the court, in holding an assistant roadmaster to be a vice-principal, reasoned thus: "He had charge of and directed the method of its performance, and while it does not appear that he personally had anything to do with employing plaintiff in the first instance, yet his authority was so great that, at least while en-

gaged in this particular work, he even had control and direction over the section foreman, Mr. Cavanaugh, who did employ the plaintiff, and who also, as representing the defendant, acted in accordance with Wahl's instructions in reference to the work and method of its performance. Under the facts shown by this record it is apparent that Mr. Wahl as assistant road master, had not only full power to direct and control the work and prescribe the method of its performance, but that he did so, and, in addition, that his judgment as to what men should be employed, and when or how long their employment should continue, or when a man should be discharged from such employment, was absolute, or as nearly so as it is possible for a master to confide a power of that sort to an agent to perform for him. To hold otherwise would be to close our eyes to conditions patent to everybody in all the ordinary business affairs of life. It is evident that the plaintiff and all the other section hands, including the section foreman, looked upon Wahl as the absolute manager and controller of the work, and from whom they received their orders, and whom they were bound to obey. Under these circumstances, we must hold that the act of Wahl was the act of the defendant." *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397.

The liberal construction put by this court upon the doctrine of departmental control is also exemplified in the ruling that a foreman of a gravel train is a vice-principal. *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 88 Mich. 281, 47 N. W. 237. See also *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571, holding a railway company liable for the negligence of a yardmaster. But in this last case distinctly nondelegable duties were involved. See *V. d. 4, infra*.

In another state it has been held that a foreman having authority to employ and discharge the men under his direction, who is the sole representative of a railroad company at the place where the work of blasting rock and transporting it on flat cars is being prosecuted, and who has authority to direct when, how, by whom, and in what manner, the work shall be performed, is not the fellow servant of a laborer under his direction, and his negligent omission to remove a blast, or warn the latter of its presence, is chargeable to the company, although he is under the general control of a road master whose headquarters are several miles away. *McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334.

Logically such a doctrine is unexceptionable, for it cannot be denied that, if the business of the employer is so extensive and complicated that there is necessarily a complete transfer of his characteristic functions to a grade of officials lower than those which take their orders directly from himself or his general manager, he should be required to answer for their negligence. But it must be admitted that, upon the facts, the cases cited in the last note carry the doctrine of departmental control beyond the limits by which the chief exponents of that doctrine, the Federal courts, seem inclined to circumscribe it in the most recent decisions. See *VII. infra*. In a decision rendered prior to the *Baugh* Case it seems to have been assumed by the Supreme Court of the United States that a foreman of construction was a vice-principal. *Coyne v. Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382. But probably, though it is not apparent from the report, his rank was higher and his functions more comprehensive than those of the foreman in the *McDonough* Case (1896) 15 Wash. 244, 46 Pac. 334, *supra*. 51 L. R. A.

In the *Harrison* Case (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034, *supra*, it was remarked that the tendency of modern decisions was to enlarge the liability of masters, especially where the delinquent was a superior servant, and the decision was doubtless influenced by the supposition that the general current of authority was being followed. This supposition, however, was scarcely justified. Any tendency there may be to hold the master to a larger measure of liability may rather be said to be manifesting itself, in the majority of jurisdictions, at least along the lines indicated by the theory which refers his responsibility directly to the character of the act which caused the injury, and ignores the functions ordinarily discharged by the negligent employee.

It is manifest that only the directors of a corporation, or the general superintendent in whose hands its entire management is placed, can be held to be vice-principals in a case where there is no division of the business of the corporation into distinct departments. What *Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. Rep. 810, disproving an instruction to the effect that one of several foremen in charge of a few miners, himself subject to the control of a "pit boss" who was in turn under the direction of the general superintendent of the mine, was a vice-principal if the power of control, management, and direction as to the men engaged in the room under his charge had been conferred upon him, and the duty of obedience was exacted from his subordinates.

Whether the position of the delinquent employee is one which answers to such a conception is a question for the jury, whenever the nature of his relations to his subordinates is left in doubt by the evidence. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

Otherwise—and this is almost invariably the situation created either by the pleadings, or by the testimony actually introduced at the trial,—the question is one of law. *STEVENS v. CHAMBERLIN*, Citing *New England R. Co. v. Conroy* (1899) 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Central R. Co. v. Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1031, 17 Sup. Ct. Rep. 603; *Alaska Treadwell Gold Min. Co. v. Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

d. Supervising employees held to be heads of departments.

Below are tabulated, under suitable headings, all the cases which may certainly be referred to the doctrine of departmental control properly so called, as well as a number of others which, though not categorically relying upon that doctrine, involve facts which render it desirable to notice them in this connection. To the latter class belong, in particular, several decisions in New York, a state in which the true doctrine of departmental vice-principals does not seem to have been formulated with any distinctness (see that state in *VII. e*). In fact it is now, for all practical purposes, merged in the theory that the character of the negligence determines whether the negligent employee was the master's agent. The reasons why the decisions of some states whose attitude on the doctrine of departmental control is more than usually difficult to define have been classified under the subtitle relating to the superior-serv-

ant doctrine rather than under the present one, have been explained in III. 1, *supra*. But it has been deemed advisable to make the following list of departmental managers more complete by citing again any of those decisions already tabulated in the other subtitle, which seem to be legitimate illustrations of the principles now under discussion.

1. Employees in the operating department of railway companies.

A division superintendent of a railroad company, who has general charge and supervision of the company's entire business over his division, including the control of the movements of all trains, is a vice-principal. *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

The same doctrine was apparently assumed to be the true one in *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994, though all that was actually decided was that a train despatcher appointed by a division superintendent and subject to his orders is not a vice-principal in respect to sending out unfit brakemen with trains.

In *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502, a train despatcher was regarded as the head of a department.

The decision in *Darrigan v. New York & N. E. R. Co.* (1884) 52 Conn. 285, 52 Am. Rep. 590, was possibly put partly on this ground, as the court in its argument seems to waver between the conception of departmental control and nondelegable duties. The *Ross* Case is one of those relied upon. But the Federal court of appeals seems to consider that the master's responsibility in this instance cannot properly be referred to this conception as it remarks in one case that a train despatcher, in giving notice of a change in the running of trains, acts as a vice-principal, "not because he has charge of a department, but because of the nature of the duty which he discharges." *Oregon Short Line & U. N. R. Co. v. Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. Rep. 965. There seems, however, to be no valid reason why the master's liability should not be placed on either of these grounds.

For cases denying a train despatcher and a traffic manager to be vice-principals, see *V. e. infra, ad finem*.

2. Employees in charge of railway trains.

In *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, the Supreme Court of the United States held, affirming (1881) 2 McCrary, 235, 8 Fed. Rep. 544, that a conductor is not a fellow servant of the engineer (Bradley, Matthews, Gray, and Blatchford, JJ., dissenting). The grounds of the decision are thus stated by Field, J., who, after laying down the general principle quoted *supra*, proceeded thus: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway cor-

poration must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction: as to them and the train, he stands in the place of, and represents, the corporation. . . . There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

But the latest utterance of the Supreme Court is that, in the absence of evidence that special and unusual powers have been conferred upon the conductor of a freight train, it cannot be held, as matter of law, that he is a vice-principal as regards the other trainmen. *New England R. Co. v. Conroy* (1899) 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85 (conductor did not properly examine a train at a place where it was especially liable to break apart), Harlan, J., dissenting. This decision, although not explicitly condemning the *Ross* Case, must, we think, be regarded as having virtually overruled it.

The conclusion arrived at in the earlier case was declared to have been based on certain assumptions, not borne out by the evidence, respecting the powers and duties of the conductors of freight trains, and to be inconsistent both with the reasoning and the conclusion in the *Baugh* Case (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. The precise position of the majority, as explained by Shiras, J., in his opinion, was that, as the evidence merely showed that the negligent servant was a freight conductor exercising the ordinary powers of such an employee, the plaintiff was virtually asking the court to declare, upon such common knowledge as it could be supposed to possess, that the conductor was a vice-principal. This, it was considered, would be going further than was warrantable, although the court had taken upon itself to lay this down in the *Ross* Case. The doctrine that a conductor may by possibility be shown to be the head of a department, and for that reason a vice-principal, is left intact; but it is very difficult to conceive of any specific evidence which, after this decision, would be regarded by a court as strong enough to overcome the presumption that he is a mere coservant of his subordinates. By the court of appeals the *Conroy* Case has been declared

to have absolutely overruled the Ross Case. *STEVENS v. CHAMBERLIN*; *Brigal v. Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. Rep. 958.

The practitioner, therefore, should bear in mind that the decisions mentioned in the remainder of this subdivision cannot any longer be safely cited in a Federal court as precedents supporting the specific theory that a conductor is a vice-principal. But as long as the Ross Case is followed in other jurisdictions, these decisions have not lost all their authority, and it would be improper to ignore them here.

The Ross Case was followed in Federal courts as to the relation of a conductor to the trainmen, in the subjoined decisions: *Northern P. R. Co. v. Cavanaugh* (1892) 2 C. C. A. 358, 10 U. S. App. 197, 51 Fed. Rep. 517 (disobedience to telegraphic order as to holding train); *Canadian P. R. Co. v. Johnston* (1894) 25 L. R. A. 470, 9 C. C. A. 587, 20 U. S. App. 85, 61 Fed. Rep. 738 (sudden starting of train while brakeman was in a position of danger); *Union P. R. Co. v. Callaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. Rep. 988 (disobedience to rule requiring conductor, after storms, to obtain information about the condition of the track at frequent intervals); *Northern P. R. Co. v. Polrier* (1895) 13 C. C. A. 52, 29 U. S. App. 583, 67 Fed. Rep. 881 (rear-end collision); *Ragsdale v. Northern P. R. Co.* (1889) 42 Fed. Rep. 383 (demurrer to answer sustained); *Missouri P. R. Co. v. Texas & P. R. Co.* (1889) 38 Fed. Rep. 816 (train was started while brakeman was tying a bell cord).

The doctrine of the Ross Case still prevails in some states according to the most recent decisions on the subject: *Van Amburg v. Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517 (permitting train to run at undue speed across bridge in course of construction. In the last cited case the court said: "The company is responsible for the other cause, for the conductor was the company on that day and for that occasion. He had exclusive command of that train—was to the engineer his master for the time, and did not so much represent the company as personate it. He was the company in bodily form with authority to command and power to enforce. The pretension that no responsibility can attach to the company except when it is present through its chief officers would practically relieve it from all responsibility. With its president in New York and its directors equally remote no possibility of fastening upon it any liability whatever would exist. No other doctrine than that it is present in the person of those of its employees who for the time operate it would give the smallest modicum of protection to the public"); *Wilson v. Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961 (excessive speed considering the character of the track—log of wood fell off and derailed train); *Spencer v. Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor signaled engineer to back a car prematurely, so that the plaintiff, a brakeman, was crushed—decided independently of the Georgia statute); *Boatwright v. Northeastern R. Co.* (1886) 25 S. C. 128 (failed to procure suitable coupling appliances from a stock supplied by the company); *Coleman v. Wilmington, C. & A. R. Co.* (1886) 25 S. C. 446, 60 Am. Rep. 516 (negligent adjustment of switch).

As to these South Carolina cases see that state, VII. c, *infra*.

In Virginia and West Virginia the Ross Case, though once followed, is no longer accepted as an authority. See those states in VII. c, *infra*.

In Michigan a railway company has been held liable for the negligence of the fireman of 51 L. R. A.

a gravel train. *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237. But here the injury was the result of complying with an order to do work outside the scope of the servant's employment, and cases of this class stand on a peculiar footing. See note to *Olson v. Minneapolis & St. L. R. Co.* 48 L. R. A. 796.

As already noted in II. f, *supra*, a conductor is, under ordinary circumstances, a mere fellow servant of his subordinates in Michigan.

It is held that the principle of the Ross Case is not applicable as between a conductor of a work train and a laborer upon such train, where the roadmaster is in charge of such train, directs its movements, and has control of all persons employed upon it, including the conductor and engineer. *Northern P. R. Co. v. Smith* (1894) 8 C. C. A. 663, 15 U. S. App. 294, 59 Fed. Rep. 903 (collision alleged to be due to want of proper flagging). Compare *Chicago & A. R. Co. v. McDonald* (1887) 21 Ill. App. 409.

In *McGill v. Southern P. Co.* (1893; Ariz.) 33 Pac. 821 (hurried order to get onto a work train), it was held that the conductor of a work train was a vice-principal as to a section foreman traveling by the train; but, on a rehearing of the case, they were held to be fellow servants, for the reason that they were both under the control of a superior on the same train. *Southern P. Co. v. McGill* (1896; Ariz.) 44 Pac. 302.

That a conductor may be a departmental vice-principal as to a servant only temporarily under his control was recognized in a case where it was held that a foreman of bridge carpenters in the employ of a railroad company, in riding to his work, belongs to the train, and is in the train department, so as to render the conductor in charge of the train a vice-principal rather than a fellow servant, although in going upon the train such foreman acts under the order of his immediate superior. *Northern P. R. Co. v. Beaton* (1894) 12 C. C. A. 301, 29 U. S. App. 88, 64 Fed. Rep. 563 (rock in a tunnel was loosened by the arm of a derrick improperly left raised, and fell on the plaintiff).

But the doctrine of the Ross Case will not render the company liable for the negligence of the driver of an engine not drawing a train, who has no subordinate except a fireman (*Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. Rep. 837); even though the engineer in such case may be called a conductor, and have full charge of the engine. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (neglected to deliver running orders to engineer).

Compare the ruling that the driver of a "wild engine" not attached to a train is a fellow servant, and not a vice-principal, of a brakeman upon another train with which the engine collides by reason of such engineer's negligence. *Healey v. New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676 (plaintiff's counsel had taken the special point that where an engineer is appointed to "conduct" a train agreeably to special orders or general rules, he is not a fellow servant of servants on his own or other trains).

Nor does it follow that because a rule of the company requires section men to obey conductors in furthering the passage of trains delayed by defects in the track, the conductor is constituted a vice-principal as to the section men in such a sense as to render the company liable for the conductor's failure to warn one of those section men of the danger that a bluff overhanging the track may fall. *Slavens v. Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. Rep. 255.

A conductor is not a vice-principal except as

to servants under his control. *Northern P. R. Co. v. Polier* (1896) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *Northern P. R. Co. v. Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. Rep. 114.

The latter case, in holding that it is only under the Montana statute that a conductor is a vice-principal as to men on another train, supercedes the ruling to the contrary effect in *Ragsdale v. Northern P. R. Co.* (1889) 42 Fed. Rep. 383. A different principle has been applied in Ohio, under the superior-servant doctrine. See I. *supra*.

For the North Carolina cases on conductors, see III. f, 3, *supra*.

3. Employees supervising the construction and maintenance of railway tracks and structures.

A foreman of railway construction is assumed to be a vice-principal in *Coyne v. Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382 (negligence alleged was confusing order). His precise functions are not apparent from the report.

Employers have also been held liable for the negligence of the following employees:

A superintendent of construction on a railway. *Kansas P. R. Co. v. Little* (1877) 19 Kan. 267 (defective machinery furnished).

A superintendent of the work of extension of a railroad, who has foremen and workmen under him whom he employs and discharges at his pleasure, and who has control of the cars, tools, and machinery with "full discretion to control and supervise." *Denver, S. P. & P. R. Co. v. Driscoll* (1889) 12 Colo. 520, 21 Pac. 708 (control of small flat car without brake was lost on a grade owing to the fact that a workman, in compliance with the superintendent's orders, lifted a stick which was used to govern its speed).

A general foreman of track layers under the superintendent of construction having the power to hire and discharge hands, and superintending their labor in constructing a railroad. *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (overloaded steel car was derailed—negligence in regard to transportation of subordinates).

The general agent in charge of the track laying, having five gangs of men under him, each subject to its particular foreman, whom he has authority to hire and discharge, and having supreme control of his department in the absence of the general superintendent. *Colorado Midland R. Co. v. Naylor* (1892) 17 Colo. 501, 30 Pac. 249 (derailment caused by the negligent manner in which the work was directed to be done—same accident as *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701, *supra*).

The foreman of a railroad company to whom is delegated absolute authority and control of an undertaking to clear away *débris* against one of the company's bridges, and to call out employees to assist in that purpose, and "command where they should work and what they should do." *Nail v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611 (while plaintiff's decedent was at work among driftwood the foreman suddenly started a locomotive, the result being that one of the ropes passing from it to the driftwood was jerked from its place, and struck plaintiff's decedent—the foreman. Said the court: "Having required decedent to do a certain thing, while that thing is being done he carelessly, by another command, puts him in mortal peril, and causes his death").

A foreman having exclusive charge and con-

trol of the work of constructing a tunnel, and authority to direct all the employees under him where they shall work. *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668 (plaintiff, while working in the place to which he was assigned, was struck by falling timbers, said timbers being of insufficient strength and insufficiently braced, to the knowledge of the foreman of repairs, who was also aware of the existence of a dangerous crack in the roof).

The superintendent of the construction of a railway tunnel. *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667 (servant killed by explosion of dynamite magazine placed too close to the works).

Of the remaining decisions in which liability was imposed on the master for the negligence of the officials designated, those decided by the circuit court of appeals are of more than doubtful authority under the more recent decisions of the Supreme Court of the United States. Another, the Nebraska one, as it emanates from a state in which the superior-servant doctrine is accepted (see III. *supra*, and VII. *infra*), is of no particular significance. The others probably go further than most of the courts which reject that doctrine would at present be willing to extend the master's responsibility. As to the Michigan cases, see also the preceding subdivision *ad finem*.

A roadmaster. *Atchison, T. & S. F. R. Co. v. Wilson* (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. Rep. 57 (a section hand killed through the overturning of a wrecking car upon which he was engaged, because of the defective construction under the superintendence of its roadmaster, of a temporary track around a wreck); *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. Rep. 564 (order to go into place of unusual danger).

As it was expressly held in *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, that a divisional roadmaster was not a vice-principal, the authority of these cases can be saved only, if at all, by assuming (what the report does not show clearly) that delinquent was the general roadmaster of the entire road.

A roadmaster (not stated whether divisional or general). *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311 (plaintiff was set at work clearing away the *débris* of a burnt depot building, without proper precautions being taken for his safety).

As to the relation of these employees to the subordinates in Minnesota, see that state, VII. e, *infra*.

A divisional roadmaster. *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034 (for facts see V. c, *supra*).

An assistant roadmaster. *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397 (order to drop rails from moving car). As to these two Michigan cases, see last subdivision.

A foreman in charge of a gravel train as regards a section hand under his control and direction, and subject to his orders. *Union P. R. Co. v. Doyle* (1897) 50 Neb. 555, 70 N. W. 43 (sudden stoppage of train by order of foreman threw plaintiff against a brake).

A foreman in charge of a pile driver, with full authority to have it repaired when out of repair, and to hire and discharge the crew. *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 43 Wis. 375, 4 N. W. 399 (failure to repair—but possibly this case was intended to rest on the conception that the negligence alleged was the breach of a nondelegable duty).

A foreman of a gang of twenty men engaged in taking down a shed standing between railroad tracks. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Rep. 804 (subordinate put to work in a dangerous place without proper precautions to protect him being taken).

4. Supervising employees in railway yards, depots, etc.

In Michigan a yardmaster who hires and discharges the yard hands, and directs and assigns their labors, is the agent of the company in these respects as well as in the furnishing of proper, suitable, and safe appliances for their labor. *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (knew of defect in engine and incompetency of fireman to handle it).

The same doctrine has been applied by two Federal courts. *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 380, 44 U. S. App. 200, 70 Fed. Rep. 669 (workmen ordered to use defective skids for loading a car); *Hardy v. Minneapolis & St. L. R. Co.* (1888) 36 Fed. Rep. 657 (order given in making up trains). But these cases are more than doubtful law under the recent decisions of the Supreme Court. See VII. d, *infra*.

The superintendent of the horse department of a street-railway company seems to be regarded as a vice-principal in *Rettig v. Fifth Ave. Transp. Co.* (1893) 6 Misc. 328, 26 N. Y. Supp. 896; but there the negligence was in regard to the place of work (door in a dangerous condition); and, moreover, the general manager had also been notified of the defect.

5. Supervising employees in the mechanical departments of railways.

A railway company is responsible for the negligence of a master mechanic having control of its whole mechanical department. *Brabbits v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289 (defective engine injured switchman—case possibly rests on fact that negligence was the breach of a nondelegable duty); *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50 (allowed a pipe to remain where it was dangerous to men on cars passing under it); *Taylor v. Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876 (plaintiff was engaged in the work of removing the key of the "equalizer" of a locomotive under the master mechanic's direction, when the latter negligently pulled the equalizer out of its place so that it fell on the plaintiff).

It has also been held that a foreman of car repairers at the general shops of a railway company, who is known as the "wreckmaster" of the road, and who has entire control, when he goes to a wreck, of all engaged therein, including, among others, such general officers as the roadmaster, is a vice-principal. *Borgman v. Omaha & St. L. R. Co.* (1890) 41 Fed. Rep. 667 (section hand injured by defective tools). *Brewer, J.*, thought the circumstances rendered the *Ross Case* controlling. *Shiras, J.*, considered that any employee having the power of control and direction was a vice-principal, and that the test of responsibility was not whether the negligent employee was at the head of some recognized department of the business.

This is certainly not the doctrine of the Supreme Court of the United States. *Quare*, as to this case under later decisions of Supreme Court. See VII. d, *infra*, and VI. f, 14 (a) *supra*.

In *Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 678, 43 N. W. 415 (failure to

protect car repairer from moving cars), a railway company was held liable for the negligence of a master workman to whom was deputed the duty of instructing a car repairer as to the proper way of doing his work. The *Ross Case* was cited, but whether on the assumption that it is an exponent of the superior-servant doctrine, or that it embodied the doctrine of departmental control, is not clear—probably the former, as the Ohio decisions are also referred to.

6. Employees supervising railway departments not connected with transportation.

A railway company is liable for the negligence of the following officials:

An employee having the full control of its timber yard. *Baldwin v. St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507 (pile of timber, carelessly put up, fell on a subordinate).

A foreman of a quarry belonging to a railway. *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324, 24 S. W. 723 (allowed laborer to remain on the track when a train might be expected at any moment).

Superintendent appointed by a railway company to supervise and manage its mining operations. *McDade v. Washington & G. R. Co.* (1886) 5 Mackey, 144 (defective machinery).

The head of the law department. See argument of *Brewer, J.*, in *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 383, 37 L. ed. 772, 779, 13 Sup. Ct. Rep. 914, 920.

Compare also *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 281, 25 N. E. 873, where the negligence of a manager of a grain elevator belonging to a railway company was held to affect it with liability; but the essence of the decision was the breach of the nondelegable duty of examining the possibly dangerous place of work into which he was sending a subordinate.

7. Supervising employees in manufacturing establishments.

The following employees have been held vice-principals:

The "superintendent of labor" under a large steel company, who is controlling the construction of a new building to contain the works. *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

The foreman of the oil department of a compress company. *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168, 24 S. W. 106 (possibly—but here the negligence alleged was the breach of the nondelegable duty of instruction).

The foreman of the foundry department in machine works. *Drinkout v. Eagle Mach. Works* (1883) 90 Ind. 423 (apparently assumed, but case went off on nature of negligent act).

The mill manager of a lumber company. *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (negligent order).

An assistant superintendent of a sawmill company in charge of a lumber yard whose duties are to superintend the piling of the lumber, take charge of the yard, and its management, and superintend the workmen, performing no labor himself in handling lumber. *Zintek v. Stimson Mill Co.* (1893) 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, second appeal (1894) 9 Wash. 395, 37 Pac. 340 (pile of lumber set on insecure foundation fell on workman).

8. Foremen in smelting works.

A foreman having absolute control of the

workmen engaged in operating the roasters at smelting works, and assigning them to whatever duties he thinks fit, without any immediate direction or superintendence of anyone, is a vice-principal. *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 318, 55 Pac. 673 (switch thrown in such a way as to injure a subordinate while pushing a car).

9. Employees supervising mining work.

A jury would be justified in finding that an employee in full charge of the sinking of a shaft is a vice-principal. *Deep Min. & Drainage Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (order to clean out a "missed hole" below a safe depth). Compare cases in V. d. 8, *supra*.

10. Supervising employees under municipalities.

An employee of a city, engaged in shoveling dirt from a bank into a wagon, is not a fellow servant of a person appointed by the board of public works of the city, with the approval of the city council, to take charge of the work on the streets, with authority to employ and discharge men and control and direct the work in its entirety. *Hathaway v. Des Moines* (1896) 97 Iowa, 333, 66 N. W. 188 (petition describing an employee with above functions is not demurrable, as it shows him to be a vice-principal).

Nor is a superintendent in full control of a quarry belonging to a city, with power to hire and discharge the workmen, and not joining with them in the work. *Augusta v. Owens* (1900) 111 Ga. 464, 36 S. E. 830 (ordered two laborers to loosen rock at a place where the plaintiff underneath would be endangered if it fell).

Nor is a laborer a fellow servant of a street commissioner superintending construction of a bridge. *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 (order to work in a dangerous place).

11. Employees concerned with the loading of vessels.

The relation of a head stevedore of a steamship company to his subordinate is for the jury, where there is some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants had been intrusted to his discretion, and the proof which tends to fix upon him responsibility for the selection of the rigging, and for adjusting and working it, also tends to establish the fact that he was clothed, as to these duties, with the ultimate power and authority of the company. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

Compare *Brown v. Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74, where a master stevedore was held liable for the negligence of a foreman. See IV. b, 2, *supra*.

An employee of a steamship company superintending the loading of a ship is a vice-principal. *Cheaney v. Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33 (here the delinquency was the failure to keep a promise to supply a "hatch tender," but it is not stated whether it was simply an improper disposition of an adequate force, or the omission to hire enough assistants).

A steamship company was held liable for the negligence of the superintendent of its dock, in *McC Campbell v. Cunard S. S. Co.* (1893) 69 Hun, 131, 23 N. Y. Supp. 477 (defective arrangement—appliances injured stevedore). But 51 L. R. A.

the decision was reversed in (1895) 144 N. Y. 552, 39 N. E. 637, on the ground that the negligence related merely to the details of the work.

12. The commanding officers of ships.

On the authority of the *Ross* Case it was held by the circuit court of appeals that the master of a steamboat was not a fellow servant of the engineer. *The Transfer No. 4* (1894) 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. Rep. 364, Reversing on this point (1893) 55 Fed. Rep. 98 (collision caused by nonobservance of rules as to signals). It is to be observed that the *Baugh* Case, decided the year before this one, is not cited, and the effect of that decision is still a matter of doubt, as regards this class of employees. See VII. d, *infra*.

Other rulings made upon the authority of the same case are these:

A seaman injured by the breaking of a gasket which the captain knew from the report of the mate to be in a rotten condition was allowed to maintain a libel in admiralty against the ship to recover damages for the injury. *The A. Heaton* (1890) 43 Fed. Rep. 502, followed in the *Julia Fowler* (1892) 49 Fed. Rep. 277 (mate knew that a rope was defective).

A pilot, being a master *pro hac vice*, and responsible for the management and navigation of the vessel, was held not to be a fellow servant of a deckhand who was injured by his derelictions of duty in regard to such management. *The Titan* (1885) 23 Blatchf. 177, 23 Fed. Rep. 413 (collision due to not having a lookout properly stationed).

In *The E. B. Ward* (1884) 20 Fed. Rep. 702, it was suggested, *obiter*, that a captain was a vice-principal.

Another case in which, though not on the ground of his being a departmental manager, a captain was held to be a representative of the shipowner, is *Thompson v. Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579. There it was held that a seaman could recover where the captain, who was also part owner, ordered him to adjust the rigging in a dangerous manner, and the seaman, after protesting and suggesting a safer method, was injured in carrying out the order.

In a later case this decision was said to have been "placed mainly on the peculiar character of the employment, and the relations existing between the master and a common seaman of a merchant vessel, outside of port." *Mathews v. Case* (1884) 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513, where recovery was denied to a mate injured by the negligence of the captain, the relations between these two employees not being the same as those between the captain and the seaman.

The action of a mate injured by a captain's negligence was also held not maintainable in *Caniff v. Blanchard Nav. Co.* (1887) 66 Mich. 638, 33 N. W. 744.

In *Olson v. Clyde* (1884) 32 Hun, 425, it seems to be assumed *arguendo*, that the master of a vessel may be the *alter ego* of the owners, but, so far as New York is concerned, this is certainly not the law. See II. f, 15, *supra*.

In *Ramsay v. Quinn* (1874) Ir. Rep. 8 C. L. 322 (seaman drowned while obeying an order to abandon the ship), it was held that a demurrer based on the theory that the captain of a ship was a mere fellow servant of one of the crew should be overruled. The following passage from *Story on Agency*, 7th ed. § 116, was relied on: The captain of a ship

is "clothed with the character of a special employer or owner of the ship, and representing, not merely the absolute owner (*dominus navis*), but also the temporary owner, or charterer for the voyage (*exercitor navis*). In short, our law treats him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it, as a servant."

But this ruling was disapproved in *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58. Affirmed in [1894] A. C. 222, II. 2, 16, *supra*.

In Washington, as already noted (III. f. 16, *supra*) a master of a ship is a vice-principal. *Keating v. Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224, citing the *Ross Case*.

The master of a ship is, in any case, a representative of the shipowner in respect to the performance of all nonassignable duties. *Walker v. Bolling* (1853) 22 Ala. 294 (employment of crew); *Scarff v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (giving medical aid to crew).

As to the cases in which the captain undertakes to do manual work himself, see VI. *infra*.

In Washington neither the mate nor the captain is a fellow servant of an ordinary seaman. *Keating v. Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224 (order to furl sail in a dangerous manner). The *Ross Case* is followed. But this does not support the conclusion that a mate is a vice-principal.

a. Supervising employees held not to be heads of departments.

The delinquent employees mentioned in the cases collected below were expressly held not to be departmental vice-principals. These rulings are referred to in a former subtitle (II. f. *supra*), and are tabulated here for the reason that they will serve to indicate the downward limits of the doctrine discussed above. The remainder of the decisions cited in the subdivision just specified may also be examined in this connection; for, even though it may not be so stated in terms, the employees there named must be taken, by implication, not to be vice-principals within the meaning of that doctrine.

The boss of a small gang of ten or fifteen men engaged in making repairs upon a railroad over a distance of three sections, aiding the regular gang upon each section as occasion demands. *Northern P. R. Co. v. Peterson* (1895) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, *Reversing* (1892) 51 Fed. Rep. 182 (careless application of brake); *Goodwell v. Montana C. R. Co.* (1896) 18 Mont. 293, 45 Pac. 210 (negligence in directing the work).

A foreman of carpenters subject to the bridge superintendent, and merely deputed to take down a building. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970.

A foreman working on the construction of a bridge with two superiors between him and his employers. *Kelly v. Jutte & F. Co.* (1899) 98 Fed. Rep. 380.

A foreman of car repairers under a master car builder, who is himself under the control of the master mechanic. *Grady v. Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. Rep. 491.

The general foreman of railway shops under a master mechanic. *Gaynon v. Durkee* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. Rep. 302.
31 L. R. A.

A general yardmaster in full control of a yard. *Cincinnati, N. O. & T. P. R. Co. v. Gray* (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. Rep. 623.

A roadmaster. *O'NEIL v. GREAT NORTHERN R. Co.* (see however, VII. e. *infra*).

A track foreman. *Spancake v. Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1006.

An employee who commonly acts for the yardmaster. *Kirk v. Atlanta & C. Air Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621.

Assuming the delegation of functions to have been complete in this case, it scarcely seems consistent with the other decisions in this state (see *Summary*, VII. *infra*), when construed in connection with the general principle that a servant deputed to act for an absent superior bears the same relation as the latter to his subordinates.

Compare, however, *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102, cited *infra*.

The foreman of one of several switching crews engaged in the yard of a railroad company under the general control of a yardmaster. *Harley v. Louisville & N. R. Co.* (1893) 57 Fed. Rep. 144, following the *Baugh Case*.

A gang boss in a railway shop under a master mechanic. *McBride v. Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687.

A station agent. *Brown v. Minneapolis & St. L. R. Co.* (1884) 31 Minn. 563, 18 N. W. 834 (neither in general control of the business nor of a special branch of it, but simply charged with a special duty).

A telegraph operator. *Dealey v. Philadelphia & R. R. Co.* (1886; Pa) 3 Cent. Rep. 112, 4 Atl. 170; *Monaghan v. New York C. & H. R. Co.* (1887) 45 Hun, 113. In the last-cited case the telegraph operator was charged with important duties at a certain point, imposing upon him the controlling and directing of the movements of trains there, within the system which the rule provided for that particular locality, but the court held the service required of him was within and subordinate to a department of the business of the company, and that, although in the performance of this service he necessarily exercised discretion and judgment in giving preference by signal in the movement of trains on to a single track, with view to the safety and protection of persons and property, and for the orderly operation of the road, that did not make his judgment that of the company as between it and its employees.

That there is nothing in his official character to make a mere telegraph operator, as distinguished from a train dispatcher, a head of a department, is also implied in a portion of the reasoning of the court in *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. Rep. 952. But the representative character of these employees is usually denied on the ground that they are discharging the functions of mere servants.

An engineer in charge of the motive power of an elevator in which other employees are carried to and from their work. *Wolcott v. Studebaker* (1887) 34 Fed. Rep. 8.

A foreman subject to the order of a yardmaster. *Fraker v. St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349.

A chief engineer who has general charge of an engine room and a department, with power to give orders to the men in the department, and to engage men for short jobs in the manager's absence. *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

A foreman in a woolen mill, sometimes called a "boss machinist" and sometimes a

"master mechanic," who is obliged to consult the superintendent as to any important alteration. *STEVENS v. CHAMBERLIN*.

A foreman in charge of men constructing a sewer, with authority to hire and discharge them under the supervision of a superintendent of sewer construction, who is himself subject to the instructions of the city engineer as general superintendent of all public works. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525, following the *Baugh* Case.

A subordinate foreman who is not invested with any of the duties of a vice-principal, while absent, and is merely instructed to call upon him to provide against danger, if any should arise. *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

An employee having direction of the actual work of removing a telephone line. *American Teleph. & Teleg. Co. v. Bower* (1897) 20 Ind. App. 32, 49 N. E. 182 (here the work was ordered by the company's district superintendent, and planned by its district chief).

A foreman of carpenters working for a corporation. *Dewey v. Parke, D. & Co.* (1889) 76 Mich. 631, 43 N. W. 644.

The underground manager of a mine. *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S., 30.

In Maryland it has been held that a divisional train dispatcher on a railway is a fellow servant of an engineer. *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994, the ground taken being that the management of the division upon which the negligent servant was train dispatcher had been committed to him, as he was a subordinate appointed by the superintendent, and though he had charge of the trainmen and of the movements of trains on his division, and could employ and discharge flagmen and brakemen, it was not shown that the master had relinquished all supervision of the work on that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. That this ruling, if construed as an unqualified assertion of a general doctrine as to the position of a train dispatcher, is contrary to the weight of authority in most jurisdictions, will be shown in a later note. These adverse cases, however, are almost all founded on the theory that the controlling of the movements of trains is a nonassignable function of the railway company; and, as the negligence here alleged was merely that the dispatcher had sent out unfit brakemen with a train, and these were not employed by him but by the division superintendent, the decision is not necessarily repugnant, upon its facts, to those in other states. If the default had had relation to the movement of trains, the trend of judicial opinion in Maryland (see IV. d, 2, *supra*, and VII. *infra*) seems to leave it an open question whether the servant would not have been allowed to recover.

In an Irish case it has been held that, in the absence of evidence to show that the general traffic manager of a railway company occupies, towards the company, the position of a vice-principal, he is to be taken as a fellow servant of a milesman (track walker) employed by the same company. *Conway v. Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 345, Affirming (1875) Ir. Rep. 9 C. L. 498. But this decision, which rests on *Wilson v. Merry* (IV. d, 1, *supra*), is contrary to the general current of American authority. 51 L. R. A.

VI. For what acts of superior servants a master must answer.

a. No responsibility as to matters beyond the scope of the authority of the superior servant.

Whatever difference of opinion there may be as to the character of the relations which must be shown to exist between the delinquent and the injured employee in order to affect the master with liability, it is universally agreed that the general rules of the law of agency are controlling in all cases to this extent,—that, on the one hand, if the act was within the scope of such employee's authority, the master cannot escape liability on the ground that it was done in direct violation of his orders. *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783.

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, where the railway company was held liable for the negligence of the conductor of a work train in ordering a laborer to do work outside the scope of his contract, the court said: "It is in general no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business; and the reasons for holding him responsible for the servant's conduct are the same whether the injury results from a failure to observe the master's directions, or from neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction."

In *Rodman v. Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, the court was equally divided upon the question whether a brakeman could recover for an injury caused by the conductor's undertaking to manage an engine in the absence of the engineer. Two were for holding the company liable as for an "abuse of authority" by an employee invested with the nondelegable duty of seeing that his subordinates discharged their respective duties. Judge Cooley and another of his colleagues thought there was nothing to show that the conductor was not acting within his powers in operating the engine, and drew the inference that the plaintiff was not in the position of a servant receiving an order, which he might rightfully have disobeyed, to do something outside the scope of his employment. The *Bayfield* Case was thought not to be in point.

An employer is liable for the acts of a vice-principal done within the scope of his employment, resulting in an injury to an employee, although the employer was not present. *Con-*

nor v. Saunders (1894) 9 Tex. Civ. App. 56, 29 S. W. 1140 (defendants had argued that they would not be liable unless they had expressly authorized their foreman to commit an injury upon the plaintiff).

On the other hand, there can be no recovery where the act or order which caused the injury was entirely outside the scope of the authority of the delinquent employee. If the act or order had no reference to the master's concerns, there is, of course, no liability on the master's part. But even if this point is determined in the plaintiff's favor, he must still fail.

A section hand injured while traveling on a hand-car, after the day's work was over, and merely to bring provisions for his boss, cannot recover. *Hurst v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 76.

A foreman, in speaking to an employee in a friendly manner and for purposes not connected with the employment, is not acting as a vice-principal so as to render the master liable for an injury which the employee receives through his attention being diverted momentarily from his work by the foreman's words (*Malsky v. Schumacher* (1894) 7 Misc. 8, 27 N. Y. Supp. 331), unless he can show that the superior servant had authority, either express or implied from the nature of his functions and the regular course of the business, to do the act or give the order alleged to be negligent.

Where an engineer has no authority to order a yardmaster to uncouple cars, and it is no part of the latter's duties to do such work, the company is not liable for injuries received by him in coupling a car at the request of the engineer. *Bradley v. Nashville, C. & St. L. R. Co.* (1884) 14 Lea, 374.

Where a boy employed in a boiler shop to work in a tool room, being out of work, is directed by the boss of the tool room to go into the adjoining boiler room for work, where he sustained the injury sued for, the boss of the tool room, being merely authorized to direct the work in that room, has no authority to direct plaintiff to seek employment in the boiler room, and the master is not liable. *Fisk v. Central P. R. Co.* (1887) 72 Cal. 88, 13 Pac. 144.

A servant who has no power to suspend rules cannot, by directing a subordinate to procure certain materials in violation of the rules provided for such a case, impose responsibility on the master. *Keenan v. New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711. There the plaintiff's intestate and another man were at work repairing a car, and found they needed a bumper spring. The intestate applied to a coemployee for it, and was informed that he did not have one. After a further search he then told the gang boss that he was unable to find what he wanted, and was directed to go to another track and take one from a car there. While he was under the car some cars were backed against it and he was injured. "It is admitted by the learned counsel for the appellant that there is no direct evidence in the case showing that it was any part of Tracy's duty to furnish materials required by the workmen under him, but he insists that the defendant having failed to designate any one person whose duty it should be to borrow springs from other cars for temporary use, and still continuing the business of car repairing, it not only acquiesced in the gang foremen procuring such materials, but impliedly authorized them to procure them wherever they could. The appellant's counsel also admits that Tracy was the fellow servant of the intestate in every- 51 L. R. A.

thing except in the performance of a duty which the law imposed upon the defendant, viz., procuring materials for use." The court declined to adopt these views, saying: "It would lead to the establishment of an exceedingly unsafe rule to hold that a gang boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular, duly protected repair tracks. Tracy [the gang boss] was in no legal sense the representative of the defendant when he suggested to the intestate that he should procure a spring from a car standing on track No. 8; he was a fellow servant making a very unwise and dangerous suggestion."

A mason injured by the negligence of carpenters working on the same building in constructing a defective scaffold cannot recover where there is no evidence to show that it was any part of their employment as carpenters to make ladders for anybody but themselves. *Mercer v. Jackson* (1870) 54 Ill. 397.

It will be useful to note here that the rule is the same under the English employers' liability act of 1880 and similar American statutes making the master liable for the negligence of employees exercising superintendence. The servant, it is held, cannot recover, unless it appears that the orders of the employee, whose negligence it is sought to impute to him, were given in respect to a sphere of duties which he was authorized to control. *Brown v. Butterley Coal Co.* (1885) 53 L. T. N. S. 964, 50 J. P. 230.

Thus, a railroad company is not liable for injuries to an employee engaged in cleaning an engine of which the engineer is at the time in sole charge, by the blowing out of the packing of a valve due to the act of a hostler who gets upon the engine and opens the throttle for the purpose of moving it. *Louisville & N. R. Co. v. Richardson* (1898) 100 Ala. 232, 14 So. 209 (deemed to be the act of a mere trespasser).

So, an employer is not chargeable with the act of an employee intrusted with the duty of constructing a freight elevator, in inviting a coemployee to ride on the elevator, instead of going by the stairway provided for the use of employees, and such coemployee accepts the invitation at his own risk. *Sievers v. Peters Box & Lumber Co.* (1898) 151 Ind. 642, 50 N. E. 877, Rehearing denied in (1898) 151 Ind. 662, 52 N. E. 399.

On the other hand, the foreman of a contractor is acting within the scope of his duties when he orders the workmen to attend some ten minutes before the regular hours of work to clear the ground of certain obstructions, which the employees of the principal employer are in the habit of leaving over night, and are such that the contract work cannot go forward unless they are removed. *Sweeney v. McGilvray* (1886) 14 Sc. Seas. Cas. 4th Series, 105.

The ultimate and essential question is whether the vice-principal had ostensible authority to give the orders which led to the injury. Hence, if a representative capacity is bestowed upon a superior servant by general directions to obey his orders, that capacity continues, so far as regards the subordinate receiving those directions, until he is actually informed that the authority so given has been withdrawn or restricted.

A son of an employer represents the latter so as to render the latter liable for his neglect in directing an employee to do a certain act which he was not ordinarily called upon to

perform, where the son had been directed to have such act performed, and the employee had general directions to do what the son told him. *La Fortune v. Jolly* (1896) 167 Mass. 170, 45 N. E. 83. The court held that it was not competent for the defendant to show that the son's general authority had been secretly withdrawn, and that the son had been instructed to perform personally the duty in the execution of which the plaintiff was injured.

An instruction in an action for injuries to a gripman upon a cable car, that it is immaterial whether the person exercising the authority to direct and command was known as a foreman or by any other title, if clothed with such apparent authority, is not objectionable on the ground that the master is not liable for negligence of one clothed with a special or limited authority, not arising from the performance of such authority. *West Chicago Street R. Co. v. Dwyer* (1896) 162 Ill. 482, 44 N. E. 815.

But in cases of this class it is held that the mere belief of the injured servant that he had been directed to obey the orders of the delinquent will not be sufficient to fasten responsibility on the employer, if, as a matter of fact, no such directions had ever been given. *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (servant here had been ordered to perform duties outside the scope of his employment).

In most kinds of business authority to commit acts of personal violence, amounting to a battery, cannot be inferred, if for no other reason, because larger powers cannot be imputed to an agent than the principal himself possesses.

A master, therefore, cannot ordinarily be held liable for the act of a supervising employee in beating a subordinate, even though it was for the purpose of furthering the master's business by compelling him to work. *Jones v. St. Louis, N. & P. Packet Co.* (1890) 48 Mo. App. 398. There Judge Thompson, after pointing out that, under the general law of master and servant, the master had no power to inflict personal chastisement upon the servant, and that the admiralty law on this point has no application to actions based on circumstances occurring on a river like the Mississippi, at least when such actions are brought into state courts, summed up as follows: "The case is not one where the superior servant or vice-principal had any authority from the general master, either express or implied, to use violence under any circumstances whatever in accomplishing the purposes of the master. It is, therefore, not like the case where the railway conductor wrongfully expels the passenger. Nor was it a case where the master had assumed, by contract or otherwise, any special duty toward the servant injured of protecting him from injury on the part of another servant, such as the duty which the carrier assumes toward his passenger of transporting him safely and without harm from one place to another. The act done to the plaintiff by the superior servant was, therefore, neither an act done in the scope of his employment nor an act done in violation of any special duty which the general master had assumed towards the plaintiff, which duty the immediate actor was appointed to perform. It stands in law as his mere wanton and criminal act for which not another person, but himself, is liable."

Under the maritime law a shipowner may be required to answer for a similar offense by the captain of one of his vessels, where it amounts to a misuse of his power to chastise a seaman for the maintenance of discipline; but this principle cannot be extended so as to create a lia-

bility for a wanton assault, which, as the evidence shows, was not demanded by any pressing emergency, and was a mere vindictive indulgence of the captain's own passions. *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 969. The court remarked that the captain's command does not extend over the persons of the crew "beyond the infliction of usual and necessary punishment in cases of disobedience or infraction of rules."

Another case in which a vice-principal is deemed to be acting outside the scope of his employment is when, merely as a personal matter, he gives a subordinate some information which proves to be erroneous, and the subordinate receives an injury in consequence of his reliance on the statement.

Recovery has been denied where a workman was injured by relying on the statement of his foreman that a rope which he was about to use for the purpose of descending from a trestle was secure. *Louisville & N. R. Co. v. Lahr* (1888) 86 Tenn. 335, 6 S. W. 683. The court here relied upon the distinction between official and nonofficial acts; but it is submitted that the true and only reason for absolving the employer should have been that the servant was under no orders to descend from the trestle, and was using the rope for his own accommodation entirely. If the servant had been about the company's business, or had been leaving his work, such an assurance would undoubtedly have been given by the foreman in his character of vice-principal.

b. *Distinction between official and nonofficial acts of supervising employees.*

1. *Generally.*

Under the general law of agency the principal, while he is not liable where the agent transcends his authority, must answer for everything done by such agent within the scope of his authority. But in actions brought by a servant to recover for injuries caused by a delinquent vice-principal the rule of *respondet superior* is not universally conceded to have this unrestricted scope.

As will be shown below (VI. f, h) many of the courts proceed upon the theory that, even where the negligence in suit is proved to have had reference to the master's business, the plaintiff's action may still be barred by evidence susceptible of the construction that the vice-principal was acting in the capacity of a mere servant when he inflicted the injury for which indemnity is sought. In other words, he is conceived of as a functionary having a dual character, some of whose derelictions of duty are official, and others nonofficial, a subordinate being allowed to recover if his injury was due to an official act, and not otherwise.

The same individual may combine in his own person the functions of both master and servant. *Cole Bros. v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074.

The mere fact that an injury results from the negligence of a servant superior in rank to the injured servant does not render the master liable, but, in order to charge the master with such negligence, the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior servant, which, under the law, the master owes that servant. *Allen v. Goodwin* (1893) 92 Tenn. 385, 21 S. W. 760.

This theory, of course, only becomes a material element where the delinquent was in control of the injured person.

In *Lincoln Coal Min. Co. v. McNally* (1884)

15 Ill. App. 181, it was contended that, as a negligent shaft boss had the power to hire and discharge other employees of the company working at the shaft, and to superintend them at work, he was a representative of the master, and not a fellow servant with deceased, who did not work under him. But the court said: "It is not necessary to inquire how far, if at all, he represented the power of the common master. The mere fact that he may have had the power to employ and discharge other servants, if conceded, and to superintend them when at work, did not, as to the particular alleged act of negligence by which deceased was killed, change his character from that of a co-servant to that of a representative of the company. The death of deceased was not the result of the exercise of any authority conferred upon Downey. He exercised no power that placed deceased in a more exposed or dangerous position than he would otherwise have occupied, nor did any power exercised by him contribute to the accident. The authority possessed by Downey, whatever it may have been, had no influence or bearing upon the accident which caused the injury, and at the time of the accident Downey and deceased were performing the labor of common servants, neither exercising any authority over the other, and they were co-servants as to the labor then being performed by them."

In exceptional instances employees may "occupy, not only a dual, but a threefold, relation towards each other, according to the duties they are called upon or delegated to perform, to wit, that of superior or master, co-ordinate or fellow servant, inferior or servant. . . . Where the injury is caused by an employee acting in the discharge of a duty that renders him inferior to, or co-ordinate with, the injured employee, the master or company is not liable, but where he acts in a superior position the master is liable. For instance, in running the train, the conductor is the superior of the engineer, and in that particular he represents the master; in the separate management of the engine and the train from the engine back they are co-ordinate or fellow servants, each being independent in his own sphere; and in permitting the fireman or other person to manage the engine in his stead, the engineer is the superior of the conductor, discharging a nonassignable duty delegated to him by the master or company." *Core v. Ohio River R. Co.* (1893) 38 W. Va. 456, 469, 18 S. E. 596.

In any jurisdiction where the functions of supervising employees are differentiated upon this basis, the effect which the theory has upon the plaintiff's rights of recovery should be explained in terms appropriate to the evidence introduced.

Instructions drawing the attention of the jury to this principle should be given where there is evidence tending to show negligence of a superior servant, whereby an inferior servant has been injured. *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387.

An instruction that, if the jury believe that the complainant was injured through the negligence of defendant or his servants, and not through his own negligence, they will find for the complainant, is too broad, as it does not distinguish between the acts of a vice-principal and the acts of a servant. *Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 673, 43 N. W. 415; *Illinois C. R. Co. v. Bolton* (1897) 99 Tenn. 273, 41 S. W. 442 (error to refuse an instruction that a section foreman does not represent the company as to what he does as a laborer); *Mobile & O. R. Co. v. Godfrey* (1859) 155 Ill. 78, 39 N. E. 590 (error to instruct a jury on the theory that a conductor, who was

also acting as foreman of a work train, was, as matter of law, a representative of the master for all purposes).

It may be mentioned in passing, though the subject does not fall, strictly speaking, within the scope of the present note, that the cases decided under the various employers' liability acts which impose a liability for the negligence of superior servants also disclose a conflict of opinions as to the limits of that liability, where the injury was due to participation in manual work. The conclusions arrived at in the various courts have doubtless been affected by those which had previously been adopted under purely common-law principles, but are so largely influenced by the language used in the statutes themselves that it would be unprofitable to review the decisions in this connection.

2. *Distinction considered with relation to the doctrine that the nature of the negligent act is the test of liability.*

It should be observed here that, although many of the decisions to be cited in the following sections, in which the master was held liable, might have been equally well referred to the theory that he must, at his peril, see that all nondelegable duties are performed with reasonable care, the only cases with which we are now properly concerned are those in which, conceding the delinquent employee to be a vice-principal by virtue of his rank and the nature and extent of the control exercised by him, he was acting as an agent of the master, or as a mere servant. Logically speaking, the process by which the master's liability is determined in this class of cases is, it is manifest, precisely the reverse of that employed in those reviewed in a future note. In the one instance, the inquiry starts with the assumption that the delinquent was a vice-principal, and proceeds to determine whether he was acting in his representative capacity as regards the default complained of. In the other, the single question to be considered is whether the default imputed was one which amounted to a breach of some one of the master's nondelegable obligations, and the superior rank of the delinquent employee consequently becomes a nonessential element in the inquiry. He is viewed, that is to say, solely as the medium through which the culpable violation of duty operated to the injury of the plaintiff. In classifying the authorities, however, it is often somewhat difficult to observe the distinction here adverted to, for the reason that, where the facts are such as render it possible to conduct the investigation along either of the alternative lines thus indicated, the courts have failed to define, with as much precision as the situation demands, the standpoint from which they were examining the defendant's liability. In not a few instances, indeed, there is even room for doubting whether judges have fully appreciated the distinction and its rationale. For example, in *McCosker v. Long Island R. Co.* (1881) 84 N. Y. 77, to sustain the ruling that no recovery could be had for the negligence of a yardmaster in signaling for the movement of a car at a wrong moment, is cited *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. This case, as will be seen by referring to VI. f. 1, *infra*, was quite inappropriate as an authority, inasmuch as a yardmaster was, under previous rulings of the court, unquestionably a fellow servant as to the discharge of his ordinary duties.

It is observable, moreover, that, in none of the late decisions by this court (see VI. f. 1, *infra*) absolving the master from liability for

the defaults of supervising employees whose official position was such as to place them at least on the border line between vice-principals and mere servants, is any clear statement found showing whether the tests of representative capacity recognized in *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573, and *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, are still regarded as having a concurrent existence with the test supplied by the nature of the negligent act, and as being merely limited by the latter test under certain circumstances, or whether the earlier decisions are now no longer law in New York. Any case in which there is any uncertainty on this score will receive notice both in this and in the following note.

The essence of the position of a vice-principal being that he represents an absent master, it occasionally follows that "where the employer himself assumes control, and gives an express order, not only what to do, but how to do it, even a vice-principal is bound to obey, and becomes for the time being a mere coemployee, whatever his general authority under other circumstances." *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

An analogous situation is presented, where an employee who was a vice-principal, as being the superintendent of a main department of his master's business, was at the time of the accident occupying another position of a lower grade. As long as he fills that position, it is clear that none of his acts can be those of a vice-principal, unless they belong to the class of representative acts which are wholly independent of rank. Cases illustrating this rule must, in practice, be extremely rare, for the simple reason that officials of sufficiently high rank to be vice-principals seldom discharge the duties of another distinct position in the manner here supposed. But the general principle must clearly be as stated, and it is recognized in the very recent decision of the Federal court of appeals that an engineer in ordering his fireman to oil a turntable at a place out on the line does not act as a vice-principal, although he may also be foreman of a roundhouse at a place some distance away, and as such possibly a representative of the company while acting in that capacity. *Brigial v. Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. Rep. 958 (started the turntable). Compare also the language used in *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, quoted in VI. f. *infra*.

Although, as will be shown below, many courts hold that a negligent act of a vice-principal is not official where it has a direct connection with manual labor, it is clear that the mere fact of its being the duty of a vice-principal to assist his subordinates in their work will not prevent recovery for injuries caused by negligence of a distinctly official character. *Lake Shore & M. S. R. Co. v. Lavalley* (1880) 36 Ohio St. 222 (foreman of car repairers failed to protect properly a car under which he himself and one of his hands were working, the consequence being that it was struck by a moving car). Compare *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673.

The fact that an assistant superintendent in a lumber yard occasionally performs some services in keeping tally of the lumber does not deprive him of his character of vice-principal so far as it depends on the discharge of any non-assignable duties. *Zintek v. Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 340. 51 L. R. A.

c. *Breach of nondelegable duties by any superior servant, master liable for.*

According to the great weight of authority, the master must answer for the defaults of employees who are vice-principals under any of the doctrines developed in the three preceding subtitles, wherever the negligence complained of consists in the failure to see that only appliances which satisfy the legal standard of safety are supplied to their subordinates. *Clarke v. Holmes* (1862) 7 Hurist & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J. (see IV. b. *supra*); *Borgman v. Omaha & St. L. R. Co.* (1890) 41 Fed. Rep. 667 (wreckmaster); *Lund v. Hersey Lumber Co.* (1890) 41 Fed. Rep. 202 (general superintendent); *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545 (general manager); *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (yardmaster); *McC Campbell v. Cunard S. S. Co.* (1893) 69 Hun, 131, 23 N. Y. Supp. 477 (dock superintendent of steamship company); *Rettig v. Fifth Ave Transp. Co.* (1893) 6 Misc. 328, 26 N. Y. Supp. 896 (departmental manager); *Union P. R. Co. v. Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (foreman of derrick); *Mitchell v. Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812 (general manager—defective boiler); *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400 (boiler exploded—no accident would have occurred if it had been disconnected by the manager when it was observed to be defective); *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2 (head stevedore negligent in selecting and adjusting rigging); *Higgins v. Missouri P. R. Co.* (1891) 43 Mo. App. 547 (gang foreman failed to furnish necessary appliances); *Tabler v. Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810 (master mechanic improvised a coupling); *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206 (roadmaster improvised a coupling); *National Fertilizer Co. v. Travis* (1899) 102 Tenn. 16, 49 S. W. 832 (failure of foreman to maintain apparatus in safe condition); *Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, 27 S. W. 644 (roadmaster removed brake staffs); *Pittsburg Bridge Co. v. Walker* (1897) 170 Ill. 650, 48 N. E. 915 (bridge foreman dispensed with appliance necessary for safety); *The Julia Fowler* (1892) 49 Fed. Rep. 277 (chief officer of ship furnished defective rope). See also *Banks v. Wabash Western R. Co.* (1890) 40 Mo. App. 458 (section foreman allowed hand-car to become unsafe); *Clowers v. Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (section foreman failed to report defective hand-car for repairs); *Sweeney v. Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555 (section foreman allowed hand-car to become defective); *Missouri P. R. Co. v. James* (1888; Tex.) 10 S. W. 332 (same facts); *The A. Heaton* (1890) 43 Fed. Rep. 592 (captain of ship knew rope to be rotten).

The master must answer, also, when the negligence consists in the failure to see that the place of work is and remains as safe as it can be made by reasonable care.

In *Ambrose v. Angus* (1895) 61 Ill. App. 304, the trial court was held to have erroneously given instructions from which it might be inferred that the foreman was a fellow servant, because the erection of a derrick was for the purpose of carrying on the same general business in which the plaintiff was engaged. See also *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412 (general manager); *Brothers v. Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424 (general manager—superintendent built defective false work); *New York, L. E. &*

W. R. Co. v. Bell (1886) 112 Pa. 400, 4 Atl. 50 (departmental manager); Paterson v. Wallace (1854) 1 Macq. H. L. Cas. 748 (roof of mine tunnel allowed by underground manager to become unsafe); Gallagher v. Piper (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329 (see IV. b. *supra*); Lynch v. Haggart (1857) 19 Dunlop (Sc. Sess. Cas.) 399 (defects in scaffolding known to manager); Whalen v. Centenary Church (1876) 62 Mo. 326 (same facts); Devany v. Vulcan Iron-Works (1877) 4 Mo. App. 236 (foreman furnished defective scaffold); Heckman v. Mackey (1888) 35 Fed. Rep. 353 (foreman allowed scaffold to become a pitfall); Slater v. Chapman (1887) 67 Mich. 523, 35 N. W. 106 (foreman created pitfall by removing clay from a temporary staircase); Mayhew v. Sullivan Min. Co. (1884) 76 Me. 100 (manager created a pitfall by having hole cut in platform); Woods v. Lindvall (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. Rep. 62 (foreman of construction erected an unsafe trestle); Band of Hope Consols v. Mackay (1871) 2 Vict. Rep. (L) 158 (general manager allowed mine ladder to remain insecurely fastened); Louisville, N. A. & C. R. Co. v. Graham (1890) 124 Ind. 89, 24 N. E. 668 (foreman of tunnel did not support roof adequately); Westville Coal Co. v. Schwartz (1898) 177 Ill. 272, 52 N. E. 276, Affirming (1897) 75 Ill. App. 468 (failure of pit boss to look after the roof of a room in a mine); Anderson v. Bennett (1888) 16 Or. 515, 19 Pac. 765 (superintendent did not make sure that all the blasts had been properly exploded before sending laborer to resume drilling); Libby, McN. & L. v. Scherman (1893) 146 Ill. 540, 34 N. E. 801, Affirming (1892) 50 Ill. App. 123 (foreman piled barrels carelessly); Zintek v. Stimson Mill Co. (1894) 9 Wash. 395, 37 Pac. 340 (assistant superintendent raised a pile of lumber on an insecure foundation); Tissue v. Baltimore & O. R. Co. (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667 (departmental manager stored explosives dangerously close to the place of work); Chicago Anderson Pressed Brick Co. v. Sobkowiak (1889) 34 Ill. App. 312 (1894) 148 Ill. 573, 36 N. E. 572 (foreman did not secure laborer against being injured by the fall of a bank); Thompson v. Chicago, M. & St. P. R. Co. (1883) 5 McCrary, 542, 13 Fed. Rep. 239 (similar facts); Burlington & M. River R. Co. v. Crockett (1886) 19 Neb. 138, 26 N. W. 921 (no watchman stationed to give notice of danger while a bank threatened to fall); Hall v. St. Joseph Water Co. (1891) 48 Mo. App. 356 (foreman allowed walls of trench to fall in); Atchison, T. & S. F. R. Co. v. Wilson (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. Rep. 57 (roadmaster constructed a defective temporary track); Kansas City Car & Foundry Co. v. Sechrist (1898) 59 Kan. 778, Appx. (foreman of carpenters left a heavy beam in such a position that it fell); Cleveland, C. C. & St. L. R. Co. v. Brown (1898) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Rep. 804 (no proper precautions to secure servants taking down building); Cook v. St. Paul, M. & M. R. Co. (1885) 34 Minn. 45, 24 N. W. 311 (place of work not kept safe for servants ordered to clear away debris of a burnt building); Northern P. R. Co. v. Beaton (1894) 12 C. C. A. 301, 20 U. S. App. 88, 64 Fed. Rep. 563 (improper disposition of a derrick on a railway car); Colorado Midland R. Co. v. O'Brien (1891) 16 Colo. 219, 27 Pac. 701 (overloaded car caused derailment); Colorado Midland R. Co. v. Naylor (1892) 17 Colo. 501, 30 Pac. 249 (same facts); Openshaw v. Utah & N. R. Co. (1889) 6 Utah, 132 (defective loading of railway car by conductor).

In a case where the plaintiff was injured by the fall of a pile of timber in a railway lumber 51 L. R. A.

yard, it was held that, if the charge of the foreman (here treated as a departmental manager) involved the duty of maintaining an inspection of the piles so as to prevent their becoming dangerous to the workmen, he was in the performance of such duty, as superior. An instruction that the plaintiff could not recover unless the foreman's negligence had relation to the employment of other servants or the furnishing of improper materials was accordingly held too broad. Baldwin v. St. Louis, K. & N. R. Co. (1885) 68 Iowa, 37, 25 N. W. 918.

It is the master's duty to see that the servants whom he controls are competent for the duties to which they are assigned. Huntingdon & B. T. Road & Coal Co. v. Decker (1877) 84 Pa. 419 (general manager employed unfit servant); Rowland v. Missouri P. R. Co. (1886) 20 Mo. App. 483 (section foreman was negligent in employing a subordinate); Lyttle v. Chicago & W. M. R. Co. (1890) 84 Mich. 289, 47 N. W. 571 (departmental manager retained an incompetent servant with knowledge of his unfitness); Fraser v. Schroeder (1896) 163 Ill. 450, 45 N. E. 288 (similar facts); Ryan v. Los Angeles Ice & Cold Storage Co. (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471 (manager allowed inexperienced men to do work they were unfitted for); Louisville & N. R. Co. v. Moore (1886) 83 Ky. 675 (conductor allowed fireman to operate an engine).

Also that they are sufficient in number to perform those duties without unduly endangering themselves or their collaborators. Mason v. Edson Mach. Works (1886) 24 Blatchf. 93, 28 Fed. Rep. 228; Stoddard v. St. Louis, K. C. & N. R. Co. (1877) 65 Mo. 514.

And that the place of work and the various appliances are examined at proper intervals with a view to ascertaining whether they have become abnormally dangerous from any cause. Pantzar v. Tilly Foster Iron Min. Co. (1885) 99 N. Y. 368, 2 N. E. 24 (general manager failed to inspect dangerous bank which fell); Kansas P. R. Co. v. Little (1877) 19 Kan. 267 (superintendent of construction failed to perform his duty of inspecting the machinery used, and reporting for repair); Baldwin v. St. Louis, K. & N. R. Co. (1885) 68 Iowa, 37, 25 N. W. 918.

And that a safe system for the conduct of the business is adopted and adhered to. Faren v. Sellers (1887) 39 La. Ann. 1011, 3 So. 368; Claybaugh v. Kansas City, Ft. S. & M. R. Co. (1894) 56 Mo. App. 630; Fraser v. Hand (1889) 33 Ill. App. 153; Richmond Granite Co. v. Bailey (1896) 92 Va. 534, 24 S. E. 232 (general manager gave an order which amounted to an abrogation of a rule issued by himself); Louisville, N. A. & C. R. Co. v. Heck (1898) 151 Ind. 202, 50 N. E. 988 (division superintendent negligent in controlling the movements of trains); Bateman v. Peninsular R. Co. (1898) 20 Wash. 133, 54 Pac. 996 (general superintendent did not stop a train when it was dangerous for it to proceed); Palmer v. Michigan C. R. Co. (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397 (laborers required by assistant roadmaster to throw rails on moving cars); East Tennessee, V. & G. R. Co. v. De Armond (1887) 86 Tenn. 73, 5 S. W. 600 (telegraph operator did not display a stop signal); The Transfer (1894) 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. Rep. 364, Reversing (1893) 55 Fed. Rep. 98 (captain of ship disregarded rules as to signaling); Criswell v. Pittsburgh, C. & St. L. R. Co. (1888) 30 W. Va. 798, 6 S. E. 31 (section foreman disobeyed rule).

Instruction and warning should be given in all proper cases, as to any extraordinary risks incident to the work, whether their abnormal character arises from the inexperience of the servant (Missouri P. R. Co. v. Perego (1887)

36 Kan. 424, 14 Pac. 7 (no instruction was given by a superintendent to an ignorant apprentice); *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168, 24 S. W. 106 (departmental manager); *International & G. N. R. Co. v. Hinzle* (1891) 82 Tex. 623, 18 S. W. 681 (foreman); or from the condition of the instrumentalities, as where a departmental manager omitted to remove a blast, or warn a laborer of its presence (*McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334); the conductor of a work-train failed to see that laborers had timely notice of the danger of earthshakes (*Burlington & M. River R. Co. v. Crockett* (1886) 19 Neb. 138, 26 N. W. 921); the foreman of a gravel pit failed to warn as to the danger of the fall of a bank (*Andreson v. Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305); a conductor failed to warn the brakeman of the dangerous condition of a load. *Louisville & N. R. Co. v. Robinson* (1891) 13 Ky. L. Rep. 153, 16 S. W. 707).

It is manifest that, although, as will be seen by comparing the various memoranda of facts in the notes to this section with those appended to the citations in II. *supra*, and with the cases to be discussed in a future note, delinquencies falling under the foregoing categories do not in all instances amount to breaches of a nondelegable duty in such a sense that, even if committed by a mere fellow servant, they would render the master liable; yet they are so distinctly of the same character that it would be irrational to hold them to be nonofficial, when the guilty party is once conceded to be a vice-principal. See, however, VI. g. *infra*.

An instruction requested to the effect that the master would not be liable for any negligence of the foreman, unless in the employment of incompetent men, or in the use of unfit machinery or appliances, is properly refused. *Baldwin v. St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918. The court said: "It may be conceded that a mere foreman, as the word 'foreman' is generally understood,—that is as a laborer, with power to superintend the labor of those working with him,—is a coemployee so far as his own mere labor is concerned. *Peterson v. Whitebreast Coal & Min. Co.* (1879) 50 Iowa, 673, 32 Am. Rep. 143. But the instruction is too sweeping. It could be sustained only upon the ground that there was no evidence tending to show negligence on the part of Collier, or anyone else acting as a superior. Now, as we have observed, the evidence showed that Collier had charge of the yard. If his charge involved the duty of maintaining an inspection of the piles in reference to their security against falling upon those employed near them, he was, we think, in the performance of such duty as superior. The close question perhaps is as to whether his charge involved such duty, but we think that the jury might infer from the circumstances that it did. . . . We are not prepared to say, therefore, that, as a matter of law, the plaintiff was negligent in not discovering them. If he was not it would seem to follow that a duty in that respect rested upon the defendant to be discharged by the person in charge of the yard. Neither the expense nor difficulty of inspecting the pile appears to have been such that an exposure like the one in question should be regarded as practically unavoidable. We think that the defendant should have seen, in the first place, as perhaps it did, that the piles were originally properly constructed; and if, as the evidence shows, the piles afterwards sometimes became dangerous by reason of a custom among the employees of cutting the cross strips to enable them to take out sticks of timber, the defendant should have exercised 51 L. R. A.

reasonable diligence in seeing that the piles were rendered safe again by a supply of other cross strips of proper length."

It has been held that a fire boss in a coal mine, whose only power of control is to direct the men to leave a dangerous place at which they are working and go to another, even if he is a vice-principal by virtue of his functions, which is denied, does not occupy that relation of vice-principal toward an employee in opening his lamp for the purpose of lighting his pipe, after a statement by such employee that there is no gas at a place which such boss is about to test. *Morgan v. Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (Dunbar, Ch. J., dissents). Dangerous accumulations of gas certainly point to the conclusion that the presence of the injured miner at a place where there were such accumulations was due to an official act of the boss.

d. *Issuance of orders deemed to be an official act.*

The logical consequence, if not the actual effect, of some decisions referred to in VI. f, 2, *infra*, is to absolve the master, even from the results of complying with the negligent order of a vice-principal, where such order relates merely to the details of the work.

But there is an overwhelming weight of authority to sustain the doctrine that the liability to which the master is declared to be subject, wherever the negligent act is a direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him, is predicable in the case of orders issued in respect to the work, whatever may be the precise object to which those orders may have relation. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 82 N. E. 285.

It is, in fact, difficult to see what more indisputable example there can be of an "exercise of authority" than the giving of such orders; and, for the purposes of the master's liability in this instance, it is obviously quite immaterial whether the delinquent employee be a mere "superior servant" or a general or departmental manager. According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position.

"The defendant ought not to escape liability for negligently issuing, as master and in the course of the performance of its duty as such, to its employees, an improper order." *Haskins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466, *Reversing* (1889) 55 Hun, 51, 8 N. Y. Supp. 272.

The order may be a negligent one because the servant is directed to use dangerously defective appliances. *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 200, 70 Fed. Rep. 669.

Or to work in an abnormally dangerous place. *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748; *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (1885) 88 Mo. 293; *Bradley v. Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763; *Cox v. Syenite Granite Co.* (1890) 39 Mo. App. 424; *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57, 24 N. E. 627, *Affirming* (1889) 31 Ill. App. 288; *Pullman's Palace Car Co. v. Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. Rep. 932; *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700; *Jones v. Old Dominion Cotton Mills*

(1886) 82 Va. 140; Chicago, St. P. M. & O. R. Co. v. Lundstrom (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198; Stockmeyer v. Reed (1893) 55 Fed. Rep. 259; Deep Min. & Drainage Co. v. Fitzgerald (1895) 21 Colo. 533, 43 Pac. 210.

According to early Scotch decisions a superior servant (here the underground manager of a mine) may be a representative of the master in respect to an order exposing a subordinate to danger (*Somerville v. Gray* (1863) 1 Sc. Sess. Cas. 3d Series, 768), while he is a fellow servant as to other operations connected with his functions as a controlling employee. *Wright v. Roxburgh* (1864) 2 Sc. Sess. Cas. 3d Series, 748 (explosion of fire-damp caused by temporary interruption of ventilation).

This particular ground of distinction seems never to have been acknowledged in any of the English cases which countenanced the doctrine of vice-principalship; and must, in any event, be repudiated in any court which is bound by the subsequent ruling of the House of Lords in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30 (IV. d. 1, *supra*).

It may be a negligent order because he is directed to do work in a dangerous manner (*Thompson v. Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579; *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397; *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124 (disposition of rails which were being loaded); *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916 (same facts); *Fanter v. Clark* (1884) 15 Ill. App. 470 (direction to remove obstruction from a planing-machine without stopping it); *Gormly v. Vulcan Iron Works* (1876) 61 Mo. 492 (order to apply fire to an oven in a manner calculated to cause an explosion); *Keating v. Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224 (furling of sails); or to do something which, under the circumstances, will render the place of work abnormally dangerous for a fellow servant. *Augusta v. Owens* (1900) 111 Ga. 464, 36 S. E. 830.

The order may also be culpable because it directs instrumentalities, suitable and safe if properly handled, to be used in a manner which any man of ordinary prudence and sagacity would understand to be likely to eventuate in disaster.

The most frequent illustrations of such orders are furnished by the cases in which conductors and other employees having the control of railway cars manage them so as to cause injury. *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Union P. R. Co. v. Callaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. Rep. 988; *Northern P. R. Co. v. Cavanaugh* (1892) 2 C. C. A. 358, 10 U. S. App. 197, 51 Fed. Rep. 517; *Canadian P. R. Co. v. Johnston* (1894) 25 L. R. A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. Rep. 738; *Northern P. R. Co. v. Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. Rep. 881; *Missouri P. R. Co. v. Texas & P. R. Co.* (1889) 38 Fed. Rep. 816; *Northern P. R. Co. v. Smith* (1894) 8 C. C. A. 663, 15 U. S. App. 294, 59 Fed. Rep. 993; *Ragdale v. Northern P. R. Co.* (1889) 42 Fed. Rep. 383; *Lake Shore & M. S. R. Co. v. Knittall* (1878) 33 Ohio St. 468; *Clark v. Hughes* (1897) 51 Neb. 780, 71 N. W. 776; *Little Miami R. Co. v. Stevens* (1851) 20 Ohio, 415; *Cleveland, C. & C. R. Co. v. Keary* (1854) 3 Ohio St. 201; *Illinois C. R. Co. v. Spence* (1893) 93 Tenn. 173, 23 S. W. 211; *Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58; *Spencer v. Brooks* (1895) 97 Ga. 681, 25 S. E. 480; *Wilson v. Louisiana & N. W. R. Co.* (1899) 51 La. 51 L. R. A.

Ann. 1133, 25 So. 961; *Van Amburg v. Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517; *Walker v. Gillett* (1898) 50 Kan. 214, 52 Pac. 442; *Ritt v. Louisville & N. R. Co.* (1887; Ky.) 4 S. W. 798; *Newport News & M. Valley Co. v. Dentzel* (1890) 91 Ky. 42, 14 S. W. 958; *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. Co. v. Wallingford* (1893) 15 Ky. L. Rep. 170, 22 S. W. 439; *Newport News & M. Valley Co. v. Carroll* (1895) 17 Ky. L. Rep. 374, 31 S. W. 132; *Chicago, B. & Q. R. Co. v. Blank* (1887) 24 Ill. App. 438; *Ayers v. Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582; *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161; *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554; *Haney v. Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748; *Madden v. Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695; *Daniel v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; *Louisville & N. R. Co. v. Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426; *East Tennessee & W. N. C. R. Co. v. Collins* (1886) 85 Tenn. 227, 1 S. W. 883; *Kirk v. Atlanta & C. Air Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621; *Hardy v. Minneapolis & St. L. R. Co.* (1888) 36 Fed. Rep. 657; *Norris v. Illinois C. R. Co.* (1899) 86 Ill. App. 614; *Armstrong v. Oregon Short Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693; *Nail v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 280, 28 N. E. 188, 611; *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288.

In *Chicago, R. I. & P. R. Co. v. Touhy* (1887) 26 Ill. App. 99, it was held that a yardmaster, in giving a signal to an engineer that a public crossing is clear of teams and may be blocked by backing some cars, is not acting as a representative of the company in the same sense that he would have been if he had issued a peremptory command, and the company is therefore not liable for an injury received by a switchman through being crushed between a moving and a stationary car. But the distinction thus implied seems to be of very dubious correctness.

The negligent management of hand-cars by section foremen and other employees controlling them is another analogous instance of official culpability. *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Woodward Iron Co. v. Andrews* (1890) 114 Ala. 243, 21 So. 440; *Louisville & N. R. Co. v. Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463; *St. Louis, I. M. & S. R. Co. v. Rickman* (1898) 65 Ark. 138, 45 S. W. 56; *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 21 So. 507 (1898) 121 Ala. 113, 25 So. 814; *Gann v. Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 381, 47 S. W. 493; *Johnson v. Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784; *Louisville & N. R. Co. v. Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463; *Chicago & A. R. Co. v. Golts* (1897) 71 Ill. App. 414.

Similar official acts of negligence are the omission to station a lookout at the proper place on board a ship (*The Titan* (1885) 28 Blatchf. 177, 23 Fed. Rep. 413); and an order to use a push-car for the improper purpose of transportation. *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. Rep. 67.

See also, as illustrating the general principle, *Chattanooga Electric R. Co. v. Lawson* (1898) 101 Tenn. 406, 47 S. W. 489; *Leiter v. Kinnare* (1896) 68 Ill. App. 558; *Blloyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S.

W. 1089; *Denver, S. P. & P. R. Co. v. Driscoll* (1889) 12 Colo. 520, 21 Pac. 708; *Chicago Dredging & Dock Co. v. McMahon* (1888) 30 Ill. App. 358; *West Chicago Street R. Co. v. Dwyer* (1894) 57 Ill. App. 440; *McCarthy v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 485, 50 N. W. 21; *Herriman v. Chicago & A. R. Co.* (1887) 27 Mo. App. 435; *Logan v. North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959; *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221 (1888) 96 Mo. 207, 9 S. W. 589; *Ramsay v. Quinn* (1874) Ir. Rep. 8 C. L. 322.

Or the order may be culpable because it is given in such a way that, under the circumstances, it is likely to confuse the workman receiving it, and thus render him less capable of protecting himself (*Coyne v. Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Supp. Ct. Rep. 382); or because it has the effect of throwing the workman off his guard, when some transitory danger is approaching; as where an assistant roadmaster ordered a laborer to continue working on a car, when an engine was close at hand. *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

It is scarcely necessary to cite authorities to the point that an order within the meaning of the general rule may be given by word of mouth or by any other means of communication which may be appropriate or convenient. *Cox v. Syenite Granite Co.* (1890) 39 Mo. App. 424; *Louisville & N. R. Co. v. Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817; *Hoke v. St. Louis, K. & N. R. Co.* (1885) 88 Mo. 360, *Reversing* (1892) 11 Mo. App. 574 (roadmaster while directing the removal of a wreck, gave a wrong signal to an engineer, and so caused injury to a laborer); *Spencer v. Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor signaled engineer to back a car prematurely, so that plaintiff was crushed); *Devine v. Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 589 (failure of conductor to give the stop motion at the proper time to an engineer who was running cars on to a siding).

It is also clear that the entire omission to give any orders at all, when the occasion demands it, is as culpable as the actual giving of improper orders. *Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235 (general manager omitted to prevent starting of machinery); *Brown v. Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (failure to give signal to stop hoisting engine).

One who acts as vice-principal in an emergency in selecting men, machinery, and a place to work does not become a fellow servant immediately upon beginning the work, with all suitable agencies provided therefor, but continues a vice-principal in directing the movements of the individual employees. *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 268, 28 N. E. 183, 611. The court said: "Counsel err in assuming that when Helms pointed out to the assembled employees the imperiled bridge and the accumulated drift and debris which threatened it, he had completed the work of selecting the place to work. As above stated, within their several departments, each man knows, or should know, in a general way at least, what duties are required of him, and how, when, and where to use the appliances provided; but at such a time and in such an emergency as that described in the complaint there must be an intelligent directing head to assign to the men their places and direct them what to do; to direct what appliances shall be used, and when, where, and now they shall be used. This intelligent and

directing head must be the master. And he to whom the master delegates such duty acts as the master, who cannot escape responsibility by having another act in his stead. Therefore, when Helms ordered the decedent to go down among the drift wood, and directed him what he should do there, he was still acting as vice-principal, and was furnishing to decedent his place to work."

Intimately connected with negligence in issuing orders is that which consists in assuring a servant that there is no danger to be feared, when, as a matter of fact, the superior giving the assurance knew or ought to have known that his statement was not true. The liability of the master under this head is fully treated in *note to McKee v. Tourtelotte* (Mass.) 48 L. R. A. 542.

e. Failure to protect subordinates from transitory dangers deemed to be official negligence.

The courts, as a whole, require the master to answer for the negligence of a vice-principal, whenever the default complained of consists in the omission to take such precautions as a prudent man would, under the circumstances, have taken for the purpose of protecting the injured subordinate against some peril of the transitory class, against which he had no adequate means of guarding himself.

It has often been held or assumed that employees controlling workmen whose duties require them to be in places where they may be struck by moving railway cars are acting in their representative capacity when they do not adopt means for preventing the cars from reaching the place where the work is going on, or for securing that the workmen shall, at all events, have due warning of the approach. Cases where injured car repairers have been allowed to recover on this ground are the following: *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 206; *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 172, 23 So. 342; *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302; *Lake Shore & M. S. R. Co. v. Lavalley* (1880) 36 Ohio St. 221; *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835; *Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 673, 43 N. W. 415; *St. Louis, A. & T. H. R. Co. v. Holman* (1894) 53 Ill. App. 617; *Hannibal & St. J. R. Co. v. Fox* (1884) 31 Kan. 586, 3 Pac. 320.

The duty of a section foreman to protect his subordinates from moving trains is also recognized as official in several cases. *Torian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Chicago, St. L. & P. R. Co. v. Gross* (1889) 35 Ill. App. 178, *Affirmed* in (1890) 133 Ill. 37, 24 N. E. 563; *St. Louis, I. M. & S. R. Co. v. Rickman* (1898) 65 Ark. 138, 45 S. W. 56.

In *Hannibal & St. J. R. Co. v. Fox* (1884) 31 Kan. 586, 3 Pac. 320, the court, in holding the company liable for the negligence of a foreman of car repairers, said: "He was not only the foreman to direct the work of his subordinates, but he was the person above all others to provide that they had a reasonably safe place at which to work; and while he was present, overseeing their work, upon him devolved the duty of using ordinary care and diligence to prevent them from being injured, mangled, or crushed by other trains or cars moving the one under which he had placed them. It is immaterial, therefore, whether Lovell be called superintendent, middle-man, boss repairer, or foreman. The duty devolved upon him to direct his subordinates to work in a peculiarly dangerous place, where by the exercise of rea-

sonable care they could not protect themselves from approaching trains of cars and under such circumstances the duty devolved upon him, as the representative of the company, to protect his subordinates while at work from the switching of cars and the making up of trains on the same track. He failed to perform his duty. For his negligence in this respect the company is liable. The latter cannot in this matter interpose between itself and Fox, who has been injured without fault on his part, the personal responsibility of Lovell, who in exercising the company's authority has violated the duty he owed, as well to Fox as to the company."

A foreman who orders a workman to get into an open coal car boarded up at the sides about 48 inches, and to pile ties thrown from the outside, places him in a position in which at times he cannot possibly see what is done by the men who are loading the ties, and is therefore bound to adopt some appropriate precaution to guard against the risk of his being struck by a tie. *Claybaugh v. Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630.

See also the following cases as illustrating the general rule. *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255 (foreman of mine failed to notify workman that a blast was about to be let off); *Brown v. Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (head steverdore failed to signal engineer to stop the machinery, when an overloaded bucket of coal was swinging dangerously); *Johnson v. Richmond & A. R. Co.* (1888) 84 Va. 713, 5 S. E. 707 (conductor failed to station himself where he could control the movements of the cars so as to avoid injuring a brakeman ordered to couple); *Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235 (manager did not take steps to prevent plaintiff from being injured by the sudden starting of machinery); *Kewanee Boiler Co. v. Erickson* (1898) 78 Ill. App. 35 (superintendent allowed steam to be let into a boiler which plaintiff was repairing); *Wabash, St. L. & P. R. Co. v. Hawk* (1887) 121 Ill. 259, 12 N. E. 253 (floor of wrecked car, being insecurely propped, fell); *Alaska Treadwell Gold Min. Co. v. Whelan* (1894) 12 C. C. A. 225, 29 U. S. App. 1, 64 Fed. Rep. 462 (night boss in mine failed to warn workman that chute was about to be opened. Reversed in (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40, solely on the ground that the negligent servant was a mere gang foreman); *Hoosier Stone Co. v. McCain* (1892) 133 Ind. 231, 31 N. E. 956 (manager of quarry allowed insufficiently blocked cars to be started on an incline by the impact of others); *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232 (foreman in quarry failed to warn subordinate that a cable was about to be tightened); *Kirk v. Sensig* (1898) 79 Ill. App. 251 (foreman failed to warn elevator man of presence of another workman in the shaft); see also the cases cited in the last subdivision, which deal with the management of railway and hand cars, most of which may be referred to the principle now under discussion, as well as to the conception of negligence in giving orders.

The duty to prevent the happening of the occurrence which would expose the servant to such a peril, or, if that is not possible, to give such warning as will enable him to remove his person out of the zone of danger in time to avoid injury, may well be regarded as a form of the nonassignable duty to furnish and maintain a safe place of work. See the language used by the court in *Alaska Treadwell Gold Min. Co. v. Whelan* (1894) 12 C. C. A. 225, 29 U. S. App. 1, 64 Fed. Rep. 462, Re-51 L. R. A.

versed in Supreme Court, but merely on the ground that the superior servant was not a departmental manager; *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

It is true that the weight of authority is against pressing this theory to such an extent as to hold a mere servant to be a vice-principal solely for the reason that he was appointed to look out for the apprehended peril, and take appropriate steps to prevent its producing injury. *Dayharsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554, where the ground seems to be distinctly taken that the "boss" of a roundhouse, in directing where the engines are to be placed, is performing the employer's nonassignable duty to see that the servants doing the work of the roundhouse are not exposed to any extraordinary risks from the insecurity of the place of work, and is therefore a vice-principal. The case shows how readily one line of argument in this class of cases may run into another; but the true rationale of the decision is probably that the negligence was an official default of a vice-principal, which the delinquent certainly was under the rulings of this court.

But the negation of liability in this regard clearly does not involve the consequence that one who is a vice-principal by virtue of his position as a superior official ceases to be a vice-principal while he is discharging the duty in question, any more than the acceptance of the doctrine which prevails in most courts, that the mere possession of a power of control does not constitute an employee a vice-principal, necessitates the conclusion that such a vice-principal does not represent the master as respects the orders which he issues to his subordinates.

1. Theory that a vice-principal does not represent the master except in so far as he is discharging some nondelegable duty.

In some cases the existence of a rule seems to be assumed which would prevent recovery wherever the negligence of the delinquent vice-principal did not amount to a breach of one of those personal duties of the master, which are nondelegable in the sense that any servant entrusted with their performance represents the master *ad hoc* vice. See VI. b. *supra*.

Since none of the courts, apart from those which apply the superior-servant doctrine, predicate nonassignability of the duty of giving orders, it is clear that the unqualified acceptance of such a rule involves the consequence that, even in giving orders, a vice-principal does not always act in a representative capacity. From this consequence, as will be seen from the decisions cited below, some judges have not shrunk, though, upon any reasonable theory of the relations of a vice-principal to his subordinates and to the common employer, it is difficult to see how such a doctrine can be justified. See the remarks in VI. b. *infra*.

Recovery was denied in *The Queen* (1889) 40 Fed. Rep. 694 (collision caused by the negligence of the master of a ship having too long a hawser, and omitting to give signals in a dense fog); *Olson v. Oregon Coal & Nav. Co.* (1899) 96 Fed. Rep. 109 (master of ship omitted to have the cover placed over a hatch), laying down the general rule that the master was a fellow servant of his crew in regard to all matters pertaining to the navigation of his ship; *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258 (waving to engineer to back up a car, conductor assumed, for the purposes of

this statement, to be a vice-principal, though this was denied. See VII. *infra*; *Klochinski v. Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 984 (superintendent of lumber company was helping to roll logs when he gave the order which caused the injury).

The last of these decisions is directly opposed to that in *Hardy v. Minneapolis & St. L. R. Co.* (1888) 36 Fed. Rep. 657.

Nor is it easy to see any rational ground on which it can be maintained that the official character of a vice-principal is suspended so completely by his mere participation in manual labor that a command given during the period of such suspension is not deemed to be given in his representative capacity.

In *Meyer v. Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 848 (fireman cannot recover for injuries caused by conductor's failure to have brakes set in time to enable his train to be sidetracked, as ordered by the train dispatcher), the court said: "The accident did not occur on account of the conductor's exercise of any authority over the appellant, which appellant, by virtue of his inferior position, was bound to obey under penalty of discharge, but the accident resulting from the negligence, if any, was one that might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman. The negligence was, then, that of a fellow servant, done in the performance of a fellow servant's duty so far as the evidence shows."

Unless this case is to be taken merely as a ruling based upon a very strict application of the rules of evidence, it seems impossible to reconcile it with the Illinois rule discussed in III. *supra*. What clearer instance can there be of an "exercise of authority" than the improper management of a train by the official in control of it.

In *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, the plaintiff, a laborer on a repair train, was injured through a derailment caused by a crossing which was not kept properly cleaned. It was held the company could not be made liable on the theory that the general foreman of the repairs on the old road, which was under reconstruction, was a vice-principal as regards the negligence in question, though he might be such as regards the non-performance of other functions in connection with the system of the defendant, as a whole. After declaring that a conclusive bar to the action was supplied by the plaintiff's implied assumption of the special risks incident to the work of repairing an old road, the court proceeded thus: "More especially is such the case when the individual who had charge of the construction train, and the reconstruction of the road, was chargeable with negligence in performing such work as was necessary to keep the track in good condition. In the capacity in which he acted, he was only a fellow servant, and for his negligence the defendant was not responsible according to well-settled rules of law. The fact that Thompson had imposed upon him larger duties, embracing the reconstruction of the entire road, does not alter his relation here, and it is sufficient to say that at this time he was acting as foreman or superintendent of a number of men employed by the company to repair its old road, and was on the construction train for that purpose. He thus became and was a coemployee with the others who were there, and was not relieved from responsibility because he had other and more important duties to perform outside of those in which he was specifically engaged. 51 L. R. A.

Even if Thompson may have been regarded as representing the master in some respects in reference to the road generally, the duties he was at this time performing were those of a fellow servant, and not of the master; and hence, if he was chargeable with negligence it was that of a fellow servant, and not of the master, within the principle of well-considered cases. *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521; *McCosker v. Long Island R. Co.* (1881) 84 N. Y. 77."

In *Hussey v. Coger* (1889) 112 N. Y. 614, 8 L. R. A. 559, 20 N. E. 558, the delinquent employee was the superintendent in full control of the work of repairing a steamer, and the plaintiff was a workman whose injury resulted from the improper method adopted for removing the covering of a hatch. This case belongs more properly to another note but in the present connection it is worth while to quote the following passage from the opinion, which is sufficiently general in its language to commit the court to a doctrine of the scope mentioned above, if the superintendent is assumed to be a vice-principal: "Assuming that this evidence presented a question of fact for the jury, and that it might properly find that no signal was given, yet the duty of giving the caution necessarily belonged to those engaged in executing the work, and not to the master. It pertained purely to the mode of execution, and rested upon those who were engaged in its performance and were well informed of the customary usage in respect thereto. It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches or ordered it to be done by others; he was, in either case, engaged in performing the duty of a workman."

The language used in *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466 (quoted in VI. d, *supra*), is, so far as it goes, an authority against the extreme doctrine which would thus absolve an employer from liability for a negligent order given by a vice-principal within the scope of his authority. But the remark was made with respect to a train dispatcher, the very essence of whose functions is to issue orders of a certain description, and not with respect to a general manager.

1. *Theory that a vice-principal does not act as the master's representative when he engages in manual labor.*

Most of the courts which proceed upon the doctrine that there is a distinction between official and nonofficial acts go no further than to exempt the master from liability where the negligent act was done by the vice-principal while he was actually engaged in manual labor. In other words, the defense of common employment is allowed to prevail if the fact of the negligent servant's superiority was not an element,—that is to say, if the injury might as well have happened, even though he was not superior (*Mann v. Oriental Print Works* (1875) 11 R. I. 152); or, as it is also put, if the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-

laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the master will not be liable. *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288; *Fitzgerald v. Honkomp* (1892) 44 Ill. App. 365.

If a superior undertakes to do the work of a fellow servant, and puts himself in the place to do the work of a fellow servant, he becomes one as to that particular work, and his negligence in such case is that of a fellow servant, and not that of a vice-principal, although he is a vice-principal generally. *Gann v. Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493.

The leading case on this doctrine is *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. The plaintiff was injured by the negligence of the managing representative of a non-resident owner of ironworks in letting steam into a cylinder and so starting machinery, and was held not entitled to recover by the majority of the court, which laid down the general rule that "a superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives."

For a criticism of this case see VI. h, *infra*. *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186, Affirming, on this point (1893) 55 Fed. Rep. 259, argues thus: "In ordering the plaintiff to work below the stone which was being quarried, the foreman was performing an act pertaining to the duties of a master; but no injury arose from the plaintiff's obedience to this order. Nor was the dry seam in the stone the proximate cause of the injury. The proximate cause of the injury was the careless and negligent acts of the foreman in pounding and prying on the stone in attempting to remove it from its bed. The quarrying of the stone and its removal from its bed pertained to the duties of a servant, and not to those of a master. The injury was the proximate result of the careless and negligent acts of the foreman which pertained to his duties as a servant, and not to the improper performance of those duties which pertained to the defendant as master."

A complaint is demurrable which alleges an injury caused by a local "agent and manager" of an express company through the manner in which he drove a wagon, which it was the plaintiff's duty to load and unload. *Dwyer v. American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471. The court said: "If the complaint had alleged facts showing that Colvin was in fact the vice-principal of the defendant, and authorized and empowered to do all acts at the city of Oshkosh which the company was authorized to do, there would still remain the disputed question whether the company would be liable to the plaintiff for the negligence of such agent, when in fact employed in the same work with the plaintiff. If the agent or manager had full power to act for the company at Oshkosh in all matters pertaining to its business there, and was also required to act as driver of the team in transporting goods, etc., to and from the office to the depots, the authorities are somewhat in conflict whether he would not be held as the plaintiff's coemployee while so engaged, notwithstanding his ample authority in other respects, and whether, for his negligence in the capacity of driver, the company might not claim exemption from liability on the ground that the injury resulted from the negligence of a coemployee."

See also the following cases in which acts specified in the memoranda appended to the 51 L. R. A.

citations were held not to have been done by the vice-principals in their representative capacity: *Gall v. Beckstein* (1898) 173 Ill. 187, 50 N. E. 711, Affirming (1897) 69 Ill. App. 616 (foreman assisted subordinate to lift a barrel); *Meeker v. C. R. Remington & Son Co.* (1900) 53 App. Div. 592, 65 N. Y. Supp. 1116 (superintendent opened a valve, while testing some new steampipes); *Taylor v. Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 32 N. E. 876 (general superintendent helping a laborer to load a rail—example given *arguendo*); *Deep Min. & Drainage Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (superintendent of the work of sinking a shaft undertook to work a sand-pump to clean out a "missed" hole in a mine); *Drinkout v. Eagle Mach. Works* (1883) 90 Ind. 423 (superintendent of foundry department of machine works acts as a servant in preparing the flasks for the making of the castings); *Salem Stone & Lime Co. v. Chastain* (1893) 9 Ind. App. 453, 36 N. E. 910 (superintendent of quarry pried off a part of a stone, so that a laborer was crushed); *St. Louis, A. & T. R. Co. v. Torrey* (1893) 58 Ark. 217, 24 S. W. 244 (foreman of bridge construction acts as mere servant in wrapping the rope of a block and tackle around the brace of the bridge to take it out of the way of a passing engine—here the engine-cab caught rope and flung the block against plaintiff); *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288 (section foreman working with his gang, and negligently striking one of them—example mentioned *arguendo*); *Illinois C. R. Co. v. Swisher* (1895) 61 Ill. App. 611 (negligence of engineer caused a train to run off the track injuring fireman); *Clay v. Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 235 (hostler negligently started engine while his helper was underneath in the ash-pit cleaning out the ashes); *Chicago & W. I. R. Co. v. Massig* (1893) 50 Ill. App. 666 (hostler at a roundhouse, and his helper in caring for locomotives, are fellow servants in respect to injuries to the latter from the running of a locomotive upon his foot placed upon or inside the rail); *Nashville, C. & St. L. R. Co. v. Handman* (1884) 13 Lea, 423 (boiler exploded, because engineer was not at his post as he should have been under the rules, and injured the fireman. Held, that the engineer did not stand in the place of the master, so far as the particular negligence in question was concerned, for the performance of any duty which, under the law, the master was bound to perform for the protection of the servant); *Allen v. Goodwin* (1893) 92 Tenn. 385, 21 S. W. 760 (heavy iron pipe dropped by foreman); *Deep Min. & Drainage Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (handling brakes or coupling cars—example given *arguendo*); *Soutar v. Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796 (superintendent handed workman a box to enable him to reach a point above his head. But see *O'NEIL v. GREAT NORTHERN R. Co.* the effect of which is stated in VI. h, *infra*); *Indianapolis & St. L. R. Co. v. Johnson* (1885) 102 Ind. 352, 26 N. E. 200 (discussion of sufficiency of complaint—negligence alleged was in regard to loading of cars); *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. Rep. 660 (selection and placing of skids for loading a car, and assisting in the work afterwards); *Sayward v. Carlson* (1890) 1 Wash. 29, 23 Pac. 830 (foreman of mill deemed to be a fellow servant of the hands while actually engaged in sawing); *Gann v. Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493 (manipulation of brake by section foreman); *Holtz v. Great Northern R. Co.* (1897) 69 Minn. 524, 72 N.

W. 805 (foreman drove a bolt through the floor of a car); *National Fertilizer Co. v. Travis* (1892) 102 Tenn. 16, 49 S. W. 832 (machinery started without warning by foreman running an engine killed man adjusting bolts); *Gulf, C. & S. F. R. Co. v. Schwabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706 (foreman of railway yard undertook to handle an engine and injured a wiper—decision placed on the ground that he was not engaged in the performance of a duty owed by the master, but apparently sustainable also on the ground that the act was beyond the scope of his authority. Otherwise it is in conflict with the Texas cases cited under the next division); *Quinn v. New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. Rep. 363 (captain undertook to hook the tongs to rails which were being loaded); followed in *The Miami* (1899) 35 C. C. A. 281, 93 Fed. Rep. 218, Affirming (1898) 87 Fed. Rep. 757, where the injury was caused by the mate attempting to cast off a chain from around a drum; *Chicago Architectural Iron Works v. Nagel* (1898) 80 Ill. App. 492 (case for jury, where there was evidence that the foreman was engaged in performing the same kind of work as the injured subordinate).

Whatever may be the position of a master or mate of a vessel, they are not vice-principals, where the injury was caused by the negligence of the former in keeping a lookout, and of the latter in steering. *The Job T. Wilson* (1897) 84 Fed. Rep. 204.

In *Barnicle v. Connor* (1900; Iowa) 81 N. W. 452, the court held that whether the foreman of carpenters, who was the delinquent, was a vice-principal or not, there could not, in any event, be a recovery, as the negligence was committed in regard to manual work.

Other decisions in which, while deeming it unnecessary to determine whether the delinquent was a vice-principal, the court has recognized the doctrine of dual capacity, are *Ricks v. Flynn* (1900) 196 Pa. 263, 46 Atl. 360; *Ross v. Walker* (1891) 139 Pa. 49, 21 Atl. 157, 159. See the comments on these in VI. h, *infra*.

In *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, it was said that a foreman of car repairers would have been treated as a mere servant if he had caused the injury by his negligence while he was actually engaged in the manual work of repairing the cars, and this doctrine was reasserted in *Rowland v. Missouri P. R. Co.* (1886) 20 Mo. App. 463. But in both of these cases the negligence was unquestionably of an official kind, and the remarks as to the dual capacity of the employees were merely *obiter*. They are also antagonistic to some other Missouri rulings in which this point was directly involved.

2. Qualifications of this theory.

The courts which apply the rule stated in the last division have conceded it to be subject to some limitations.

Under the doctrines of legal causation, as generally accepted, it is clear that a master cannot be allowed to escape liability, where the injury was partly the result of a manual act of a vice-principal, and partly a breach of some duty to which he is undeniably subject in his capacity of *alter ego*.

In holding an employer responsible for the negligence of a vice-principal in dispensing with the use of a tag line in raising the framework of a bridge, notwithstanding that he attempted to control the swaying framework by seizing it with his hands and holding it in proper position by his unaided strength. *Pittsburg Bridge* 51 L. R. A.

Co. v. Walker (1897) 170 Ill. 550, 48 N. E. 915. Affirming (1897) 70 Ill. App. 55. "The primary cause of the injury received by the appellee was the exercise by Farnsworth of authority conferred upon him by the master to order, direct and control the operation of moving the framework from its position on the bank to the place where it was needed to be placed in the bridge, without using the tag line. If the appellant, through Farnsworth as vice-principal, abandoned the use of a tag-line,—a confessedly appropriate and safe device,—and adopted an improper and unsafe method of accomplishing such removal, and injury resulted to appellee in consequence thereof, under such circumstances as the master would be liable if Farnsworth had not personally participated in the execution of the plan, no reason is perceived why liability should be avoided upon the ground that Farnsworth personally assisted in endeavoring to perform the work. In so assisting, Farnsworth voluntarily assumed temporarily to labor as a common workman, but he was not any the less the representative of the appellant company nor his position any the less one of superiority."

The question what cars shall be taken on to repair-tracks, and where they shall be placed, is determined by the foreman of an electric railway in his capacity as vice-principal, and if under the circumstances he should have notified a workman on that track that other cars were about to be moved thereon, the company is liable for his omission to give such notification, and will not be absolved for the mere reason that he himself acted as motorman in moving the cars. *Metropolitan West Side Elev. R. Co. v. Skola* (1900) 183 Ill. 454, 56 N. E. 171.

Nor can he escape, *a fortiori*, where the evidence shows that such a breach was in a legal sense the sole proximate and efficient cause of the injury.

Where a servant was injured by the fall of a heavy iron box which was being hoisted by two chains, and the accident was due to the fact that a handle of the box had been broken, and the hook on the end of one of the chains had slipped on the flange of the box to which it had been attached by the orders of the employee in charge of the work, the injury is regarded as being due, not to his negligence in the character of a fellow servant, but to his breach of the nonassignable duty of preventing the accident by using additional chains or taking some other precaution suggested by the circumstances. *Fraser v. Hand* (1889) 33 Ill. App. 153.

Where it was the duty of a yardmaster to see to the making up of trains, if he directed a boy engaged as a call boy to perform the duties of a switchman, the fact that he was on an engine in charge of it at the time of giving the order is immaterial; and if it was negligence to give such order, it was his negligence as yardmaster, and not as engineer. *Hardy v. Minneapolis & St. L. R. Co.* (1888) 36 Fed. Rep. 657 (injury declared to have been caused, not by the operation of the engine, but in the discharge of yardmaster's duties in making up trains); *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 744 (no error in submitting question to jury—the question whether the starting of machinery for the purpose of testing it was an act done as a vice-principal).

Nor could the master, without a gross absurdity, be absolved, where the manual act which caused the injury was done for the very purpose of discharging some nondelegable duty.

Other cases proceed upon the theory that a vice-principal who orders a workman to take up a particular position, where he will be imperiled if certain kinds of manual acts are neg-

happily done, must be regarded as a representative of the master in respect to any acts of that description by which he may subsequently injure the workman.

In *Taylor v. Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876, where a master mechanic, after ordering a servant to do work which required him to take up a certain position with respect to a locomotive, caused him injury by taking out the "equalizer," the court said: "The obligation to make safe the working-place and the materials with which the work is done rests on the master, and he cannot escape it by delegating his authority to an agent. It is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were, therefore, done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place. It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distant department by virtue of the power delegated to him by the master, is no more than a fellow servant, for, in the absence of the master, the command, if entitled to obedience, must be that of the master conveyed through the medium of an agent. Nor can it be held without infringing the principles of natural justice, that if he who is authorized to give the command makes its execution unsafe, the employee, whose duty it is to obey, has no remedy for an injury received while doing what he was commanded to do."

In *Cole Bros. v. Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074, where the foreman of a factory, after giving an order which required a servant to take up a certain position with reference to a machine, proceeded to do some work himself on the same machine, and by his careless handling of a tool caused the injury complained of, the court said: "In doing these things he was performing the master's duty, and in that respect he was not a fellow servant with the appellee. The execution of the master's orders in conjunction with the manual acts of *Crawley* and *Eller* [the foreman] rendered the place in which appellee was working dangerous, and injury actually befell him. Here was a violation of the master's duty which the appellant owed to appellee, to keep the place in which he worked reasonably safe." (Dissenting, *Ross*, J.)

In *Crystal Ice Co. v. Sherlock* (1893) 37 Neb. 19, 55 N. W. 294, where the manager of an ice company injured a workman on a chute by sending down upon him a lump of ice, the court, in replying to the argument of plaintiff's counsel that, as the injury was caused by setting free the piece of ice which caused the damage sued for, the defendant should not be held liable, for the reason that the act was not peculiarly within the scope of the foreman's duties, but was rather one the performance of which properly fell within the class of labor properly to be performed by the laborers under the direction of said foreman, said: "The difficulty with this argument is that it loses sight of the fact that the defendant in error was placed in a dangerous place and required to do an act which of necessity forbade his avoidance of injury, should the foreman set in motion a piece of ice from a point above 51 L. R. A.

where the foreman's orders required him to go. Suppose now that this piece of ice had been detached by a fellow servant of the defendant in error, under the orders of the foreman, after the foreman had so located the defendant in error that he must inevitably suffer if the order was executed. Could it with any propriety be claimed that the company was relieved of liability simply because the agency which caused the injury was set in motion by a fellow servant? In such case, as in the one at bar, the negligence and carelessness pertained, not to the mere manual act of releasing the ice, which caused the injury but was rather imputable to the order which placed defendant in error in such situation, under such circumstances that injury to him was unavoidable from the foreman's setting in motion the ice which caused the damage."

See also *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876, allowing recovery where a foreman picked at a pile of ore, so as to cause it to fall on a laborer set to work beside it.

And compare the statement that the master is not released from responsibility for an injury sustained by a servant in the course of his employment because ordered by a foreman to work in a dangerous place, although the foreman co-operated with the servant in the work. *Kolb v. Carrington* (1897) 75 Ill. App. 159.

It would seem that the third of these qualifications of the rule can scarcely be admitted consistently with the retention of the rule itself.

The cases in which the doctrine has been applied that a vice-principal is a mere servant when he is doing a servant's work all presuppose, at the very least, some general direction respecting the work which accounts for the position of the injured servant at the time of the accident, and there is apparently no logical ground upon which such a direction can, as an essential and controlling element of the juridical situation, be differentiated from a special order, so as to entail the consequence that recovery shall be allowed in one case and denied in the other. Until this difficulty has been fairly met, and, supposing that to be possible, cleared away, the cases last cited must be regarded as inconsistent in principle, if not upon the specific facts, with the decisions referred to in the preceding division.

The suggestion in the *Nebraska* case cited above, that the injury was, under the circumstances, really caused, rather by the order than by the subsequent manual act, will plainly not suffice as a ground of distinction between the decisions in which recovery has been allowed and refused, except in so far as the order may have been itself culpable; and it does not seem to have been of the description either in the *Nebraska* case or the others referred to.

g. Theory that a vice-principal represents the master, even when he participates in manual labor.

A considerable body of authorities can also be produced for the other view, that a vice-principal acts in a representative capacity as to what he does, while assisting to do the work which he is appointed to supervise. To this conclusion, as is indicated by the extracts quoted below from the opinions, the courts have felt themselves forced by their inability to find any satisfactory logical grounds upon which to predicate a distinction between the quality of an act done by the order of a vice-principal, and the quality of the same act when done by the vice-principal in person.

In *Shumway v. Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 261 (machinery started by a superintendent after an obstruction had been removed) the defendant was held liable on the broad ground that a superintendent stands in the place of the master in whatever he does in furtherance of the business and operations he has in charge.

In *Berea Stone Co. v. Kraft* (1877) 81 Ohio St. 287, 27 Am. Rep. 510, where the injury was caused by using hooks for hoisting a large stone which was so soft that chains should have been passed round it, the court said, "The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised may have caused the injury and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in no wise relieves the company from liability. If the act done by him had been done under his direction as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person."

In *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161, the court laid down the law as follows: "The defendant had no cause to complain of the instruction of the court that the conductor could change his own relation to the company from that of *alter ego* to that of a fellow servant of a brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty. If the conductor had ordered the fireman to do an act which might reasonably have been expected to endanger the brakeman, and which did result in injury to him, the company would have been answerable for the natural consequences of his orders. It would be unreasonable to hold that, by doing the careless act himself, instead of ordering another, who felt constrained to obey, to do it, he relieved the company from responsibility. *Qui facit per alium facit per se*, is the maxim which applies, where, as vice-principal, he compels another to do what is culpable. It would be illogical to say that, where he directs or orders, he utters the command of the company, and adopts for it the act of the employee who obeys, and yet, when he does the act in proper person, he descends from the role of vice-principal to that of servant."

In *Dayharsh v. Hannibal & St. J. R. Co.* (1890) 108 Mo. 570, 15 S. W. 554, where the "boss" of a roundhouse undertook to move one of the engines himself and injured a subordinate, the court reasoned thus: "If he had expressly directed the engine to be moved down by another upon the plaintiff, in the manner described in the evidence for the latter, the defendant would have been responsible for the act, and we are unable to perceive any logical or reasonable distinction between so directing it and his performing such negligent act himself in the circumstances here shown. It was one which fell within his authority as the master's representative to direct, and it can make no difference in principle whether he did it personally or by another, in its bearing on the rights of the parties to this cause, where his act involved an obvious breach of the master's duty to use care to provide a reasonably safe place for plaintiff to work."

In *Husson v. Missouri P. R. Co.* (1892) 50 Mo. App. 300, where a section foreman injured a laborer with the pick which he was using to pull a tie from under the rails, the 51 L. R. A.

court said: "In this case we have the unusual fact that the injury was directly inflicted by the foreman himself while engaged in the work as a collaborator with plaintiff. Does this fact alter the relation of the parties, or interfere with the master's liability? Our opinion is that it does not. If in the case at bar the section foreman had ordered one of his hands to strike his pick down between the heads of the two others, it would not be contended that defendant was not liable for the injury resulting from such imprudent order. There is no just or logical distinction between the act of the vice-principal in negligently ordering a servant to do an imprudent thing, and in doing the thing himself. In each case it is the act of the vice-principal; in one, he wills the servant shall do the act, in the other, he wills that he, himself, shall do it."

In *Sweeney v. Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555, the court, in holding the defendant liable for the negligence of a section foreman in prematurely throwing a switch for a hand car, referred to three earlier decisions in Texas: *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 12 S. W. 835 (foreman of car repairers failed to keep promise to protect subordinate); *Galveston, H. & S. A. R. Co. v. Smith* (1890) 70 Tex. 611, 13 S. W. 562 (roadmaster in moving train so as to cause collision acts as servant—decision of commission adopted by supreme court, but only on the ground that the case was distinguished from the *Williams* Case by the fact that the injured servant "was not employed under the immediate eye of the roadmaster"); *Nix v. Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571 (assistant foreman negligently started machinery while plaintiff was near a driving belt). After pointing out that under the first of these cases the delinquent was a vice-principal, the court proceeded thus: "Such relation being established, the three cases first cited, as adopted by the supreme court lead to the conclusion that Murphy should be held to have been the representative of the defendant in the performance of any act, service, or duty for the defendant in the line of his employment, and that no distinction should be drawn between the performance of those higher duties intrusted to him specially, and those of an ordinary character which both he and the subordinate servants and employees under him were in the habit of indiscriminately performing. In other words, when he negligently injured the plaintiff the law viewed his act in the same light as if the same master had been personally present and committed the negligent act himself, and in the latter contingency no one would doubt the disability of the master."

See also the following cases in which the master was held responsible: *Northern P. R. Co. v. Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. Rep. 182 (sudden application of the brake of a hand-car by foreman of track repairers; Reversed in (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, but solely on the ground that the delinquent employee was not a vice-principal; the supreme court mentions, but does not pronounce any decided opinion as to, the controversy respecting the proper limits of official acts); *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 678 (foreman threw a switch in such a manner as to injure a subordinate while pushing a car); *Russ v. Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472 (master held liable for negligence of a foreman in placing a keg at the front end of a hand-car on which he is riding with the hands under him, and leaving it where it is liable to roll off in front by the

motion of the car, while he assists the men in moving the car); *Hughlett v. Ozark Lumber Co.* (1898) 53 Mo. App. 87 (oilier of machinery injured by superintendent's negligence in causing machinery to start by the manner in which he handled a new belt); *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237 (foreman of gravel train caused an accident to a laborer by releasing a brake, and thereby suddenly widening the gap between a car from which he had ordered the laborer to jump and the one to which he was to jump).

h. Discussion of the doctrine of the dual capacity of vice-principals.

1. With reference to the standpoints of the courts which reject the superior-servant doctrine.

As early as 1875 the supreme court of Rhode Island recognized, *arguendo*, the theory that there are certain classes of negligent acts in regard to which a vice-principal does not act in his representative capacity. *Mann v. Oriental Print Works* (1875) 11 R. I. 152.

But the earliest case in which that theory was actually applied with the result of preventing a servant from recovering damages seems to be *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. The majority of the court approved a change to the effect that, although the delinquent might, as manager, have represented the defendant, he did so only in respect of those duties which the defendant had confided to him as superintendent, and the trial judge's refusal to charge that, as to any other acts or duties performed by him, he was not to be regarded as the defendant's representative, was held to be error. This decision is at all events the leading authority on the subject, and the question whether the theory applied was correct virtually resolves itself into the question whether the opinion delivered by *Rapallo, J.*, for the majority of the court or the dissenting opinion of *Earl, J.*, embodies the sounder views.

Minority opinions so seldom receive any attention from the judge who is intrusted with the task of stating the conclusions of the majority, that the omission of Judge *Rapallo* to notice Judge *Earl's* criticism of the theory which was deemed to be a bar to the plaintiff's action, is not at all surprising. But it is not a little difficult to understand why the lucid and forcible arguments of the latter judge should have made so little impression upon the courts in other jurisdictions, that, so far as the number of decisions goes, the doctrine which he combated must now be regarded as the more authoritative. In order to draw the attention of the profession once more to the reasoning of this distinguished jurist, some lengthy extracts from his opinion are subjoined: "If this fiction were liberally applied, if it were held that every servant entering into the service of a master assumed all the risks incident to such service, then the master would not be responsible to such servant for his own negligence, as that would be as much an incident to the service as the negligence of a servant. The maxim *Volenti non fit injuria* would shield the master. But the fiction is not applied to shield the master. He is held responsible for his own negligence, whether engaged in the discharge of the duties peculiar to him as master or working side by side with his servants in the same kind of labor. So the fiction should not be applied to shield the master from responsibility for the negligence of the middleman standing in his place and representing him. Public policy does not require that the doctrine of *respondet superior* should 51 L. R. A.

be thus far limited. It is not too much for the master to be responsible for his negligence. He is generally a person selected with care, of superior judgment and skill, and is, more generally than other servants, able to respond to his master for his own negligence. I can perceive no reason founded upon public policy, as there is none founded upon any principle of natural justice, for limiting the doctrine of *respondet superior* in its application to the relation existing between a master and such an agent. The master should be responsible for all his negligence while engaged in his service, because he stands in his place, representing him as his *alter ego*; and I can perceive no reason founded on public policy or expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master. A rule that a master shall be held responsible for some negligent acts of his representative, and not responsible for other negligent acts, done possibly at the same time, within the scope of his employment in the same service, would be illogical, perplexing, and inconvenient. Take the case of a general superintendent of a railway. It is conceded that for negligence in his discharge of the absolute duties which a master owes to his servants, the master—the corporation—would be responsible. But suppose, instead of such duties, he should, in furtherance of his master's business, carelessly perform a mechanical act about which common laborers were also engaged, would there be any reason, founded upon principle or public policy, for distinguishing the two cases and imposing upon the master a liability in the one case and not in the other? Suppose the superintendent carelessly ordered a train to be started, and some one was thus injured, the corporation would undoubtedly be liable for the damages. Would it not be thus liable if, instead of ordering the train to be started by others, he placed his own hand to the lever and carelessly started it himself? Would he be the responsible representative of the corporation in the one case, and not in the other? Suppose he was standing upon a train of cars, and carelessly started that train himself, causing an injury to someone, and at the same moment of time he carelessly ordered an engineer to start another train, also causing an injury; would the corporation be liable for the damages in the one case, and not in the other? The question in all this class of cases, the negligent act and consequent injury being proved, is whether the servant whose act is complained of stood in the place of the master—represented him as his *alter ego*. That is always mainly a question of fact. If he did, then the rule of law to be applied is plain and simple, and is the same which would measure the responsibility of the master to a stranger in his service. On the one hand, it is claimed that in determining the responsibility of the master in such cases, we must look solely at the duties which were devolved upon the servant whose acts are complained of, and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be, that in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position; and if we find that he was the representative of the

master, within the rules above stated, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to his hands,—as well to co-servants as to strangers. It cannot be claimed that what John L. Babbitt did was an idle thing, having no pertinency to the business in hand. If he was there in defendant's works, as we have assumed the jury found, standing in his place and having the general charge of his business, then he was empowered to do whatever he saw fit in and about that business and in furtherance of its objects. Whatever he could order or employ another to do, he could do himself. Did he represent the defendant when he ordered the laborers to put the boat into the dry dock, and not represent him a few minutes later when he put his hands to the engine to further the same work? If he had ordered another servant to do this careless act, the defendant would have been liable, and does the defendant escape liability because John did the act himself? I say no."

His position seems to the present writer to be quite impregnable, but the current of judicial authority has set so strongly against his views, that it will be worth while to supplement his arguments by pointing out that, quite apart from those objections which he urges against the theory of his associates; there are some serious, if not fatal, flaws in Judge Rapallo's reasoning. The first of these flaws is the reliance placed upon the two rulings which are cited from other jurisdictions, one an Irish, and the other a Massachusetts case. In both of these the *rationale* of the decisions was simply that the delinquent was not a vice-principal at all, and the question whether a vice-principal may occupy a dual relation to his subordinates was not determined or even alluded to.

It is submitted that cases in which representative capacity was denied altogether, and the character of the negligent act for this a mere incidental detail, are not legitimate precedents to sustain a decision which makes the character of the act the point upon which the liability of the master hinges.

It may be noticed in passing that there is a similar misuse of a precedent in National Fertilizer Co. v. Travis (1899) 102 Tenn. 16, 49 S. W. 332, *supra*, which cites Boyce v. Fitzpatrick (1881) 80 Ind. 526, where the delinquent was simply held to be a fellow servant of the plaintiff, and no allusion was made to a dual relation.

Nor, as it seems to us, is Judge Rapallo more fortunate in the attempt which he makes to extract the doctrine enunciated by him from an earlier case in New York itself. There is a flagrant *non sequitur* in that passage of his opinion in which *Flike v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, is cited. After stating its effect he proceeds thus: "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. *The converse of this proposition necessarily follows.* If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance." The sentence which we have italicised, whether it be viewed from the standpoint of abstract principle, or in connection with prior decisions of the same court, to say nothing of those in other jurisdictions, certainly cannot be accepted as a statement of law. 51 L. R. A.

ment of a self-evident conclusion. If it were not for the position here taken by so many distinguished judges, one would be at a loss to understand how the doctrine that a master remains liable for the performance of certain obligations, even though the servant intrusted with the performance may not have been a vice-principal for general purposes, could ever have been supposed to invoke the corollary that a vice-principal for general purposes is a vice-principal only when he is in the discharge of one of those obligations. From such a corollary an obvious way of escaping is indicated by the consideration that, logically speaking, the conceptions of a liability traced home to the master, through the particular act which caused the injury, and of liability referable to the official position of the delinquent which constitutes him a general agent of the master, are neither essentially incompatible, nor mutually exclusive, in such a sense that a court must elect between them. In fact it may fairly be maintained that the New York court of appeals, by its language in one, if not two, cases decided between the date of the *Flike* and the *Crispin* Cases, and recognizing, without any suggestion of a qualification or restriction, the responsibility of a master for the defaults of a general manager, had by implication recognized also that the "converse" adverted to in Judge Rapallo's argument does not "follow necessarily" from the theory on which he relies.

Malone v. Hathaway (1876) 64 N. Y. 5, 21 Am. Rep. 573, while holding that the position of the delinquent was that of foreman merely, having no general charge except such as is common to those acting in that capacity, and that the defendants were present, and had the general charge and responsibility for the different branches of their business, added: "If it was claimed that Bagley's [the foreman's] position and responsibilities were different from that named as foreman, and that the defendants had transferred the charge and direction of any branch of the business and of the duties upon him, it would have been a proper question for the jury, if, indeed, there was any evidence to warrant the claim."

In *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, the precise point of view is more disputable. But, at all events, there are reasonable grounds for arguing that its *rationale* is rather that the nondelegable duty there violated was among those with which a functionary assumed to be a vice-principal was intrusted, than that this functionary was conceived to be a vice-principal merely because he was a special agent for the performance of that duty.

Surely there could be no more striking proof of the commanding influence of the court which is mainly responsible for the adoption of the doctrine of the dual capacity of vice-principal, than the fact that so many other judges should have been content to follow a decision based upon reasoning which not only ignores the possibility that there may well be two principles upon which the question whether an employee represents the master or not may be determined, but even fails to take into consideration prior rulings of the same court which by a reasonable intendment, may be construed as conceding the concurrent existence of those principles.

There is still another point in which the opinion of the majority seems to be open to attack. It loses sight of the fact that the essence of the conception of an *alter ego*, or vice-principal, as such a functionary was understood in the earlier cases, was simply this, that the law of agency, which, as a general rule, was superseded by the doctrine of common employment, where a fellow servant was the delinquent, re-

maintained operative where that servant exercised such complete control over the work to be done, that he was, simply as a matter of fact, the master's substitute or deputy. See, especially, *Gallagher v. Piper* (1864) 16 C. B. N. S. 689, 33 L. J. C. P. N. S. 329, and the other English cases cited in IV. b. 1, *supra*.

Under these circumstances, it is plain that the effect of declaring a master not to be liable for some acts of a vice-principal which are undoubtedly within the scope of his powers amounts to what is nothing more nor less than the introduction of an entirely novel principle into the law of agency. To justify such a modification of that law, it is submitted that arguments addressed more directly to the real question involved than those of Judge Rapallo may fairly be demanded. A court which asks us to adopt the doctrine that the servant's right to recover should be made to depend solely upon the conception of a special agency as regards the performance of certain duties of a nondelegable character is at least bound to demonstrate, by some satisfactory reason, that the duties to which that agency is restricted are the only ones in regard to which a master can be deemed to have a representative. Until such a reason has been produced it seems not too much to say that the decision in *Crispin v. Babbitt* rests upon no more solid foundation than irrelevant precedents and a transparently fallacious piece of dialectic legerdemain by which the rule in the *Filke* Case, primarily intended, as the opinion shows, to provide an additional offensive weapon for the servant, was converted into an instrument for the curtailment of the rights which he already enjoyed.

The reason for which the perplexed inquirer is looking is certainly not supplied by the suggestion made in one case, that the injured servant is no worse off than he would have been if the vice-principal, instead of undertaking the work himself, had ordered one of his subordinates to do it, and the injury had resulted from the default of that subordinate. *Quinn v. New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. Rep. 363.

The essential question is simply whether the servant's implied assumption of certain risks can reasonably be said to cover any of the acts done by a superior employee who, as regards most of his functions, is conceded to represent the master, and there is no legal analogy, so far as the writer is aware, which would justify a court in taking into account the extent of the injury or benefit which would accrue to the servant, according as the question is answered in one way or the other.

The special difficulty involved in the acceptance of a theory which in many instances would absolve the master, even for the injuries produced by negligent orders, has been already adverted to in VI. f, *supra*.

Very little light is thrown upon the logical foundations of the doctrine of dual capacity by any of the cases outside of New York. None of them, it seems to us, really go to the root of the matter. Until last year the utterances of the supreme court of Pennsylvania were such that it might apparently have been numbered among the opponents of the New York theory.

In *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88, the concurrent existence of two tests of vice-principalship was thus distinctly recognized: A vice-principal for whose negligence an employer will be liable to other employees must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it giving him, not mere authority to superintend certain work or certain work-

men, but control of the business, and exercising no discretion or oversight of his own; or, second, one to whom he delegates a duty of his own, with a direct, personal, and absolute obligation, from which nothing but performance can relieve him.

This passage was quoted with approval in *Ricks v. Flynn* (1900) 196 Pa. 263, 46 Atl. 360, but its effect is so much cut down by the comments of the court that the law in this state would now seem not to be materially different from that in New York.

The *Prevost* Case, it is now declared, should be construed as embodying a doctrine subject to a qualification which is deemed to have been established by *Ross v. Walker* (1891) 139 Pa. 49, 21 Atl. 157, 159, where it was laid down that a servant intrusted with the performance of the various nondelegable duties is a vice-principal, while he is in discharge of those duties, and that, as to any other acts, he is not the master's representative.

But it is submitted that the citation of this case as an authority to sustain the position, which the court adopts, *viz.*, that a vice-principal by virtue of his position does not represent the master as to merely manual acts, is as improper, though not for the same reason, as the citation in *Crispin v. Babbitt*, of the *Massachusetts* and *Irish* cases mentioned above. In *Ross v. Walker*, the question whether the delinquent was a vice-principal by virtue of his position was not involved, the court even refusing to consider it; and the observations made, *arguendo*, manifestly had reference to a representative capacity conceived of as arising out of a restricted agency in respect to one or more particular nondelegable duties.

In Minnesota the principle that there are two distinct tests of representative capacity has been declared quite recently. It has been settled by this court that an employee becomes a vice-principal, as respects another servant, only when he is intrusted with the performance of some absolute and personal duty of the master himself, or the general management and control of the master's business, or some branch of it. *O'NEIL v. GREAT NORTHERN R. CO.* Citing *Brown v. Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834. The position taken, as expressed in the syllabus written by the court itself, was that the roadmaster of a railway company, directing the work of clearing away a bridge, is not the vice-principal of the company to the extent that his omission to give a particular warning of a detail thereof, which portends danger, would render the company liable for his omissions in that respect. It was fully recognized that such an act would have been treated as official if the delinquent had been a vice-principal by virtue of his position, and the doctrine was applied that, except in cases of general managers of a whole business or a department of it, the distinction upon which the master's liability rests is that which exists between a general warning, and one as to dangers of the transitory class, which arise during the progress of the work.

This theory of responsibility is, however, not construed in this state as enabling a servant to recover, where the negligent act was purely a manual one, committed while the vice-principal was participating in the labor of his subordinates. *Soutar v. Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796, cited in VI. f, *supra*. The court therefore merely declines to go to the same length as those whose decisions are referred to at the beginning of VI. f.

In *Jackson v. Norfolk & W. R. Co.* (1897)

48 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258, it was distinctly recognized that the case of a general or departmental manager constitutes an exception to the principle that the final test of representative capacity is whether the negligent act represented a breach of one of the nondelegable duties, as that term is generally understood.

2. With reference to the superior-servant doctrine.

One conceivable view of the relation of an employee who exercises control to his master and his subordinates is that, assuming the basis of the superior-servant doctrine to be the nondelegable quality of the duty of giving such orders as will not expose servants to unnecessary dangers (III. c. 4, *supra*) a controlling employee should be treated as a special agent for the performance of that duty alone. The corollary from this theory would clearly be that negligent acts done while he was participating in manual labor would not be done in his representative capacity. The position of the courts which, while applying the superior-servant doctrine, except from its operation acts not done in the exercise of authority, is, therefore, stronger in a sense than that of the courts whose decisions were reviewed in the preceding subsection, inasmuch as it does not necessarily involve the anomaly of declaring that there are some acts as to which, although they are within the scope of his authority, and he is not even forbidden to do them, a general agent does not represent the master.

But this hypothesis of a special agency in respect to the duty of giving orders does not by any means represent the only possible theory as to a superior-servant's relation to his employer. It is clear from the decisions cited in VI. g, *supra*, that some, at least, of the courts which apply the superior-servant doctrine proceed upon the assumption that, as to all matters within the scope of their authority, foremen of the lower grades are as much general agents for the protection of their subordinates as are the superintendents of an entire business or a principal department of it, when acting within the scope of their much wider authority. If this is really the juridical situation, the essential ground upon which the master's liability or nonliability will depend must obviously be the same in the courts which accept the superior-servant doctrine as in those which reject it.

In both classes of jurisdictions, therefore, the refusal to allow recovery under the circumstances must bring us face to face with the same difficulty, *vis.*, that such refusal is only justifiable on the assumption that the duty of a vice-principal to avoid injuring his subordinates by manual acts is not one of those which the master, who would admittedly have been under a similar duty if he had himself participated in the work, may be conceived to have delegated to his deputy, and that no reasons have ever been judicially suggested why this assumption, rather than its converse, should be entertained.

In default of such reasons, the present writer has no hesitation in saying that he considers the rulings of the Illinois and Tennessee courts, as stated in VI. b, 1, *supra*, to be less correct in principle than those of the Ohio, Missouri, and Texas courts, cited in VI. g.

VII. Summary of the effect of the decisions in each jurisdiction with regard to the relation of supervising employees to their subordinates.

a. Introductory statement.

In the following paragraphs is given a succinct summary of the effect of the decisions

which have been rendered in various jurisdictions with respect to the specific application of the doctrines discussed in the foregoing subtitles of this note. An inspection of the dates of these decisions shows that, broadly speaking, the American courts, as a whole, followed very closely in the steps of the English judges up to about the year 1870. That is to say, setting aside the few states in which the theory that any superior servant was a vice-principal (III. *supra*), had been avowedly adopted, the only qualification of the doctrine of common employment which had been suggested or allowed was the case in which a general manager was the delinquent, and the same difference of opinion upon this point existed here as in the mother country. (See IV. *supra*.)

Whether the judgment of the House of Lords in the famous case of *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 80 (see IV. d, 1, *supra*), which was at first mentioned with approval in several American cases, provoked a reaction against the rigorous doctrine applied in it, or the social and economic conditions of the United States operated so as to modify the trend of judicial ideas, it is at all events sufficiently obvious to a student of the Reports that, during the last thirty years of the nineteenth century, there was a marked tendency to temper the strictness of the doctrine of common employment in various directions. An important step was taken in the *Filke Case* (1873) 53 N. Y. 549, 13 Am. Rep. 545, in which it was for the first time distinctly laid down that, however low the rank of the delinquent, the master is responsible, if the negligent act involved a breach of certain duties declared to be absolute and nondelegable. But this doctrine was in some measure a sort of two-edged sword, for it was afterwards construed, in the *Crispin Case* (1880) 81 N. Y. 516, 37 Am. Rep. 521, and the decisions which followed it, in such a manner as to deprive the servant of a remedy for certain kinds of negligence, even when committed by a general manager. (See VI. b-h. *supra*.) But this construction was, as we have seen, not adopted in all jurisdictions, and, in view of this limited acceptance, and the comparative rarity of the circumstances under which the rule in the *Crispin Case* becomes applicable, the doctrine that the character of the negligent act is a controlling consideration has been, on the whole, a distinct gain to the servant.

Whatever he may have lost by it was in any event more than compensated by the extension of the principle that a general manager is the master's *alter ego* to cases in which the delinquent was the manager of a distinct department. This theory first propounded in the *Ross Case*, (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, and afterwards explained and limited in the *Baugh Case* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, is now firmly established, not merely in the Federal courts, but in a large number of the state courts also (see V. *supra*).

So far as the present position of the law is concerned, it is clear that its most marked feature is the disposition of the judges to refer the liability of the master in all cases to the character of the negligent act, and to disregard altogether the superiority of the delinquent's rank as a test of representative capacity. It is scarcely possible, however, to deny that a development of doctrine along this line alone may be productive of much injustice to the servant and the writer has already expressed his opinion (VI. h, *supra*) that the disuse of the test which is thus excluded is an unwarrantable innovation in the law of agency.

b. The United Kingdom.

Several cases have been cited in a former subdivision (IV. b) in which the doctrine of the vice-principals of a general manager was recognised by English judges, but, as stated in IV. d, the law was declared in a different sense by the House of Lords in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. See also IV. e. The doctrine of departmental control is impliedly condemned in the same case. (V. a, *supra*); but it has never really been discussed as a distinct and specific conception.

That superior servants of a lower grade than general managers could be vice-principals is a theory which has never been countenanced in England. It has been declared that there can be no recovery, where the delinquent is an "underlooker" in a mine. *Hall v. Johnson* (1865) 8 Hurlst. & C. 589, 84 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 770, 13 Week. Rep. 411.

An underground manager of a mine. *Wright v. Roxburgh* (1864) 2 Sc. Sess. Cas. 3d Series, 748; *Wilson v. Sueddons* (1866) 4 Macph. (Sc. Sess. Cas.) 736; *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30 (IV. *supra*) (the last-mentioned case definitely settles this to be the law in the United Kingdom, and overrules some earlier Scotch cases to the contrary); *Somerville v. Gray* (1863) Sc. Sess. Cas. 3d Series, 768; *Hardie v. Addle* (1858) 20 Sc. Sess. Cas. 2d Series, 553.

The foreman of a gang engaged in excavating. *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 334, 19 L. T. N. S. 30, per Lord Cranworth, *arguendo*.

The chief engineer of a steamer. *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89.

The captain of a ship. *Hedley v. Pinkney & Sons S. S. Co.* [1894] A. C. 222, Affirming [1892] 1 Q. B. 58, and Overruling *Ramsay v. Quinn* (1874) Ir. Rep. 8 C. L. 322; *Leddy v. Gibson* (1873) 11 Sc. Sess. Cas. 3d Series, 304.

The traffic manager of a railway. *Conway v. Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 345, Affirming (1875) Ir. Rep. 9 C. L. 498.

In Scotland a strong tendency towards the "superior-servant doctrine" was at first exhibited, and one of the earlier decisions, *Dixon v. Ranken*, 14 Dunlop, 420, was strongly relied on in the leading Ohio case of *Cleveland, C. & C. B. Co. v. Keary* (1854) 3 Ohio St. 201. This tendency seems to have been only partially checked by the judgment of the House of Lords in *Bartonhill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, for it will be observed that one of the decisions, cited above, in which an underground manager in a mine was held to be a vice-principal, bears the date of 1863. The law was only settled definitely on the same basis as that of England by *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 10 L. T. N. S. 30, *supra*. The particular decisions with regard to general managers in Scotland have been discussed in IV. b, and d, *supra*.

c. British colonies.

In these the English cases are of course followed. The following have been held to be mere servants:

The foreman of a pile-driving gang. *Drew v. East Whitby Twp.* (1881) 46 U. C. Q. B. 107.

The superintendent of structures on a railway. *Carney v. Caraquet R. Co.* (1890) 29 N. B. 425.
51 L. R. A.

A civil engineer superintending the construction of a railway for nonresident contractors, who are represented by a general agent. *McBride v. Brogden* (1876) 3 New Zealand C. A. 271.

The mate of a ship. *Sanderson v. Smith* (1882) 3 New So. Wales L. R. 81.

As to the cases on the position of general managers, see IV. b and d, *supra*.

d. Federal courts.

The Federal decisions are singularly conflicting, and their significance as authorities can perhaps be shown most clearly by considering them with reference to the two leading cases in which the Supreme Court has explained its views.

Several cases preceding the judgment in the *Ross Case* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, permitted recovery under circumstances in which the master would now be absolved in any court which was not an avowed adherent of the superior-servant doctrine (III. *supra*), and are therefore no longer law so far as the Federal courts are concerned.

In *McMahon v. Henning* (1880) 1 McCrary, 516, 3 Fed. Rep. 353, a yardmaster was held to be a vice-principal.

In *Gravelle v. Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. Rep. 711, a jury was told that, if the plaintiff was a subordinate of an assistant yardmaster with respect to the duties which he was then performing, he was not a fellow servant of such yardmaster.

In *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. Rep. 564, it was laid down that the general rule as to common employment is subject to this exception, among others, that where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary perils, of the existence and extent of which he is not advised, the master is liable. In this case a road master was assumed to be a vice-principal.

In *Miller v. Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. Rep. 67, the master was held liable for the negligence of a foreman of carpenters who ordered a subordinate into a dangerous position.

In *Brown v. The Bradish Johnson* (1873) 1 Woods, 301, Fed. Cas. No. 1,902, it was laid down that a mariner who is injured in the service of the ship can recover damages in the nature of extra wages where there has been some carelessness or other fault on the part of the officers of the ship, his rights in the absence of such fault being limited to free medical attendance until he is cured.

In another case in the same circuit a vessel was held liable for the expenses of a sailor incurred during his recovery from an injury caused by the misconduct of his officers as well as for the wages accruing during the same period. *Brown v. The D. S. Cage* (1872) 1 Woods, 401, Fed. Cas. No. 2,002 (liability for wages conceded).

In *The Clatsop Chief* (1881) 7 Sawy. 274, 8 Fed. Rep. 163, it was held that a fireman of a steam-tug, injured through a collision caused by incompetence of the master, could recover, the broad ground being taken that he was an inferior servant injured by the misconduct of a superior one.

In *Peterson v. The Chandos* (1880) 4 Fed. Rep. 645, Deady, D. J., although the case was decided on another point, considered that, on account of the dependent position of a sea-

man, and of the impossibility of his leaving the service, like a workman on land, when he is dissatisfied with competency of his coemployees, it was unjust to apply the doctrine of common employment to a case where a seaman was injured by the carelessness of the mate in putting up a rotten crane-line. (This *dictum* was disapproved in *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517.)

In *Daub v. Northern P. R. Co.* (1883) 18 Fed. Rep. 625, where a deck hand was caught round the leg by a head-line which he was paying out, owing to the negligence of the mate in not stationing himself in such a position as to be able to observe any accident which might render it necessary to stop the ship instantly, the master was held liable (also disapproved in *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517).

But the tendency exhibited by these cases was not universal, as a division foreman of bridges on a railway was in 1882 held to be a mere servant, in *Yager v. Atlantic, M. & O. River R. Co.* 4 Hughes, 192.

And the same defense was admitted in the case of a mate of a ship. *The E. B. Ward, Jr.* (1884) 20 Fed. Rep. 702; *Malone v. Western Transp. Co.* (1873) 5 Bliss. 315, Fed. Cas. No. 8,996; *The City of Alexandria* (1883) 17 Fed. Rep. 390.

In *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, the employer was held liable for injuries received by a boy in obeying the order of a foreman. But the rationale of this decision is that the risk undertaken was outside the scope of the contract of service. See *note* to *Olson v. Minneapolis & St. L. R. Co.* (Minn.) 48 L. R. A. 706. It is not material, therefore, to inquire whether it is or is not in harmony with later decisions not involving this element.

The actual scope of the decision in *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, is first, that the head of any distinct department of a business was a representative of the master, and secondly, that, under this doctrine, a railway company was liable for the negligence of a conductor. But a good deal of the language used by Mr. Justice Field in the majority opinion was apparently susceptible of the construction that he intended to adopt a theory of vice-principals not materially different from that discussed in III. *supra*, and before the *Baugh* Case had explained the real scope of the decision, several rulings based on an erroneous idea of its effect had been made, both in the Federal and the state courts. Confining our attention for the present to the former courts, it seems certain that a master would not now be held liable by one of them as he was between the dates of the *Ross* and *Baugh* Cases for the negligence of the following employees:

A gang foreman in a machine factory. *Mason v. Edison Mach. Works* (1886) 24 Blatchf. 93, 28 Fed. Rep. 228.

A foreman of carpenters. *Pullman's Palace Car Co. v. Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. Rep. 932.

An engineer who, in accordance with the company's rules, has taken charge of the forward section of a train which has broken apart. *Newport News & M. Valley Co. v. Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. Rep. 362.

A section foreman was held to be a vice-principal in *Northern P. R. Co. v. Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. Rep. 182, where the court of appeals went so far as to lay it down that the test for determining as to whether a person occupies the relation of vice-principal or fellow servant is not whether he has charge of an important 51 L. R. A.

department of the master's service, but whether his duties are exclusively supervision, direction, and control of the work, and over subordinate employees engaged therein.

This decision was reversed in 1895 by the Supreme Court (162 U. S. 348, 40 L. ed. 904, 16 Sup. Ct. Rep. 843) the *Baugh* Case having been decided in the meantime. See further, as to such employees, *infra*.

Possibly the *Baugh* Case has not impliedly overruled the decisions declaring employers liable for the negligence of the foreman of a quarry. *Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186, affirming on this point (1893) 55 Fed. Rep. 259.

A foreman in charge of the erection of a building. *Heckman v. Mackey* (1888) 35 Fed. Rep. 353.

A roadmaster (apparently of a division only). *Atchison, T. & S. F. R. Co. v. Wilson* (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. Rep. 57.

A foreman of a construction crew. *Lindvall v. Woods* (1891) 44 Fed. Rep. 855, where it was left to the jury to say whether the foreman of several gangs engaged in constructing a railway was a vice-principal, the judge charging them that a master is responsible for the negligence of an employee vested with the entire control and supervision of a particular work to be done. This charge was approved in (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. Rep. 62. In the case of the same name in (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020, arising out of the same accident, the foreman was held to be a mere servant, and the further ground was taken that the trestle which fell was not a structure furnished for the laborers to work upon, but itself a part of what was to be done in the construction of the road.

A pilot in command of a vessel. *The Titan* (1885) 23 Blatchf. 177, 23 Fed. Rep. 413.

A captain of a ship. *The A. Heaton* (1890) 48 Fed. Rep. 592; *The Transfer No. 4* (1894) 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. Rep. 364, *Reversing* (1893) 55 Fed. Rep. 98 (*Baugh* Case not cited, though it was decided in the previous year).

The case of *Quinn v. New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. Rep. 363 in which such liability was denied, turned on the fact that the captain was engaged in manual labor. The theory of dual capacity is also the ground of the decision in *The Queen* (1889) 40 Fed. Rep. 694, though this case probably carries that theory further than is justifiable under the principles accepted by most courts. See VI. *2, g. supra*.

A yard master was held to be a vice-principal in *Hard v. Minneapolis & St. L. R. Co.* (1888) 36 Fed. Rep. 567, and the same ruling has been made since the *Baugh* Case. See *infra*.

That a foreman of construction on a railway is a vice-principal was assumed by the Supreme Court itself in *Coyne v. Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382, but his precise functions are not stated.

One case which, at first sight, might seem to have been superseded by the later rulings of the Supreme Court may be upheld as really embodying the principle that the duty of furnishing appliances is nonassignable. *The Julia Fowler* (1892) 49 Fed. Rep. 277 (defective rope furnished by chief officer of ship).

On the other hand, some of the cases decided during this period also took a correct view of the effect of *Ross* Case, the master being held not liable for the negligence of the engineer of a detached engine. *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. Rep. 837.

The foreman of a gang engaged in excavating work. *Anderson v. Winston* (1887) 31 Fed. Rep. 528.

A "wreck master" having full control of members of wrecking crews, not excluding the road masters when they are present. *Borgman v. Omaha & St. L. R. Co.* (1890) 41 Fed. Rep. 667 (susceptible of being reconciled with the cases *infra* to the opposite effect, on the supposition of a different arrangement which made the delinquent a real head of a department, when the occasions for his services arose; otherwise the case must be treated as overruled, both generally by the *Baugh* Case, and, as to the specific facts, by *McGrath v. Texas & P. R. Co.* (1894) 9 C. C. A. 133, 23 U. S. App. 86, 60 Fed. Rep. 555, cited *infra*).

An engineer in charge of the motive power of an elevator. *Wolcott v. Studebaker* (1887) 34 Fed. Rep. 8.

The foreman of a master stevedore. *The Wm. F. Babcock* (1887) 31 Fed. Rep. 418 (hatch left open).

In 1893 came the Supreme Court's explanation of its real position in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, an extract from which has already been given in *V. c. supra*. The court declined to extend the principle of the *Ross* Case so as to cover the engineer of a detached engine, and declared that the doctrine of departmental control, as formulated in the *Ross* Case, merely enabled the servant to recover for the negligence of an employee in complete control of one of the principal departments of a large concern, and did not imply that the master was liable for the acts of all servants controlling a separate piece of work in one of those departments. See, generally, *V. supra*.

In later decisions, accordingly, the action has been declared not to be maintainable, where the delinquent was the foreman of a gang assaulting regular section crews as occasion required. *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

A section foreman. *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Northern P. R. Co. v. Charless* (1896) 162 U. S. 359, 40 L. ed. 909, 16 Sup. Ct. Rep. 848; *Deavers v. Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. Rep. 480; *Kansas & A. Valley R. Co. v. Waters* (1895) 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. Rep. 28; *Wright v. Southern R. Co.* (1897) 80 Fed. Rep. 260.

A divisional road master. *Martin v. Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

A foreman on the construction of a bridge with two superiors over him. *Kelly v. Jutte & F. Co.* (1899) 98 Fed. Rep. 380.

A wreckmaster. *McGrath v. Texas & P. R. Co.* (1894) 9 C. C. A. 133, 23 U. S. App. 86, 60 Fed. Rep. 555.

An acting foreman of a wrecking gang. *Filippin v. Kimball* (1898) 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. Rep. 258.

A foreman of a drill crew in a railway yard. *Central R. Co. v. Keegan* (1893) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

A foreman of a switching crew. *Harley v. Louisville & N. R. Co.* (1893) 57 Fed. Rep. 144.

A foreman of car repairers. *Grady v. Southern R. Co.* (1899) 84 C. C. A. 494, 92 Fed. Rep. 491.

The foreman of gang taking down a building. *Cleveland, C. C. & St. L. R. Co. v. Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. Rep. 970, *Reversing on rehearing* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Rep. 804.

The temporary boss of a bridge gang, who

was himself a laborer. *Texas & P. R. Co. v. Rogers* (1893) 6 C. C. A. 403, 18 U. S. App. 547, 57 Fed. Rep. 378.

A foreman in the construction of a bridge, with two superiors over him. *Kelly v. Jutte & F. Co.* (1899) 98 Fed. Rep. 380.

One of several foremen in a railway machine shop. *Gaynon v. Durkee* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. Rep. 302.

A foreman in charge of the repairs of machinery in a mill. *Stevens v. Chamberlin*.

A foreman supervising laborers constructing a sewer. *Minneapolis v. Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. Rep. 525.

The foreman of a gang of stevedores. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. Rep. 748; *The Kensington* (1898) 91 Fed. Rep. 681.

A gang foreman in a mine. *Alaska Treadwell Gold Min. Co. v. Whelan* (1897) 163 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

An underground boss in a mine. *What Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 400, 56 Fed. Rep. 810.

In one case a railway company was held liable for the negligence of a yardmaster. *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 200, 70 Fed. Rep. 669; but it seems at least an open question whether this is a proper inference from the *Baugh* Case.

Cincinnati, N. O. & T. P. R. Co. v. Gray (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. Rep. 623, is to the opposite effect, but the decision of the court of appeals was not cited.

The cases cited in *V. d. supra*, following the *Ross* Case as to the point that conductors are vice-principals, have been, as there mentioned, virtually, if not actually, overruled by the decision in *New England R. Co. v. Conroy* (1899) 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, and need not be again noticed in the present summary.

As already stated, the earlier cases are conflicting as to the relation of mates to their subordinates, but since the *Ross* Case there can no longer be a question that, in the Federal courts, they are regarded as mere servants, under ordinary circumstances. *The Egyptian Monarch* (1838) 36 Fed. Rep. 773; *Carlson v. United N. Y. Sandy Hook Pilots' Assn.* (1899) 93 Fed. Rep. 468; *The Job T. Wilson* (1897) 84 Fed. Rep. 204; *The Miami* (1899) 35 C. C. A. 281, 93 Fed. Rep. 218, *Affirming* (1898) 87 Fed. Rep. 757; *The Walla Walla* (1891) 46 Fed. Rep. 198.

The ruling in *Halverson v. Nisen* (1876) 3 Sawy. 562, Fed. Cas. No. 5,970, concerning a mate's negligence in not examining an appliance is, however, not law under the modern doctrine as to nonassignable duties.

The decisions made on the authority of the *Ross* Case as to the status of captains were, as we have seen, conflicting. Whether they should be regarded as vice-principals or not, still remains doubtful even after the *Baugh* case, and the other later utterances of the Supreme Court.

Recovery was denied by courts of first instance in *The Ravensdale* (1894) 63 Fed. Rep. 624; *Olson v. Oregon Coal & Nav. Co.* (1899) 56 Fed. Rep. 109; *The Job T. Wilson* (1897) 84 Fed. Rep. 204.

But in the first case the delinquent was merely the captain of a lighter, and his position did not involve the discharge of the functions usually associated with the masters of vessels. In all of them, moreover, the negligence was such as might be considered nonofficial in the sense in which that term is understood by many

Federal courts. See VI. f, *supra*. These rulings, therefore, are inconclusive.

The liability of an employer for the negligence of a general manager is fully recognized by the Federal courts. *Baltimore & O. R. Co. v. Baugh* (1898) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (see V. b, *supra*); *Northern P. Coal Co. v. Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. Rep. 756; *Northwestern Fuel Co. v. Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. Rep. 915; *Lund v. Hersey Lumber Co.* (1890) 41 Fed. Rep. 202.

The doctrine of the dual capacity of a vice-principal has been recognized by the court of appeals (*Reed v. Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. Rep. 186; *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 169, 70 Fed. Rep. 669; *The Miami* (1899) 35 C. C. A. 281, 93 Fed. Rep. 218, *Affirming* (1898) 87 Fed. Rep. 757); and by the lower courts. *Quinn v. New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. Rep. 363; *Olson v. Oregon Coal & Nav. Co.* (1899) 96 Fed. Rep. 109; *The Job T. Wilson* (1897) 84 Fed. Rep. 204.

In *Northern P. R. Co. v. Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. Rep. 182, a railway company was declared liable for an act of manual negligence done by a section foreman. The decision was reversed by the Supreme Court (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, but merely on the ground that the delinquent was not a vice-principal. The difference of opinion as to the distinction between official and nonofficial acts was referred to in the argument, but no ruling was made as to this point.

a. State courts.

Alabama.

Under the common law it was settled that even an employee supervising half a railroad was not a vice-principal. *Mobile & M. R. Co. v. Smith* (1877) 59 Ala. 245.

In later cases recovery was denied for the negligence of a conductor. *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300, 9 So. 252, intimating that *Mobile & M. R. Co. v. Smith* had gone to the "extreme verge of soundness."

And of the foreman of a gang of men employed in the construction of a telegraph line. *Postal Teleg. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854 (a decision both with reference to the common law and the employer's liability).

Arizona.

This court has held, following the *Ross Case*, that the conductor of work train is a vice-principal. (*McGill v. Southern P. Co.* (1893; *Ariz.*) 33 Pac. 821); except when a superior is on the train. See S. C. (1896; *Ariz.*) 44 Pac. 302.

Arkansas.

In *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264, it was laid down, *arguendo*, that superiority of rank is not a test of the representative capacity of an employee, and, pursuant to this theory, the conductor of a work train was, in 1883, held not to be a vice-principal. *St. Louis, I. M. & S. R. Co. v. Shackelford* (1883) 42 Ark. 417.

The question did not come before the supreme court again until 1893, in which year several judgments were rendered, which modified the earlier rulings on lines indicated by the *Ross Case* (VII. d, *supra*) and the decisions based upon it. In *Bloyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089 a foreman of bridge-builders on a railway was held to be a vice-principal. Besides the *Ross Case*, other decisions were relied upon, which were 51 L. R. A.

supposed to have established a general rule, that, where supervision is necessary to the safety of workmen it is the master's duty to bestow it, the corollary drawn being that he is responsible for the negligence of any agent to whom the duty is intrusted. This is virtually the superior-servant doctrine (III. *supra*), and only the authorities based upon that doctrine support this sweeping statement of the court. The learned judge who wrote the opinion, Arkansas court, was certainly mistaken in thinking that the rulings which he cites as to general managers (*Quincy Min. Co. v. Klits* (1879) 42 Mich. 34, 8 N. W. 240), or as to train despatchers (*Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502), are pertinent precedents for the general rule formulated. The scope of those rulings is much narrower than is here represented (see V. *supra*). Nor can even the *Ross Case* itself be properly vouched in aid of the specific ruling of the court. The cases cited in V. *supra*, show very plainly that a foreman of the grade of the delinquent is not a vice-principal under any proper conception of the doctrine of departmental control.

A similar remark applies to *St. Louis, A. & T. R. Co. v. Torrey* (1893) 58 Ark. 217, 24 S. W. 244,—supposing the *rationale* of that case to be that a vice-principal (here a foreman of bridge construction) was not a representative of the master in respect to a negligent act characteristic of a servant. But possibly the nature of the act is intended to be the sole essential ground of the decision.

In *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250, it seems to be assumed that the foreman of a railway roundhouse was a departmental vice-principal.

In *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324, 24 S. W. 723, it was held, on the authority of the *Bloyd Case* (1893) 58 Ark. 66, 22 S. W. 1089, that the superintendent in charge of a quarry owned by a railway company was a vice-principal. This is a legitimate application of the doctrine of departmental control if the superintendent exercised control unrestricted except as regards the general manager of the company; but the report does not show as clearly as might be wished the precise nature and extent of the powers vested in the delinquent.

In *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168, 24 S. W. 106, an employee in charge of the oil department of a compress company seems to have been viewed as a departmental manager, but the main stress, perhaps, was intended to be laid on the nondelegable quality of the duty violated.

From the foregoing summary it would appear reasonable to conclude that the Arkansas court, while it is theoretically an adherent of the doctrine of departmental control, has applied that doctrine to employees of lower grade than is warrantable under the latest and best-considered decisions of the Federal courts, whose views as to the proper limits of this doctrine are of strongly persuasive, if not of controlling, authority in the other jurisdictions where it has been adopted. Under these circumstances the proper classification of the Arkansas cases becomes a matter of some difficulty. But, having regard to the actual facts, and the position of the employees held to be vice-principals from the *Bloyd Case* downwards, it seems justifiable upon the whole to say that, even if this state cannot be described as one of those which proceed upon the theory that all directing employees represent the master, its decisions are most correctly placed in the same list as those which illustrate that theory. See III. f, *supra*.

The dual capacity of superior servants was

recognized in *St. Louis, A. & T. R. Co. v. Torrey* (1893) 58 Ark. 217, 24 S. W. 244. California.

At an early date the common law was superseded in this state by the Code, which (§ 1070) relieves employers from liability for the negligence of a coservant "in the same general business." These words have been thought by the supreme court to have been intended to sweep away the distinctions created by the adjudged cases in favor of the servant, on the ground of the negligent servant's superior position. *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175. Such a theory, if rigidly applied, would clearly absolve the master from responsibility for the negligence, even of a general manager; and at one period there was a strong tendency to adopt this extreme view.

But, on the whole, the statute has been treated as merely declaratory of the common-law, the result being that this court like those of nearly all the other states holds a master to be liable for the negligence of a general manager. *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471. See IV. b, *supra*, for a review of the decisions. The servant's right to recover, so far as it depends on the official position of the delinquent, is under the cases so far decided limited to the cases where that delinquent was a general manager.

The decision in *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041, holding a master liable for the negligence of a foreman superintending the excavation of a trench, is not a ruling in the contrary sense, as the default was in not maintaining the appliances in a proper condition.

The doctrine of departmental control has apparently not been discussed. In one case a railway company was required to answer for the negligence of a roadmaster, an official who in some states has been held a vice-principal (see V. d, *supra*), but the rationale of the decision was that the plaintiff had not been warned of a special danger incident to the place of work. *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720.

In the first place, owing to the ambiguity of the word "department," courts which are probably or certainly included among those which hold heads of departments to be vice-principals sometimes express themselves in language which, if taken literally, would imply a rejection of that doctrine.

The master's liability for the acts of the lower grades of supervising employees is well established; as where the negligent person was a conductor. *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175.

A section foreman. *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708.

A foreman in a mine. *Stephens v. Doe* (1887) 73 Cal. 26, 14 Pac. 378 (presumably not in full control: see above).

The foreman supervising the silver-room department of smelting works. *Nixon v. Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803.

The foreman of a farm. *Noyes v. Wood* (1894) 102 Cal. 389, 36 Pac. 766 (presumably not in full control; see above).

A gang foreman of stevedores. *McDonald v. Hazletine* (1878) 53 Cal. 35.

The mate of a ship. *Livingston v. Kodiak Pkg. Co.* (1894) 103 Cal. 258, 37 Pac. 149.

The superintendent of the construction of a bridge. *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

The foreman of construction of a trestle. *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

A foreman in a quarry which is managed by 51 L. R. A.

a superintendent. *Donovan v. Ferris* (1900) 128 Cal. 48, 60 Pac. 519.

The theory that a vice-principal should be regarded as a mere servant, when he is doing a servant's work, has not been directly raised in any of the cases. Two of the cases which illustrate the dual capacity of employees simply decide that foremen whose rank is lower than that of general managers are vice-principals in regard to the performance of nondelegable duties. *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041; *Elledge v. National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720 (see above).

The point on which two others turn is that certain foremen of this grade were not vice-principals to the negligent act which caused the injury. *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559 (answering that all was clear below when a workman was about to throw down a heavy article); *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017 (neglect to provide a scaffold of sufficient strength during the progress of the work). But in the latter of these cases some language is used which shows a decided leaning toward the doctrine of *Crispin v. Babbitt* (see VI. h, *supra*). Colorado.

A master is held answerable for the negligence (official at all events; see below) of general manager. *Lantry v. Silverman* (1892) 1 Colo. App. 404, 29 Pac. 180.

And of a departmental manager,—as an employee in full charge of the sinking of a mine shaft. *Deep Min. & Drainage Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210.

And of the superintendent of the construction of a railway. *Denver, S. P. & P. R. Co. v. Driscoll* (1889) 12 Colo. 520, 21 Pac. 708.

The general foreman of track layers, under a superintendent of construction. *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701; *Colorado Midland R. Co. v. Naylor* (1892) 17 Colo. 501, 30 Pac. 249.

No cases in which the status of servants lower than departmental managers was considered have been found.

The doctrine that a vice-principal is a mere servant when he does manual work is applied in one of the above cases. *Deep Min. & Drainage Co. v. Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210.

Connecticut.

A master is liable for the negligence of a general manager. *Gerrish v. New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235.

The doctrine of departmental vice-principals seems also to be recognized in this state, as the *Ross Case* was relied upon in *Darrigan v. New York & N. E. R. Co.* (1884) 52 Conn. 295, 52 Am. Rep. 590 (delinquent was a train dispatcher). But the court in its argument wavers between this conception and that of a nondelegable duty intrusted to the dispatcher.

The mere fact that the negligent servant was the superior of the injured one will not enable the latter to recover. *Wilson v. Williamatic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653; *Sullivan v. New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711 (gang foreman not a vice-principal).

Delaware.

A general manager has been held to be a vice-principal. *Foster v. Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545. The status of superior servants of lower grade has not been discussed.

Florida.

The subject of vice-principals has apparently not been discussed in this state, all the employer's cases of injuries to servants turn-

ing upon the question of common employment merely (see note to Guggenheim Smelting Co. (N. J.) 50 L. R. A. 417. Georgia.

The master is liable for the negligence of a general manager. *Atlanta Cotton Factory Co. v. Speer* (1882) 69 Ga. 137, 47 Am. Rep. 750 (assumed); *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *McDonald v. Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839.

And of a departmental manager. *Taylor v. Georgia Marble Co.* (1895) 99 Ga. 512, 27 S. E. 768; *Spencer v. Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor was delinquent; *Ross* Case followed); *Augusta v. Owens* (1900) 111 Ga. 464, 36 S. E. 830 (superintendent of quarry owned by a city); *Cheaney v. Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33 (employee of steamship company superintending the loading of a ship).

No action can be maintained for the negligence of a superior servant of the lower grades—as a workman with two or three under him, engaged in erecting a building. *McDonald v. Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 830 (refusing to treat such an employee as a general superintendent).

A gang boss on the construction of a building. *Cates v. Itner* (1898) 104 Ga. 679, 30 S. E. 884; (a room foreman in a factory.) *McGovern v. Columbus Mfg. Co.* (1886) 80 Ga. 227, 5 S. E. 492.

A foreman of a squad of men receiving timbers which are being hoisted by a derrick. *Gunn v. Willingham* (1900) 111 Ga. 427, 36 S. E. 804.

In one case a doctrine which was virtually the same as that of superior and subordinate (III. *supra*) was enunciated. *Atlanta Cotton Factory Co. v. Speer* (1882) 60 Ga. 137, 47 Am. Rep. 750, where the master was held liable for the negligence of the immediate overseer of a girl fifteen years of age in allowing her to play with her companions in a room to which the superintendent had forbidden them to be taken. If it was intended by this ruling to formulate a principle of universal applicability, as between master and servant, the case is clearly overruled by the last four cases above cited. But it was recently explained that when the court laid it down that "the agent who represents the corporation, as master over other employees for the time, occupies the position of the corporation for such time as to such subordinates," all that was meant was that the corporation was liable where the injured employee was a child who was without access to the general superintendent, and who received her orders solely from the manager of the branch of the business in which she was engaged. *Southern Agricultural Works v. Franklin* (1900) 111 Ga. 319, 36 S. E. 693. Obviously, however, such an explanation is anything but satisfactory, for if the mere fact of an absence of personal communication between a servant and the general manager is to make the intermediate superior a vice-principal, there is no logical ground upon which a court can decline to accept the superior-servant doctrine without qualification. The scope of the *Speer* Case, therefore, must be even narrower than that suggested. Its true *rationale* should rather be sought in the theory, exemplified in numerous cases, that the obligations of employers to minors of tender years are more extensive than those to which they are subject with regard to servants of full age. In other words, the general doctrine that a master is not liable for an injury caused by the negligence of a fellow servant does not apply to the case of a child who is injured through the negligence of a superintendent 51 L. R. A.

whose orders the child was bound to obey. *Southern Agricultural Works v. Franklin* (1900) 111 Ga. 319, 36 S. E. 693, explaining effect of *Augusta Factory v. Barnes* (1884) 72 Ga. 228, 53 Am. Rep. 838, to be that the defendant company's agent, in the case of a minor employee owed the employee a higher degree of care and duty, which required its agents in authority over her to look after her safety while under its charge and in the performance of her duty. (There the servant was not only a minor, but was also directed to undertake new risks, so that the case for the servant was really stronger than is stated. It was considered that the doctrine of *Scudder v. Woodbridge* (1846) 1 Ga. 195, that the defense of common employment was not available where the injured person was a slave, was applicable to minors of tender age. As regards the *Speer* Case itself, a court which rejects the doctrine of superior and subordinate might clearly hold an employer liable upon the specific facts there in evidence, by construing them as indicative of a breach of the nondelegable duty of instructing a young employee as to the dangers of the place of work. But this theory was not relied upon. Illinois.

This is one of the states which has unreservedly accepted the doctrine of superior and subordinate (III. *supra*). Employers have been held responsible for the negligence of the following servants:

A general superintendent. *Kewanee Boiler Co. v. Erickson* (1898) 78 Ill. App. 35.

The foreman of a steel company. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 878.

The foreman of a brick company's clay mine. *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1889) 34 Ill. App. 312, Affirmed (1894) 148 Ill. 573, 36 N. E. 572 (vice-principalship not for jury in this instance).

The foreman of a meat-packing establishment. *Libby, McN. & L. v. Scherman* (1893) 146 Ill. 540, 34 N. E. 801, Affirmed (1892) 50 Ill. App. 123.

The foreman of a foundry. *Fitzgerald v. Honkomp* (1892) 44 Ill. App. 365.

A yardmaster. *Chicago, R. I. & P. R. Co. v. Touhy* (1887) 26 Ill. App. 99; *Norris v. Illinois C. R. Co.* (1899) 83 Ill. App. 614.

The foreman of a wrecking crew. *Wabash, St. L. & P. R. Co. v. Hawk* (1887) 121 Ill. 259, 12 N. E. 253.

The foreman of a railway lumber yard. *Chicago & A. R. Co. v. May* (1884) 108 Ill. 288.

Foreman of track repairers. *Chicago, St. L. & P. R. Co. v. Gross* (1890) 133 Ill. 37, 24 N. E. 563, Affirmed (1889) 35 Ill. App. 178.

A section foreman. *Chicago & A. R. Co. v. Goltz* (1897) 71 Ill. App. 414; *Chicago, St. L. & P. R. Co. v. Gross* (1889) 35 Ill. App. 178.

The foreman of an electric railway company at its car shed. *Metropolitan West Side Elev. R. Co. v. Skola* (1900) 183 Ill. 454, 56 N. E. 171.

The "starter" of a street railway. *West Chicago Street R. Co. v. Dwyer* (1894) 57 Ill. App. 440 (probably a vice-principal).

The foreman of one of the gangs engaged on the construction of a bridge. *Pittsburg Bridge Co. v. Walker* (1897) 170 Ill. 550, 48 N. E. 915, Affirmed (1897) 70 Ill. App. 53.

The foreman of a gang of carpenters. *Latter v. Kinnare* (1896) 68 Ill. App. 558.

The foreman of a gang engaged in hoisting a heavy article. *Fraser v. Hand* (1889) 83 Ill. App. 153; *Fraser v. Schroeder* (1896) 163 Ill. 459, 45 N. E. 288.

A pit-boss in a mine. *Consolidated Coal Co.*

v. Wombacher (1890) 184 Ill. 57, 24 N. E. 627, Affirming (1889) 31 Ill. App. 288.

The foreman of a gang engaged in excavating. Chicago & T. R. Co. v. Simmons (1882) 11 Ill. App. 147.

A foreman of car repairers. St. Louis, A. & T. H. R. Co. v. Holman (1894) 53 Ill. App. 617.

The foreman of a dredge. Chicago Dredging & Dock Co. v. McMahon (1889) 30 Ill. App. 358.

The feeder of a planing machine (as regards a boy under his orders). Fanter v. Clark (1884) 15 Ill. App. 470.

A superior servant is a vice-principal only as to servants under his control. Lincoln Coal Min. Co. v. McNally (1884) 15 Ill. App. 181.

It might be thought that courts which have imposed liability for the negligence of the employees above enumerated would have had no hesitation in holding railway companies liable for the defaults of conductors. But the precise extent of the responsibility for such employees is, as the cases stand, somewhat obscure.

The supreme court has held the conductor of a wrecking train to be a vice-principal. Abend v. Terre Haute & I. R. Co. (1884) 111 Ill. 202, 53 Am. Rep. 616.

And the same ruling has been made by the court of appeals with regard to the conductor of a gravel train. Chicago, B. & Q. R. Co. v. Blank (1887) 24 Ill. App. 438.

On the other hand, the court of appeals has declared a railway company not liable for the negligence of the conductor of a construction train. Chicago & A. R. Co. v. McDonald (1887) 21 Ill. App. 409.

And the principle of this case has been approved by the supreme court to the extent that it has declared it to be a question for the jury whether such a conductor is a vice-principal as to one of the laborers. Mobile & O. R. Co. v. Massey (1894) 152 Ill. 144, 38 N. E. 787, Affirming (1893) 52 Ill. App. 556 (omission to read running orders led to a collision).

The more recent decisions of the supreme court seem to regard the company's liability as dependent simply upon the answer to the question whether, irrespective of the kind of train which he controlled, the act of the conductor was official or not. In one it was held error to instruct a jury on the theory that, as matter of law, a conductor, who is also the foreman of a work train, represents the company for all purposes. Mobile & O. R. Co. v. Godfrey (1895) 155 Ill. 78, 39 N. E. 590.

In another the court refused to disturb the finding of the court of appeals that the negligence of a conductor of a freight train in permitting it to run past a switch on which he had been directed to await the passage of another train is that of a fellow servant, and not of a vice-principal of the fireman, notwithstanding the rule of the company requiring trains to be run under the directions of the conductor, except when his directions conflict with the rules, or involve risk and hazard, in which case the engineer shall be held equally responsible. Meyer v. Illinois C. R. Co. (1899) 177 Ill. 591, 52 N. E. 848, Affirming (1895) 65 Ill. App. 531.

In the Meyer Case just cited the court seems to have contravened the principle enunciated by itself (see VI. f), that any act of negligence involving an exercise of authority is official. Most of the decisions, however, merely go to the extent of treating as a bar to the action the fact that the negligent act was done by the delinquent employee while participating in the work of his subordinates. Gall v. Beckstein (1898) 173 Ill. 187, 50 N. E. 711 (1897) 69 Ill. App. 616; Illinois C. R. Co. v. Swisher (1895) 61 Ill. 51 L. R. A.

App. 611; Chay v. Chicago, B. & Q. R. Co. (1894) 56 Ill. App. 235; Chicago & W. I. R. Co. v. Massey (1893) 50 Ill. App. 666; Chicago Architectural Iron Works v. Nagel (1898) 80 Ill. App. 492.

The cases in which the plaintiff obtained a judgment under such circumstances may be differentiated from the foregoing, as being an application of the doctrine of proximate cause considered to be required by the evidence. Pittsburg Bridge Co. v. Walker (1897) 170 Ill. 550, 48 N. E. 915, Affirming (1897) 70 Ill. App. 55; Fraser v. Hand (1889) 33 Ill. App. 153; Metropolitan West Side Elev. R. Co. v. Skola (1900) 183 Ill. 454, 56 N. E. 171; Illinois Steel Co. v. Schymanowski (1896) 162 Ill. 447, 44 N. E. 876.

But it would certainly be more simple to explain them as embodying the theory that a vice-principal represents the master, even as to manual acts when they have the effect of imperiling the servant in the performance of some particular duty to which the vice-principal has assigned him.

Indiana.

In this state the doctrine that a master is not rendered liable merely by reason of the superior rank of the delinquent was carried so far at one time that the master mechanic of a railway was held not to be a vice-principal. Columbus & I. C. R. Co. v. Arnold (1869) 31 Ind. 174, 99 Am. Dec. 615. This decision, which was based upon the opinion of the House of Lords in *Wilson v. Merry* (IV. d. 1, *supra*), was declared, somewhat guardedly, to be "an extreme case perhaps carrying the doctrine beyond its proper limits." *Indiana Car Co. v. Parker* (1885) 100 Ind. 181. In a still later decision it was merely described as "an extreme case" and declared to have been greatly modified by later rulings. *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611. It has never been expressly overruled, therefore, but the decisions cited below show that the general principle it embodies is no longer law in Indiana. Upon the specific facts it is discredited by *Taylor v. Evansville & T. H. R. Co.* (1891) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876.

A general manager was treated as a vice-principal in *Mitchell v. Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812.

A possible illustration of the doctrine of departmental control is furnished by *Drinkout v. Eagle Mach. Works* (1883) 90 Ind. 423, where the delinquent was the foreman of the foundry department in machine works. But liability was really predicated rather from the nature of the negligent act. The same remark seems applicable to *Louisville, N. A. & C. R. Co. v. Graham* (1890) 124 Ind. 89, 24 N. E. 668, where the foreman of the construction of a tunnel allowed the place of work to become unsafe. Less equivocal recognitions of the doctrine are the following decisions:

Imposing liability for the negligence of a master mechanic. *Taylor v. Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876.

A foreman in full control of the work of clearing away debris which is endangering a railway bridge. *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611.

A division superintendent of a railway. *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

A street commissioner superintending the construction of a bridge. *Lebanon v. McCoy* (1895) 12 Ind. App. 300, 40 N. E. 700.

That mere superiority of rank will not constitute a servant a vice-principal, the rule being the same, whether the injured servant is an adult or a minor, is well settled. *Pitts-*

burgh, C. & St. L. R. Co. v. Adams (1886) 105 Ind. 151, 5 N. E. 187.

Hence, all employees below the grade of departmental managers are treated as mere servants.

As a conductor. Thayer v. St. Louis, A. & T. H. R. Co. (1884) 22 Ind. 26, 85 Am. Dec. 409; Louisville, N. A. & C. R. Co. v. Southwick (1896) 16 Ind. App. 486, 44 N. E. 268.

A section foreman. Justice v. Pennsylvania Co. (1891) 130 Ind. 321, 30 N. E. 303.

A foreman controlling a gang in one of the tunnels of a cement company. Ross v. Union Cement & Lime Co. (1900; Ind.) 58 N. E. 500.

The foreman of the woodshop in a car factory. Indiana Car Co. v. Parker (1884) 100 Ind. 181.

The superintendent of machinery in a factory. Boyce v. Fitzpatrick (1881) 80 Ind. 526.

The foreman of a gang lifting machinery. Robertson v. Chicago & E. R. Co. (1896) 146 Ind. 486, 45 N. E. 655.

An employee controlling an engine cleaner while he is instructing him in his duties. Spencer v. Ohio & M. R. Co. (1892) 130 Ind. 181, 29 N. E. 915.

A "bank boss" in a mine. Brazil & C. Coal Co. v. Cain (1884) 98 Ind. 282.

The foreman of gang removing a telegraph line. American Teleph. & Teleg. Co. v. Bower (1898) 20 Ind. App. 32, 49 N. E. 182.

Negligence committed in doing manual work which has no immediate connection with the characteristic functions of a vice-principal, viewed as a supervising and directing agent, is deemed to be nonofficial. Taylor v. Evansville & T. H. R. Co. (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876; Drinkout v. Eagle Mach. Works (1883) 90 Ind. 423; Indianapolis & St. L. R. Co. v. Johnson (1885) 102 Ind. 352, 26 N. E. 200; Salem Stone & Lime Co. v. Chastain (1894) 9 Ind. App. 453, 36 N. E. 910 (complaint demurrable which alleges that the foreman of a stone company injured a subordinate by prying off a large piece of rock).

In the first case the employer was held liable for the special reasons noted in VI. g. *supra*, where an extract from the opinion is given. In the last three cases it is possible that the delinquent was not regarded as a vice-principal by virtue of his rank, and that the *rationale* of the decision was merely the nature of the act. Iowa.

The superior-servant doctrine was categorically rejected by a decision which declared a petition to be demurrable which seeks recovery on the theory that the delinquent servant had "charge and control" of the plaintiff. Peterson v. Whitebreast Coal & Min. Co. (1879) 50 Iowa, 673, 32 Am. Rep. 143 (approved in Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N. W. 743).

The effect of this decision was subsequently stated to be that a mere foreman, as the word is generally understood,—that is a laborer with power to superintend the labor of those working with him—is a coemployee, so far as his own labor is concerned. Baldwin v. St. Louis, K. & N. R. Co. (1885) 68 Iowa, 37, 25 N. W. 918.

Hence liability has been denied, where the delinquents were a foreman of track repairers. Hoben v. Burlington & M. River R. Co. (1866) 20 Iowa, 562.

A machinist who occasionally calls in other employees of a railway company to his assistance. Hathaway v. Illinois C. R. Co. (1894) 92 Iowa, 337, 60 N. W. 651.

A foreman superintending the construction of a house for a contractor. Benn v. Null (1884) 65 Iowa, 407, 21 N. W. 700 (presumably 51 L. R. A.

not in complete control; see cases cited below as to general and departmental managers).

A foreman of car repairers. Foley v. Chicago, R. I. & P. R. Co. (1884) 64 Iowa, 644, 21 N. W. 124.

An employee who, in the absence of the superintendent of a mine, gives them occasional directions as to their work, and whose regular functions are to take charge of the tools, and keep the time of the men. Wilson v. Dunreath Red-Stone Quarry Co. (1889) 77 Iowa, 429, 42 N. W. 360.

A master is held liable for the negligence of a general manager. Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N. W. 743.

And of a departmental manager. Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N. W. 743 (mill manager of lumber company); McCarthy v. Chicago, R. I. & P. R. Co. (1891) 83 Iowa, 486, 50 N. W. 21 (plaintiff ordered into dangerous place by foreman superintending the construction of a railway bridge); Baldwin v. St. Louis, K. & N. W. R. Co. (1888) 75 Iowa, 297, 39 N. W. 507 (employee controlling the lumber yard of a railway company); Hathaway v. Des Moines (1896) 97 Iowa, 333, 66 N. W. 188 (in entire charge of municipal street work).

In this state the theory of dual capacity can scarcely be said to have been finally settled. The court has very distinctly recognized the applicability of both the alternative tests of vice-principalship which are supplied by the official position of the delinquent and the nature of the negligent act. See Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N. W. 743, holding that a master is liable for negligence in giving orders when the employee is a vice-principal, and then only.

But in the only case which, so far as the writer knows, touches on the doctrine of dual capacity, it was left undetermined whether a foreman of carpenters employed by a firm of contractors was a vice-principal. (Barnicle v. Connor (1900) 110 Iowa, 288, 81 N. W. 452), and the position taken was that there could not in any event be a recovery, as the negligent act was done while he was participating in manual labor.

Kansas.

Some of the earlier cases in this state involving delinquencies of superior servants were made to turn upon the nondelegability of certain duties, irrespective of rank. Kansas P. R. Co. v. Salmon (1875) 14 Kan. 512; Atchison, T. & S. F. R. Co. v. Moore (1883) 29 Kan. 632; St. Louis & S. F. R. Co. v. Weaver (1886) 35 Kan. 412, 11 Pac. 408. But in the last-named case the Ross Case was cited by the court with approval, *arguendo*, and laid it down that an employer was liable for the negligence of "one having the general management or control of some portion of the master's business."

To this period also belongs a decision which requires something more than the mere possession of a power of control to warrant the inference that the delinquent was a vice-principal. Kansas P. R. Co. v. Little (1877) 19 Kan. 267, where it was declared that the superintendent in full charge of the construction of a culvert is in a different position from a mere foreman working with the other employees under a common principal. Here, however, the default was in respect to defective machinery, and the decision in the servant's favor might have been put on that ground.

A few years later a doctrine not distinguishable from that of superior and subordinate was applied in Hannibal & St. J. R. Co. v. Fox (1884) 31 Kan. 586, 3 Pac. 320, where an action was sustained for the negligence of a

foreman of car repairers in not protecting a subordinate from moving cars.

In *Missouri P. R. Co. v. Perego* (1887) 36 Kan. 424, 14 Pac. 7, where a foreman of a railway machine shop was held to be a vice-principal, the court seems to have had in mind a doctrine of no wider scope than the *Little Case* (1877) 19 Kan. 267, as it approved the following charge: "If Wirth was vested with full power to command the services of the deceased, and directed what he should do and how he should do it, and the whole management thereof and the direction of the deceased were vested in said Wirth, the defendant and superior servants reserving no discretion in themselves as to the direction of the work, then the act of Wirth is the act of the defendant, and not of a fellow servant."

The default was in respect to the quality of the machinery furnished in a case where a foreman of a gang hoisting stone with a derrick was held to be a vice-principal. *Union P. R. Co. v. Fray* (1890) 43 Kan. 750, 23 Pac. 1039. This ruling is therefore of a somewhat ambiguous import in the present connection.

The same remark is applicable to *Rouse v. Downs* (1897) 5 Kan. App. 549, 47 Pac. 982 (roadmaster constructed switch improperly).

But under the most recent decisions in which employers were held liable, it is no longer doubtful that the superior-servant doctrine is a part of the law of this state. It has been laid down that whoever has full and unrestricted authority to direct and command is a vice-principal. *Walker v. Gillett* (1898) 59 Kan. 214, 52 Pac. 442 (conductor), following the *Ross Case*, and refusing to accept the restrictions subsequently formulated in the *Baugh Case*. See VIII. d. *supra*. Upon the authority of this case employers have been held liable for the negligence of a foreman of carpenters in a car factory (*Kansas City Car & Foundry Co. v. Secrist* (1898) 59 Kan. 778, Appx.); and of a foreman in smelting works who has absolute control of ten roasters and the workmen engaged thereon, and assigns them, at his discretion, to whatever duties he may think fit. *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 678.

This is probably one of the states in which an employer is not absolved on the ground that the negligence of the vice-principal was committed in doing work usually done by a servant. See *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 678.

Kentucky.

In this state the superior-servant doctrine is applied, but (as already explained in a note in 46 L. R. A., on pages 346-7) in order to let in its operation in a common-law action it must be proved that the negligence of the delinquent was gross. See *Cincinnati, N. O. & T. P. R. Co. v. Palmer* (1895) 98 Ky. 382, 33 S. W. 199; *Louisville & N. R. Co. v. Survant* (1894) 96 Ky. 197, 27 S. W. 999 (error not to instruct jury as to this point); *Louisville & N. R. Co. v. Brantley* (1894) 96 Ky. 297, 28 S. W. 477 (where the relations of the delinquent and injured servants are not stated); *Eastern Kentucky R. Co. v. Powell* (1895) 17 Ky. L. Rep. 1051, 33 S. W. 629 (instruction making company liable for ordinary negligence only disapproved).

In view, however, of the extended significance attached to the phrase "gross negligence," this limitation does not seem to be of much benefit to a defendant in one large class of cases, the doctrine being that the absence of slight care by superiors in the management

of a railway train is gross negligence, and will render the company liable for consequent injuries sustained by a brakeman without his fault (*Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649). It is clear that almost all the negligent acts of which a conductor is guilty come under this category; and the same may be said of the defaults of an engineer in handling his engine. See cases cited below.

If the plaintiff seeks to avail himself of the damage act, providing for a right of action in case the injured person should die, he must prove that the negligence was wilful. Unless death results the common-law rule governs. *Cincinnati, N. O. & T. P. R. Co. v. Palmer* (1895) 98 Ky. 382, 33 S. W. 199. In this case separate instructions were given as to gross and wilful negligence.

Assuming the necessary degree of negligence to have been established, the superior-servant doctrine is extended so as to embrace cases in which the injured servant, though not exercising control over the injured one, was above him in grade. This recovery is allowed where the delinquent is the engineer of a train, and the injured servant a brakeman either on his own train (*Louisville & N. R. Co. v. Brooks* (1885) 83 Ky. 129 (cars driven together with such force that the brakeman was knocked down, while coupling, and dragged along the track); *Louisville & N. R. Co. v. Moore* (1886) 83 Ky. 675 (fireman acting as engineer); *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. Co. v. Grubbs* (1890; Ky.) 49 S. W. 3 (held to be gross negligence on the part of an engineer to start a train suddenly and without a signal immediately after a brakeman has made a coupling, and before he has had time to withdraw); *Richards v. Louisville & N. R. Co.* (1899) 20 Ky. L. Rep. 1478, 49 S. W. 419 (moving train ahead without waiting for signals—brakeman run over); *Cincinnati, N. O. & T. P. R. Co. v. Palmer* (1895) 98 Ky. 382, 33 S. W. 199 (porter had his hand crushed through the negligence of the engineer in running his engine too rapidly against a car to be coupled); *Louisville & N. R. Co. v. Adams* (1890) 21 Ky. L. Rep. 498, 51 S. W. 577; *Louisville & N. R. Co. v. Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817 (switching crew); or on another train. *Louisville & N. R. Co. v. Robinson* (1868) 4 Bush, 507 (in this case the brakeman belonged to a freight train and the engineer was running a passenger train); *Louisville & N. R. Co. v. Sheets* (1890) 11 Ky. L. Rep. 781, 13 S. W. 248 (in this case the injured servant was a switchman and the engineer was on an ordinary train).

But an engineer is not a superior servant as regards a conductor, even though the latter is injured, while acting as brakeman. *Linck v. Louisville & N. R. Co.* (1899; Ky.) 54 S. W. 184.

In a recent case an engineer of a train which had accidentally broken into two sections was considered to be, while he was backing the engine to find the other part of the train, a superior servant in charge of the engine, and therefore a vice-principal as respects a brakeman on the engine; *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900 (collision caused by backing at excessive speed).

A fortiori, the master is liable where there is an actual exercise of control, as where the delinquent is a conductor. See cases cited under III. f. 3, *supra*.

A foreman of a gravel train. *Louisville & N. R. Co. v. Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426.

An engineer temporarily controlling the services of a laborer for the purpose of righting an engine. *Louisville & N. R. Co. v. Collins* (1865) 2 Duv. 114, 87 Am. Dec. 486.

A section foreman. *Louisville & N. R. Co. v. Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463.

The foreman of a switching crew. *Louisville & N. R. Co. v. Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817.

A foreman of a sawmill. *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704.

Louisiana.

A general manager is a vice-principal. *Mattise v. Consumers' Ice Mfg. Co.* (1894) 46 L. Ann. 1535, 16 So. 400.

The position of superior employees of lower grades is determined by the doctrine of the *Ross Case*, as it was understood by some courts before it was explained by the *Baugh Case* (VII. d. *supra*),—that is to say, practically equivalent to the doctrine of superior and subordinate. Hence, liability has been imposed, not only for the negligence of a conductor (*Van Amburg v. Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517; *Wilson v. Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961); and of an employee supervising the work of taking down a building (*Faren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363); and of a foreman in full control of the work of constructing a line of telegraph (*Vicars v. Cumberland Teleph. & Teleg. Co.* (1900) 52 La. Ann. 2153, 28 So. 367); but also of a foreman of car repairers. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342.

Maine.

A general manager is a vice-principal. *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Lasky v. Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367; *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143 (*arguendo*).

The doctrine of departmental control was recognized in *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143.

The principle that mere superiority of rank does not constitute a vice-principal has been applied in the case of a road master. *Lawler v. Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492.

The conductor of a construction train. *Cassidy v. Maine C. R. Co.* (1884) 76 Me. 488.

Foreman of locomotive shop. *Beaulieu v. Portland Co.* (1860) 48 Me. 291.

The foreman in charge of the "grinder" crew in a mill. *Cowan v. Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 840.

A foreman superintending the digging of a sewer or trench. *Conley v. Portland* (1886) 78 Me. 217, 3 Atl. 658; *Dube v. Lewiston* (1891) 88 Me. 211, 22 Atl. 112.

The foreman of a gang repairing a dam for a lumber company. *Doughty v. Penobscot Log Driving Co.* (1884) 76 Me. 143.

Maryland.

It seems doubtful whether this court has ever really recognized the doctrine that even general managers are vice-principals. See IV. d. 2, *supra*, for a review of the cases. But it is at least certain that employees who are elsewhere held to be departmental vice-principals in some jurisdictions are regarded as mere servants; for example:

A division superintendent in full control of his section of a railway. *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994.

And the master mechanic of a railway company. *L. R. A.*

pany. Shauck v. Northern C. R. Co. (1866) 25 Md. 462.

The captain of a tug-boat belonging to an elevator company. *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338.

The foreman of a gravel train. *O'Connell v. Baltimore & O. R. Co.* (1863) 20 Md. 212, 83 Am. Dec. 549.

An employee superintending the construction of a bridge, with several gang foremen under him, has also been held not to be a vice-principal. *State use of Hamelin v. Maister* (1881) 57 Md. 287.

Massachusetts.

The decisions in this state are clearer and more consistent than in any other, as they proceed upon the theory that no servant, however high his rank and complete his control over his master's business, is ever a vice-principal merely by virtue of his official position. Liability has been denied where the delinquents were the following employees, which are enumerated, roughly speaking, according to a descending scale:

A general manager. *Albro v. Agawam Canal Co.* (1860) 6 Cush. 75; *King v. Boston & W. R. Corp.* (1851) 9 Cush. 112; *Floyd v. Sugden* (1883) 134 Mass. 563; *Meehan v. Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518.

The captain of a ship. *Johnson v. Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458.

A foreman of a factory (not clear whether he was in full control). *McGuerty v. Hale* (1894) 161 Mass. 51, 36 N. E. 682.

A foreman superintending the construction of a building. *Summersell v. Fish* (1875) 117 Mass. 312; *Duffy v. Upton* (1873) 118 Mass. 544.

The foreman of the work in the yard of a manufacturing company. *Moody v. Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185.

Foreman superintending the digging of a sewer or trench. *Flynn v. Salem* (1883) 134 Mass. 351; *O'Connor v. Roberts* (1876) 120 Mass. 227; *Zeigler v. Day* (1877) 123 Mass. 152.

The mate of a ship. *Benson v. Goodwin* (1888) 147 Mass. 237, 17 N. E. 517; *Kalleck v. Deering* (1894) 161 Mass. 469, 37 N. E. 450.

A foreman of stevedores. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

The superintendent of blasting at a quarry. *Kenney v. Shaw* (1882) 133 Mass. 501.

A conductor. *Whitmore v. Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220.

A section foreman. *Clifford v. Old Colony R. Co.* (1886) 141 Mass. 564, 6 N. E. 751.

A brakeman in charge of a section of a train temporarily divided. *Hayes v. Western R. Corp.* (1849) 3 Cush. 270.

A mason with a "tender" working under him. *Kennedy v. Spring* (1893) 160 Mass. 203, 35 N. E. 779.

Michigan.

A general manager is a vice-principal. *Quincy Min. Co. v. Kitts* (1879) 42 Mich. 34, 3 N. W. 240 (*arguendo*); *Slater v. Chapman* (1887) 67 Mich. 523, 35 N. W. 106; *Shumway v. Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251; *Ryan v. Bagaley* (1883) 50 Mich. 179, 45 Am. Rep. 85, 15 N. W. 72; *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1084 (*arguendo*).

The doctrine of departmental control is extended somewhat further in this state than the decisions of the Supreme Court of the United States seem to warrant, a railway company having been held liable for the negligence, not only of a train despatcher (*Hunn v. Michigan*

C. R. Co. (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502; but also of an assistant road master. *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034 (see V. b. *supra*); *Palmer v. Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397 (see V. b. *supra*).

And a yard master. *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571.

But in the last case the negligence was a breach of two nondelegable duties, and it may be that the decision was intended to be based on that ground alone.

In some of its decisions this court has contrived to come very near the superior-servant doctrine; but they are susceptible of explanation on other principles.

Thus, in a Michigan case it was broadly laid down that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond, and on this ground a railway company was held liable for the act of a conductor of a construction train in ordering a young and inexperienced laborer to do dangerous work outside the scope of his employment. *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205. The effect of this case, however, is greatly restricted by the remark of the same court in *Wheeler v. Berry* (1893) 95 Mich. 250, 54 N. W. 876, in commenting on this case, that if the plaintiff had been a man of full age and experience, and familiar with the work, a recovery could not have been sustained. The rationale of the case, therefore, is rather the fact that the risk was not assumed, than the superior position of the servant. Moreover the order had reference to the performance of work, outside the scope of the servant's contractual duties, and it would seem that, under such circumstances, all courts, whether they accept or reject the superior-servant doctrine, hold the master responsible, wherever the injury was the result of obedience to a command given by an employee controlling the injured servant, irrespective of whether such employee was a vice-principal or not, as that term is construed in other connections.

In *Rodman v. Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, two of the judges in an equally divided court were for holding a railway company responsible to a brakeman for the negligence of a conductor in undertaking to operate an engine himself. The ground taken by *Champlin, J.*, for himself and his colleague was that he was a vice-principal, as being charged with a nondelegable duty, conceived to be imposed on the company, of seeing that the men under his control were performing their respective functions. Such a theory, if it is strictly and literally construed, leads up to a doctrine practically indistinguishable from that discussed in III. *supra*. But here, as in the *Bayfield* Case (1877) 37 Mich. 205, the language used is to be construed with reference to the contention of the plaintiff that he was entitled to recover on the ground that the act of the conductor had subjected him to risks outside the scope of his employment. The very broad theory laid down by *Champlin, J.*, cannot, it seems, be regarded as committing him to the doctrine that a conductor is a vice-principal under ordinary circumstances. So far as this case, therefore, decides anything, it is not really in conflict with the Michigan decisions, *infra*, declaring a conductor to be a fellow servant of his subordinates. But the facts were clearly discussed by the learned judge from a standpoint which was, to some extent at least, an improper one. The 51 L. R. A.

duties of the brakeman were in no respect changed because the conductor handled the engine himself, and it is only when there is such a change that a servant can be said, in the true sense of the phrase, to be exposed to risks outside his employment. The brakeman in this case was precisely in the same position as if any other incompetent person had done what the conductor did. Even supposing that such a situation might import liability, that liability would clearly be predicated on a ground of the failure to have a competent engineer, altogether a different theory from the one put forward by *Champlin, J.* See the opinion delivered by *Cooley, Ch. J.*

A subordinate decision, holding the conductor of a construction train to be a vice-principal is also to be explained as an illustration of the doctrine applicable in regard to risks outside the scope of the original employment. *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237.

That this court has never had any intention of adopting the superior-servant doctrine is put beyond controversy by its refusal to sustain an action for the negligence of the captain of a ship. *Caniff v. Blanchard Nav. Co.* (1887) 66 Mich. 638, 33 N. W. 744 (mate injured).

A conductor. *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60; *Jarman v. Chicago & G. T. R. Co.* (1893) 98 Mich. 136, 57 N. W. 32.

A section foreman. *Hammond v. Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 47 N. W. 965; *Timm v. Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116; *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097.

The foreman of a ballasting train on a railway. *Schroeder v. Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663.

A foreman of car repairers. *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260.

A foreman supervising the erection of an elevator. *Andre v. Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86.

A shift boss in a mine. *Petaja v. Aurora Iron Min. Co.* (1895) 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335, Affirmed on rehearing (1895) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951.

Minnesota.

Masters are held liable for the negligence of general managers. *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

As regards departmental managers, the language used in *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311, seems scarcely susceptible of any other construction than, (1) that a railway company is liable for the negligence of such a functionary. And (2) that a road master is for this reason a vice-principal. Yet a few years before it had been held that a road master was a mere servant. *Brown v. Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484. As there was no question in the latter case of a violation of any duty classed among those that are nondelegable, it would seem that the two rulings are in conflict unless (but this is not stated) the latter one may be supposed to have had reference to the general road master of the line and the earlier one to a divisional road master. So far as the report shows, however, such a ground of differentiation was not in the mind of the court. The doctrine of the earlier of the above two cases was again applied last year in *O'NEIL v. GREAT NORTHERN R. Co.* but here, again, the

precise official position of the road master is not apparent from the report.

Until quite recently it could not be said that this court had shown any tendency toward the adoption of the superior-servant doctrine. It refuses to allow recovery for the negligence of the foreman of graders on one of the sections of railroad under construction. *Lindvall v. Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

An assistant engineer supervising graders. *Cornellson v. Eastern R. Co.* (1892) 50 Minn. 23, 52 N. W. 224.

A foreman subject to the orders of a yard-master. *Fraker v. St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349.

The foreman of a railway roundhouse. *Gonsior v. Minneapolis & St. L. R. Co.* (1887) 36 Minn. 385, 31 N. W. 515.

A section foreman. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866.

As to road masters, see above.

But four years ago the case of *Carlson v. Northwestern Teleph. Exch. Co.* (1896) 63 Minn. 438, 65 N. W. 914, seemed to foreshadow a new departure. The court held merely that a foreman in charge of the excavation of a ditch, with power to employ and discharge subordinates, is a vice-principal in respect to the act of ordering a laborer to work in a place of unusual danger in the ditch without giving him proper warning as to the perils to which he would be exposed. Upon such facts, the case may obviously be kept out of the category of those which embody the superior-servant doctrine (III. *supra*), by referring the ruling to the conception of a breach of the non-delegable duty of instruction. But it will be seen from the extract from the opinion which was quoted in III. c, 4, *supra*, that the decision was sustained by reasoning which, if carried to its logical conclusions, would render the mere exercise of a power of control a test of representative capacity. It remains to be seen whether the court will take any further steps in this direction.

In *O'NEIL v. GREAT NORTHERN R. Co.* there is an unmistakable reversion of the doctrine of the rulings cited above, but it does not refer to the language used in the *Carlson* case.

The doctrine of dual capacity has been applied in *Soutar v. Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796; *Holtz v. Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805. As to its limits, see *O'NEIL v. GREAT NORTHERN R. Co. Mississippi*.

In this state *Wilson v. Merry* (IV. d, 1, *supra*), was expressly approved. *Iagrone v. Mobile & O. R. Co.* (1890) 67 Miss. 592, 7 So. 432; *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178. But of these cases the first merely denied liability for the negligence of a section foreman, and the second absolved the company where the delinquent was a conductor. The broad rule impliedly laid down by the approval thus expressed of the highest ruling, was, therefore, not required for the purposes of either decision, and, when the Constitution of 1890, § 193, and the Code of 1892, § 3559, introduced what was virtually the superior-servant doctrine, it was still, perhaps, an open question whether a general or departmental manager would have been held a vice-principal or not.

Missouri.

According to the majority of the decisions in Missouri there is no distinction, so far as regards the master's responsibility, between the manual and other acts of a vice-principal. 51 L. R. A.

Dayharsh v. Hannibal & St. J. R. Co. (1890) 103 Mo. 570, 15 S. W. 534; *Hutson v. Missouri P. R. Co.* (1892) 50 Mo. App. 300; *Russ v. Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 323, 20 S. W. 472; *Hughlett v. Osark Lumber Co.* (1893) 53 Mo. App. 87.

These rulings supersede the *dicta* to the opposite effect in *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Rowland v. Missouri P. R. Co.* (1886) 20 Mo. App. 463.

In the earlier decisions in this state we find the superior-servant doctrine categorically rejected, the Ohio rulings being disapproved in *McDermott v. Pacific R. Co.* (1860) 30 Mo. 115 (denying a chief engineer of a railway company to be a vice-principal); *Rohback v. Pacific R. Co.* (1869) 43 Mo. 187 (these cases were approved in 1873); *Brothers v. Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424, where it was laid down that a master is not liable for injuries received by a servant, caused by the negligence of a conservant, unless the latter is not possessed of the ordinary skill and capacity for the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.

In 1876 a conductor was held to be *prima facie* a mere servant. *McGowan v. St. Louis & I. M. R. Co.* (1876) 61 Mo. 528.

As was also a gang-foreman of carpenters at a bridge. *Lee v. Detroit Bridge & Iron Works* (1878) 62 Mo. 565.

While in *Marshall v. Schricker* (1876) 63 Mo. 308, the doctrine is laid down, upon a review of all the previous authorities in Missouri, that the exercise of control does not make the employee a vice-principal (foreman of blasting operations held a mere servant).

The law remained the same up to 1879, as it was then held erroneous to instruct a jury to the effect that an employee acting for and in the employ of the defendant in its yard at B, whose duties were to direct and control assistant brakeman in said yard, of whom deceased was one, was a vice-principal. *Rains v. St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459.

The case which may be said to mark the passage from a rejection to an acceptance of the superior-servant doctrine which, at least up to quite recently, has been consistently applied, is *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298. The opinion professes to rely upon the earlier cases in Missouri; but in view of their plain purport, as set forth above, it is impossible to admit that there is not a complete discontinuity of theories at this stage of the development of the law. The decision was that the master was liable for the consequence of obedience to the order of a foreman in charge of the construction of a turntable, whose directions the general superintendent had directed the plaintiff to follow. From a perusal of the opinion, it seems apparent that this conclusion was reached by a dialectic process which is responsible for a good deal of faulty judicial ratiocination, *viz.*, indulging the assumption that because, among the various grounds for denying liability in a previous case, the court may have mentioned the absence of a certain element, it therefore meant to commit itself to the doctrine that, if that element had been present, its decision would have been different. When the explicit language used in the cases above cited is examined, it is submitted that there is no sufficient ground for inferring that the representative capacity of the foreman in this instance would have been conceded at any earlier period in this state, although it may have been noted in one of those cases (*McGowan v. St. Louis & I. M. R. Co.* (1876) 61 Mo. 528), that there was no proof that the

conductor had the superintendence or control over the men, or the work, or power to provide or replace the machinery, and in another of the cases (*Marshall v. Schricker* (1876) 68 Mo. 309), that the employer cannot be charged with the negligence of one who was merely a foreman over the plaintiff, not engaged in a distinct department of the general service, but in the same work with plaintiff, and not charged with any executive duties or control over plaintiff which would constitute him the agent of the employer. The consideration by which the court seeks to fortify its conclusion in the *Dowling Case*, viz., that as the superintendent had instructed plaintiff to do whatever the foreman might order him to do, the accident was in effect a direct consequence of an order given by the superintendent, is really of no importance. That it cannot be conceded to bear the weight here ascribed to it is at once apparent, if we remember that such an instruction is impliedly or expressly given, wherever servants are working under foremen of the lower grade. The actual or supposed giving of such an instruction may possibly be adduced as one of the grounds for adopting the superior-servant doctrine; but it cannot be made to serve as a bridge to span the chasm between that doctrine and the one which denies the possession of control to be a test of representative capacity.

But, however this case may be explained, it is certain that a doctrine involving precisely the same results as that prevailing in Ohio, which was explicitly repudiated in the earlier decisions, has been applied in a large number of cases. Employers have been held liable for the negligence, not merely of the higher grades of employees, such as a master mechanic (*Tabler v. Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810), but also for the defaults of such servants as a foreman in charge of a roundhouse (*Dayharsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554); a conductor (*Miller v. Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58 (see, however, the *Grattis Case* (1899) 153 Mo. 380, 48 L. R. A. 390, 55 S. W. 103, *infra*); a road master (*Hoke v. St. Louis, K. & N. R. Co.* (1885) 88 Mo. 360; *Foster v. Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916); a division road master (*Browning v. Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, 27 S. W. 644); a yard master (*Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302; *Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206); a foreman of a switching crew (*Taylor v. Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206); a section foreman (*Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094, and the other cases cited in III. f. 6); a foreman of car repairers (*Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Renfro v. Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302); a foreman of a gang loading railway cars (*Higgins v. Missouri P. R. Co.* (1891) 43 Mo. App. 547; *Proctor v. Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124); a foreman of a gang constructing a turntable (*Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (1885) 88 Mo. 293); a foreman of a gang removing the roof of a building (*Sullivan v. Hannibal & St. J. R. Co.* (1891) 107 Mo. 66, 17 S. W. 748); a foreman in charge of the removal of an embankment (*Bradley v. Chicago, M. & St. P. R. Co.* (1896) 138 Mo. 293, 89 S. W. 763) one of several subordinate foremen in a quarry (*Cox v. Syenite Granite Co.* (1890) 89 Mo. App. 424); a foreman at a foundry in charge of the work of unloading barges (*Devany v. Vulcan Iron Works* (1877) 4 Mo. App. 236); a foreman supervising excavation of reservoir. *Hall v. St. Joseph Water Co.* (1892) 48 Mo. App. 356. 61 L. R. A.

The authority of these decisions, however, seems to be greatly shaken by the recent case, in which it was held that a conductor was *prima facie* a mere fellow servant of an engineer and fireman, and that it was therefore error to instruct the jury on the theory that he was a vice-principal in charge of a department. *Grattis v. Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 899, 55 S. W. 108 (signal to go ahead).

This ruling embodies the precise doctrine of the *McGowan Case* (1876) 61 Mo. 523, which was in fact relied upon by the court, and, in view of the long line of cases just cited, must be regarded as one of the most extraordinary examples of a judicial *volte face* which can be produced from the reports. The decisions which had laid down in such clear and unambiguous terms that all superior servants were vice-principals were quietly ignored, and the decision is based apparently upon the ground that because it is practically impossible to determine what are departments of the service within the meaning of the doctrine which declares that when they are different, there is no common employment (see note to *Sofield v. Guggenheim Smelting Co.* (N. J.) 50 L. R. A. 417), it is therefore preferable to adopt some other test of representative capacity than that which depends on the question whether the delinquent was a head of a department. But there are two obvious flaws in this singular argument. In the first place, there is no warrant in the cases as they stand, for saying that the departments with which the doctrine of departmental control is concerned (*V. supra*), have been conceived of as being coextensive or identical with the departments, the diversity of which takes the delinquent and injured servants out of the category of coemployees. This is a point which no court has yet undertaken to elucidate, and as long as it remains in obscurity it cannot legitimately be made the basis of any argument like that of the *Missouri*. So far as any reasonably precise inferences can be drawn from a comparison of the two kinds of departments, it seems most probable that, if there should ever be any necessity to decide the matter, it would be found that they do not connote coextensive subdivisions of the master's business. But such an investigation would be a frivolous waste of time and labor, for it is much better to regard the word "department" as at best a rough means of identifying the conception to which it is intended to refer the master's responsibility, and determine that responsibility by means of the tests supplied by the elementary considerations for which, according to circumstances, the word may stand.

In the second place, the introduction of the conception of headship of department was wholly irrelevant in a state which, like *Missouri*, had so unreservedly adopted the superior-servant doctrine. The error of the trial court in this respect was obvious, and in view of the earlier decisions the proper course would have been simply to admit the essential correctness of the charge, unless it was intended to inaugurate a wholly new series of cases in which the superior-servant doctrine should find no place. But if this is the purpose of the court, it is certainly being attained in a very curious fashion.

Both during the earlier and later periods defined by the rejection and acceptance of the superior-servant doctrine, the master has been held liable for the acts of a general manager, or other employee in full control of a business or an independent piece of work. *Brothers v. Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424; *Whalen v. Centenary Church* (1876) 62 Mo.

326; *Gormly v. Vulcan Iron Works* (1876) 61 Mo. 492; *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298; *Hyatt v. Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 294.

As regards the doctrine of dual capacity, it has been recognized in *Rowland v. Missouri P. R. Co.* (1886) 20 Mo. App. 463, *Moore v. Wabash, St. L. & P. R. Co.* (1884) 84 Mo. 481; but repudiated in cases of manual participation in labor in foreman of roundhouse. *Day-harsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554; *Russ v. Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472; *Hutson v. Missouri P. R. Co.* (1892) 50 Mo. App. 300.

Montana.

- In 1896 it was held that the effect of the adoption of the new Constitution was to abrogate the Compiled Statute 1887, § 697, which, while the state was still under a territorial government, had introduced a rule of liability virtually the same as the superior-servant doctrine. *Criswell v. Montana C. R. Co.* (1896) 18 Mont. 187, 33 L. R. A. 554, 44 Pac. 525.

The effect of this ruling was to reverse the judgment in the same case (1895) 17 Mont. 189, 42 Pac. 767 by which liability had been imposed for the negligence of a conductor, on the supposition that the rights of the plaintiff, a brakeman, were determined by the provisions of the act.

Under the common-law principles thus returned to operation, it has been held that no action can be sustained for the negligence of a section foreman. *Hastings v. Montana Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264.

Or of a foreman of a gang assisting regular section crews as occasion required. *Goodwell v. Montana C. R. Co.* (1896) 18 Mont. 293, 45 Pac. 210.

Nebraska.

In this state the superior-servant doctrine prevails, and employers have been held liable for the negligence, not only of general managers (*Crystal Ice Co. v. Sherlock* (1893) 37 Neb. 19, 55 N. W. 294 (repudiates doctrine of dual capacity. See VI. g, *supra*); but also of the foreman in charge of a gravel train (*Union P. R. Co. v. Doyle* (1897) 50 Neb. 555, 70 N. W. 43 (here designated a departmental manager); of the conductor of work train (*Chicago, St. P. M. & O. R. Co. v. Lundstrom* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198; *Burlington & M. River R. Co. v. Crockett* (1886) 19 Neb. 138, 26 N. W. 921); of a conductor (*Clark v. Hughes* (1897) 51 Neb. 780, 71 N. W. 776); of a car repairer deputed to instruct a new workman (*Chicago, B. & Q. R. Co. v. Sullivan* (1889) 27 Neb. 679, 43 N. W. 415); and of the foreman of a gang repairing structures along a railway. *Sloux City & P. R. Co. v. Smith* (1888) 22 Neb. 775, 36 N. W. 285.

The doctrine of dual capacity was denied in *Crystal Ice Co. v. Sherlock* (1893) 37 Neb. 19, 55 N. W. 294. For facts, see VI. g, *supra*.

New Hampshire.

A general manager is possibly regarded as a vice-principal. See *Griffin v. Glen Mfg. Co.* (1891) 67 N. H. 287, 30 Atl. 344 (but the evidence here was held not to show negligence).

There is no liability for the negligence of the lower grades of superior servants, as a section foreman. *Hanley v. Grand Trunk R. Co.* (1882) 62 N. H. 274.

New Jersey.

The question whether general managers are vice-principals has been discussed in IV. d, 2, *supra*, where it has also been pointed out that the doctrine of nondelegability of duties has been applied to an unwonted set of facts in a recent case.

51 L. R. A.

There is no liability for the negligence of superior servants of lower grades than general managers.

Such as a foreman in full charge of the work of constructing a sewer. *Curley v. Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731; approving *Wilson v. Merry*, IV. d, 1, *supra*.

A foreman of a driller in a mine. *Gilmore v. Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707.

A foreman superintending the erection of a gas holder. *McLaughlin v. Camden Iron Works* (1897) 60 N. J. L. 557, 88 Atl. 677.

A foreman supervising the building of a boat, and working with his subordinates. *Olsen v. Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694.

New Mexico.

A section foreman is not a vice-principal. *Atchison, T. & S. F. R. Co. v. Martin* (1893) 7 N. M. 158, 34 Pac. 536, Affirmed in (1897) 168 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

Nor is a pit boss of a mine working under a general superintendent. *Deserant v. Cerrillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290.

New York.

The doctrine that a general manager is a vice-principal was fully recognized in *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573, and *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369. But the effect of these decisions is considerably restricted by *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521, and the other nine recent rulings on the same lines. See VI. f, h, *supra*.

The terminology appropriate to, and usually associated with, the doctrine of departmental control is not, so far as the writer knows, found in the New York reports, but there are some rulings bearing upon the subject.

In 1868, it was held that a railway company was not liable for the negligence of its superintendent of bridges. *Warner v. Erie R. Co.* (1868) 39 N. Y. 468. But the conclusion was based on arguments which would preclude recovery for the negligence of any agents of a company except the directors (see IV. d, 2, *supra*), and is therefore inconsistent with the cases as to general managers, cited above.

In *Brick v. Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, the delinquent was superintending the reconstruction of an old road, and, from his functions as stated, would undoubtedly have been held in some jurisdictions to be a departmental manager. But the case actually turned on the nature of the negligent act. See VI. f, *supra*.

In *McC Campbell v. Cunard S. S. Co.* (1893) 69 Hun, 181, 23 N. Y. Supp. 477, a dock superintendent of a steamship company was treated as a vice-principal; but this decision was reversed (1895) 144 N. Y. 552, 39 N. E. 637, on the ground of the character of the negligent act.

In another case a railway company was held liable for the negligence of the superintendent of its grain elevator (*McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 281, 25 N. E. 373); but here the real *rationale* of the decision was the breach of the nondelegable duty of inspecting the place of work.

A telegraph operator has been held not to be a vice-principal, as he merely has to exercise some discretion within a department. *Monaghan v. New York C. & H. R. R. Co.* (1887) 45 Hun, 113.

In this state the superior-servant doctrine has never obtained the slightest footing. Employers have been held not liable for the negligence of the following employees below the rank of general managers:

A wreckmaster. *Belfus v. New York, L. E. & W. R. Co.* (1883) 29 Hun, 556.

A yardmaster. *McCoaker v. Long Island R. Co.* (1881) 84 N. Y. 77.

A conductor. *Sherman v. Rochester & S. R. Co.* (1853) 15 Barb. 574 (1858) 17 N. Y. 153; *Wooden v. Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199, *Reversing* (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 841 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768.

A locomotive engineer. *Watts v. Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 873 (foreman injured).

A section foreman. *Barringer v. Delaware & H. Canal Co.* (1879) 19 Hun, 216.

A foreman of car repairers. *Keenan v. New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711.

A foreman superintending the construction of a building. *Kiffin v. Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109.

A foreman of a gang of carpenters. *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573; *Jenkins v. Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484.

A division superintendent of railway bridges. *Neubauer v. New York, L. E. & W. R. Co.* (1885) 101 N. Y. 607, 4 N. E. 125.

A foreman supervising the construction of a bridge arch. *Hofnagle v. New York C. & H. R. R. Co.* (1874) 55 N. Y. 608.

A gang foreman on a bridge. *Ludlow v. Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A foreman superintending the placing of a bridge pier. *Ulrich v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

A foreman superintending the erection of a scaffold. *Moore v. McNeill* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956.

A foreman in charge of a derrick. *Scott v. Sweeney* (1884) 34 Hun, 292.

A foreman of bricklayers. *White v. Eidlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184.

A superintendent of repairs to a ship. *Hussey v. Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

A foreman supervising the erection of an elevator. *Whallon v. Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174.

The foreman of the work of drawing one of the shafts for a tunnel. *Riley v. O'Brien* (1889) 53 Hun, 147, 6 N. Y. Supp. 129.

A foreman superintending the digging of a trench. *Collins v. Crimmins* (1895) 11 Misc. 24, 31 N. Y. Supp. 860; *Schott v. Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631.

A foreman of a gang engaged in excavating work. *Daley v. Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840.

A foreman supervising the loading of an elevator. *Denenfeld v. Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110.

A foreman under a master stevedore. *Kenny v. Cunard S. S. Co.* (1885) 20 Jones & S. 434 (1885) 23 Jones & S. 558; *Tully v. New York & T. S. S. Co.* (1890) 10 App. Div. 463, 42 N. Y. Supp. 29.

O'Connor v. Hall (1900) 52 App. Div. 428, 65 N. Y. Supp. 136.

The foreman of a quarry. *Cullen v. Norton* (1891) 126 N. Y. 1, 26 N. E. 905.

A foreman of blasting operations in a public work. *Perry v. Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021, *Reversing* (1895) 91 Hun, 243, 36 N. Y. Supp. 208; *Mancuso v. Cataract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 273; *Vitto v. Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1; *Capasso v. Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 700, *Reversing* (1898) 25 App. Div. 234, 49 N. Y. Supp. 409, 51 L. R. A.

The captain of a ship. *Loughlin v. State* (1887) 105 N. Y. 159, 11 N. E. 371; *Scarf v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 969; *Geoghegan v. Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507.

The mate of a ship. *Geoghegan v. Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507; *Scarf v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Olson v. Clyde* (1884) 32 Hun, 425.

It should be noted that in all the more recent of the above cases the essential ground of the decision is rather the character of the negligent act than the official position of the delinquent, which, since the ruling in *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521, (see VI. f, h, *supra*), is treated as being of secondary importance.

Some cases distinctly recognize the representative capacity of general managers or superintendents. *Malone v. Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573; *Corcoran v. Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Eagan v. Tucker* (1879) 18 Hun, 347; *Fort v. Whipple* (1877) 11 Hun, 586. Possibly in these two last cases the essential ground of the decision may really have been the breach of a nondelegable duty; but as they antedate *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521, they are more probably intended as applications laid down in the above rulings of the court of appeals. In any event, however the rights of a servant under all these rulings as to general managers are considerably circumscribed by the case just cited. See VI. f, h, *supra*.

The decision in *Pantzar v. Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24, holding the defendant liable for the negligence of its general superintendent, is based upon the theory that the nondelegable duty of inspection was violated.

North Carolina.

In the earliest case in which the proper inference to be drawn from the exercise of the control by the delinquent was considered (*Dobbin v. Richmond & D. R. Co.* (1879) 81 N. C. 446, 31 Am. Rep. 512), a railway company was held liable for the negligence of an employee who was superintendent, engineer, conductor, and fireman, of a gravel train. The court, as is evident from its opinion, had no intention of going any further in ascribing a representative capacity to superior servants than the point fixed afterwards by the *Ross Case*, as afterwards explained by the *Baugh Case* (VII. d, *supra*). The servant, it was declared, "does not undertake to incur the risks that may result from the negligence of the master, or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a 'middleman,' who, as well as the laborer, is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a 'fellow servant' in the sense of that term as used by the courts, because he rep.

resents the master in his authority to direct, control, and manage the business."

In a case decided two years later, it was remarked, *arguendo*, that an employer was liable for the defaults of a superior whose commands and directions the injured servant was bound to obey. *Cowles v. Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620. But the real point on which this case turned was negligence in respect to defective appliances, and therefore the precise question whether the delinquent, an engineer in charge of a train, was a vice-principal or not, was not settled.

If this question had been presented, it would almost certainly have been determined against the plaintiff, for some years afterwards the doctrine of the *Dobbin Case* (1879) 81 N. C. 440, 31 Am. Rep. 512, was reiterated, and it was declared that, to be regarded as a vice-principal, a superior servant must be something more than a mere foreman. *Kirk v. Atlanta & C. Air Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621 (acting yardmaster denied to be a vice-principal); *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (conductor held to be a vice-principal). In the former case the court even professes to rely on the English case of *Feltham v. England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676; but this ruling, as we have seen (IV. *supra*), goes much further than any North Carolina decision in denying the servant indemnity for the acts of a superior. Moreover, it is difficult to see any rational ground on which a yard master can be held not to be a vice-principal if that character is ascribed to a section foreman, as was done in the very next year.

The court considered such an employee to be something more than a mere foreman within the meaning of the rule laid down in the *Dobbin Case* (1879) 81 N. C. 446, 31 Am. Rep. 512, inasmuch as he was "charged with authority to employ, control, and command the plaintiff, as to the labor he should do in the railroad, and to discharge him from such service." *Fatton v. Western N. C. R. Co.* (1887) 96 N. C. 435, 1 S. E. 863.

Other later cases assuming or holding a section foreman to be a vice-principal are, *Logan v. North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959; *Styles v. Richmond & D. R. Co.* (1896) 118 N. C. 1084, 24 S. E. 740; *Johnson v. Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784.

The principle of the *Dobbin Case* is also held to render a railway company liable for the negligence of a conductor. *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (1894) 114 N. C. 718, 19 S. E. 362; *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 534; *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161.

Whether a foreman of carpenters was a vice-principal was held not to be established by the evidence set out on the record, in *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23.

The inference from the above cases would seem to be that this court, although it disclaims the theory that the mere exercise of control constitutes a vice-principal, can scarcely be placed in any other class than that of the adherents of the superior-servant doctrine. Neither by the Federal courts, nor by any of the state courts which have elaborated the doctrine of departmental control, is a section foreman held to be a vice-principal.

A superior servant is a vice-principal only as to servants under his control (I. *supra*). *Wright v. Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100.
51 L. R. A.

The doctrine of dual capacity is rejected. *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161.
North Dakota.

Section 1130 of the Civil Code of Dakota reproducing the provisions of the California Code, has been expressly held to be merely declaratory of the common law. *Elliot v. Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 8 L. R. A. 363, 41 N. W. 758.

Under this Code, as adopted in North Dakota, it has been held that a foreman of a pile-driving gang is not a vice-principal. *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222.
Ohio.

This is one of the states in which the superior-servant doctrine prevailed before the enactment of the statute of 1890.

Employers were held liable for the negligence of a general manager. *Cleveland C. & C. R. Co. v. Keary* (1854) 3 Ohio St. 201. A conductor. *Cleveland, C. & C. R. Co. v. Keary* (1854) 3 Ohio St. 201, and other cases cited under III. 4, 3, *supra*.

A foreman of car-repairers. *Lake Shore & M. S. R. Co. v. Lavalley* (1880) 36 Ohio St. 221.

The foreman of a quarry. *Berea Stone Co. v. Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510.

A locomotive engineer (as regards a laborer under his directions). *Baltimore & O. R. Co. v. Sutherland* (1894) 1 Toledo Leg. News, 388.

A superior servant was in one case regarded as a vice-principal, even as to servants not under his control. *Pittsburg, Ft. W. & C. R. Co. v. Devlin* (1887) 17 Ohio St. 197.

The doctrine of a vice-principalship as inferred from the exercise of control is not extended so far as to import a representative character to servants who merely give signals in the course of the work. See II. *supra*.

The doctrine of dual capacity was rejected in *Berea Stone Co. v. Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510.

Oregon.

An employer is liable for the negligence of a general manager (*Anderson v. Bennett* (1888) 16 Or. 515, 19 Pac. 765); but not for that of superior servants of lower grade, as a section foreman. *Brunell v. Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129.
Pennsylvania.

In this state a master is liable for the negligence of a general manager. *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Hoover v. Carbon County Electric R. Co.* (1890) 191 Pa. 146, 43 Atl. 74; *Duffy v. Oliver Bros.* (1890) 131 Pa. 203, 18 Atl. 872; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 150; *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2; *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50; *Lewis v. Selfert* (1887) 116 Pa. 628, 11 Atl. 514.

Under the doctrine of departmental control employers have been held answerable for the defaults of an employee superintending the construction of a railway tunnel. *Tissue v. Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667.

The master mechanic of a railway company. *New York, L. E. & W. R. Co. v. Bell* (1886) 112 Pa. 400, 4 Atl. 50.

The superintendent of labor under a large steel company. *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

That a departmental manager is a vice-principal was also recognized in *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 150; *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40

Atl. 88; *Lewis v. Selfert* (1887) 116 Pa. 628 11 Atl. 514.

Whether a head stevedore of a steamship company is a vice-principal was held, under the circumstances stated in *V. d. 9, supra*, to be a question for the jury. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

There is no liability for the negligence of any employer of lower grade than departmental managers:

As a section foreman. *Spancake v. Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1006.

An assistant foreman of a contractor for structural iron work. *McGinley v. Levering* (1893) 152 Pa. 366, 25 Atl. 824.

A foreman of a gang engaged in removing stone from the side of a railway. *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141.

A gang foreman in a factory. *National Tube Works Co. v. Bedell* (1880) 96 Pa. 175.

A foreman of a lathe. *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621.

A foreman of masons. *Weger v. Pennsylvania R. Co.* (1867) 55 Pa. 460.

A foreman of a gang engaged in excavating work. *Durst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

A slate-picker boss in a mine. *McCool v. Lucas Coal Co.* (1892) 150 Pa. 638, 24 Atl. 350.

An engineer in charge of the engine-room and freeing department of an ice company. *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

A foreman of mines appointed under the statutes. See cases cited in II. f, 14, *supra*. Rhode Island.

Much of the language used in *Mann v. Oriental Print Works* (1875) 11 R. I. 152, indicates a leaning towards the adoption of the superior-servant doctrine; but there the superior servant, an engineer, was really held to be, as regards his foreman, a representative of the master merely for the reason that his order took the subordinate (a fireman) outside the scope of his original employment.

In a later case the superior-servant doctrine, as expounded in the *Ross Case* (VII. d, *supra*), was repudiated. *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 639 (delinquent was engineer of a steam-roller). There the court declared that the decisive test of liability was the character of the negligent act.

And primarily, on this special ground, it has subsequently been held that there can be no recovery for the defaults of the foreman of a gang engaged in excavating. *Larich v. Moles* (1894) 18 R. I. 513, 28 Atl. 661.

A foreman of a foundry. *Di Marcho v. Builders' Iron Foundry* (1893) 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

A foreman of construction. *Frawley v. Sheldon* (1897) 20 R. I. 258, 38 Atl. 370.

The foreman of a gang engaged in removing telegraph poles. *Murgridge v. Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 328. South Carolina.

The doctrine of representative capacity, as deducible from the discharge of a nondelegable duty, was recognized in *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 262, 44 Am. Rep. 573; *Lasure v. Graniteville Mfg. Co.* (1882) 18 S. C. 275. But it was not until 1884 that this court had any occasion to express its opinion as to the relation of superior servants to their subordinates.

In *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. E. 557, it inclined to the view that in the control and direction of his gang, a section foreman was in the performance of duties of the company, and to that extent their representa-

tive; but recovery was refused on the ground that an order to get down and push behind a car did not require him to do anything outside the scope of his employment, and that the case was therefore controlled by the principle that ordinary risks are assumed.

In *Boatwright v. Northeastern R. Co.* (1886) 25 S. C. 128, the *Ross Case* (VII. d, *supra*), was followed and the refusal of the trial judge to charge that a conductor was a fellow servant of a brakeman was approved. The negligence here was in failing to procure suitable coupling appliances from a stock supplied by the company, so the question of nondelegable duties was not involved.

In *Coleman v. Wilmington C. & A. R. Co.* (1886) 25 S. C. 446, 60 Am. Rep. 516, a conductor of a material train was held to be a vice-principal as respects a laborer, the court considering that the delinquency alleged, that of failing to readjust a switch, constituted a breach of the duty to provide a safe and suitable track.

In *Wilson v. Charleston & S. R. Co.* (1897) 51 S. C. 79, 23 S. E. 91, it is apparently assumed by the court that a yard master, while performing his ordinary duties of making up and controlling the movements of trains, is a fellow servant of a car cleaner, but it is not clear from the statement of facts whether the injured person was a subordinate of the yard master or not.

On the ground that no breach of nondelegable duties was shown, it was held that there could be no recovery for the negligence of a conductor of one train in failing to give notice to the men on another train which was following his that there were "loose" cars on the track. *Jenkins v. Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182. See I. *supra*.

For similar reasons, though with even more hesitancy, South Carolina has been treated as an adherent of the doctrine of departmental control, rather than of the doctrine of superior and subordinate.

From the above summary of the effect of the decisions, it is extremely difficult to say what is precisely the position of this court in regard to the representative capacity of delinquent employees. But the *obiter dictum* as to the status of section foremen in the *Couch Case* (1884) 22 S. C. 557 taken in connection with the fact that the *Ross Case* is relied on in the two rulings with respect to conductors, may be regarded as indicating an adoption of the doctrine of departmental control (V. *supra*). So far as railway companies are concerned, the question has ceased to be of any practical importance, as they are prevented by Const. 1895, art. 9, § 15, from availing themselves of the defense of co-service.

South Dakota.

The relation of supervising employees to subordinates has not been discussed in any reported case. But the doctrine of nondelegable duties was recognized in *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. Dak. 422, 50 N. W. 907. Tennessee.

This is one of the states where the superior-servant doctrine prevails.

A master is held to be liable for the negligence of a general manager. *Washburn v. Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784; *Haynes v. East Tennessee & G. R. Co.* (1866) 3 Coldw. 222.

A telegraph operator, as being a helper to the superintendent. *East Tennessee, V. & G. R. Co. v. De Armond* (1887) 86 Tenn. 78, 5 S. W. 600 (conductor injured).

A conductor of a train. *Illinois C. R. Co. v. Spence* (1893) 93 Tenn. 173, 23 S. W. 211.

An engineer in charge of a train. *East Ten-*

nessee & W. N. C. R. Co. v. Collins (1886) 85 Tenn. 227, 1 S. W. 883.

An engineer in charge of a part of a divided train where it is his duty under the rules to assume control. Louisville & N. R. Co. v. Martin (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772.

A foreman of a fertilizer company's business. National Fertilizer Co. v. Travis (1899) 102 Tenn. 16, 49 S. W. 832.

A section foreman. Chattanooga Electric R. Co. v. Lawson (1898) 101 Tenn. 406, 47 S. W. 489; Gann v. Nashville, C. & St. L. R. Co. (1898) 101 Tenn. 380, 47 S. W. 493; Illinois C. R. Co. v. Bolton (1897) 99 Tenn. 273, 41 S. W. 442; Louisville & N. R. Co. v. Bowler (1872) 9 Helsk. 866.

But in Knox v. Southern R. Co. (1898) 101 Tenn. 375, 47 S. W. 491, the court refused to hold that a "boss wiper," who had certain duties of a higher grade than those of an ordinary wiper, such as opening the doors, giving the signal for the moving of the engine, and ordering the hands to go and adjust the turntable, "stood in the place and stead of the master" in the discharge of his duties.

A superior servant is a vice-principal only as to servants under his control (I. *supra*). East Tennessee, V. & G. R. Co. v. Rush (1885) 15 Lea, 145; Nashville, C. & St. L. R. Co. v. Wheelless (1882) 10 Lea, 741, 48 Am. Rep. 317; Coal Creek Min. Co. v. Davis (1891) 90 Tenn. 711, 18 S. W. 887.

In other recent cases the master's responsibility has been considerably contracted by the adoption of the theory of dual capacity, which has been applied in several cases. Nashville, C. & St. L. R. Co. v. Handman (1884) 13 Lea, 423; Allen v. Goodwin (1893) 92 Tenn. 885, 21 S. W. 760; Gann v. Nashville, C. & St. L. R. Co. (1898) 101 Tenn. 380, 47 S. W. 493; National Fertilizer Co. v. Travis (1899) 102 Tenn. 16, 49 S. W. 832.

Texas.

An employer is liable for the negligence of a general manager. Galveston, H. & S. A. R. Co. v. Smith (1890) 76 Tex. 611, 13 S. W. 562; Sulphur Lumber Co. v. Kelley (1895; Tex. Civ. App.) 30 S. W. 696.

In the earlier cases all employees of lower grades than general managers were held to be mere servants:

As a conductor. Robinson v. Houston & T. C. R. Co. (1877) 46 Tex. 540.

And a captain. Price v. Houston Direct Nav. Co. (1877) 46 Tex. 537.

But afterwards the court adopted the doctrine that the possession of a power of control, if accompanied by a power of hiring and discharging the injured person, constitutes a vice-principal. See III. c, *supra*.

It had been explained that, when it was laid down in an earlier case (Missouri P. R. Co. v. Williams (1889) 75 Tex. 4, 12 S. W. 885), that an employee who has charge of a special department of the employer's business, with the power to hire the servants in his department, is not a fellow servant of those under his control. This did not imply that the department of the business must necessarily be a principal one; and that the rule is applicable to any special business of the employer, which is carried on by a number of employees under another, who has power to employ and discharge them. Fort Worth & D. C. R. Co. v. Peters (1894) 87 Tex. 222, 27 S. W. 257.

Employers have been held liable for the negligence of a master mechanic. Douglas v. Texas Mexican R. Co. (1885) 63 Tex. 564.

The foreman of a railway company's paintshop. International & G. N. R. Co. v. Hinzle (1891) 82 Tex. 623, 18 S. W. 681.

5) L. R. A.

A yard foreman. San Antonio & A. P. R. Co. v. Reynolds (1895, Tex. Civ. App.) 30 S. W. 846.

A section foreman. Missouri P. R. Co. v. James (1888; Tex.) 10 S. W. 332; Sweeney v. Gulf, C. & S. F. R. Co. (1892) 84 Tex. 433, 19 S. W. 555; Gulf, C. & S. F. R. Co. v. Wells (1891; Tex.) 16 S. W. 1025.

A foreman of the construction of a telegraph line. Postal Teleg. Cable Co. v. Coote (1900; Tex. Civ. App.) 57 S. W. 912.

A foreman of a sawmill. Sulphur Lumber Co. v. Kelley (1895; Tex. Civ. App.) 30 S. W. 696.

A conductor, as having no power of discharge, was deemed to be a vice-principal, in Campbell v. Cook (1894) 86 Tex. 630, 26 S. W. 486.

The doctrine of dual capacity is rejected in Texas. See VI. g, *supra*.

Utah.

This court has adopted the superior-servant doctrine, holding masters liable for the negligence of a general manager. Reddon v. Union P. R. Co. (1897) 5 Utah, 344, 15 Pac. 262.

A conductor. Openshaw v. Utah & N. R. Co. (1889) 6 Utah, 132.

A foreman of a switching crew. Armstrong v. Oregon Short Line & U. N. R. Co. (1893) 8 Utah, 420, 32 Pac. 693.

An underground foreman of a mine. Cunningham v. Union P. R. Co. (1885) 4 Utah, 206, 7 Pac. 795; Trihay v. Brooklyn Lead Min. Co. (1886) 4 Utah, 468, 11 Pac. 612.

A foreman of railway gravel pit. Andreson v. Ogden Union R. & Depot Co. (1892) 8 Utah, 128, 30 Pac. 305.

Vermont.

The superior-servant doctrine was disproved in Davis v. Central Vermont R. Co. (1882) 55 Vt. 84, 45 Am. Rep. 590, *arguendo*; but the actual point settled by that case is that certain duties of the master are nondelegable. It overruled a former decision to the effect that the master mechanic was not a representative of the defendant company.—Hard v. Vermont & C. R. Co. (1860) 32 Vt. 473.

Virginia.

The earliest case in which the relation of a superior servant to a subordinate was directly presented was Moon v. Richmond & A. R. Co. (1884) 78 Va. 745, 49 Am. Rep. 401, where a brakeman was injured through a derailment caused partly by the way in which the train was made up, and partly by the excessive speed at which it was run. The court held that a conductor in control of men on a material train, and of its makeup generally, is not a fellow servant of a brakeman, but his superior, holding "a position wherein he exercises discretionary authority," and charged with "duties for the proper performance of which the law holds the company itself responsible; any negligence on his part in this behalf is the negligence of the company itself."

This case was said, in Norfolk & W. R. Co. v. Nuckols (1905) 91 Va. 193, 21 S. E. 342, to have been really decided on the ground that the negligence of the master was one of two concurring causes of the accident. But the instruction which it was held error to refuse unquestionably embodies the superior-servant doctrine.

In 1887, following the Moon Case (1884) 78 Va. 745, 49 Am. Rep. 401, a section foreman was held not to be a fellow servant of a section man in regard to the duty of signaling the approach of a train. Torlan v. Richmond & A. R. Co. (1887) 84 Va. 192, 4 S. E. 339.

During the following years we find reported several cases holding railway companies liable for the negligence of conductors. Johnson v. Richmond & A. R. Co. (1888) 84 Va. 713, 5 S. E. 707 (conductor ordered inexperienced brakeman, a boy sixteen years of age, to couple cars,

and failed to place himself in such a position as to be able to give signals which would have brought the cars gently together); *Ayers v. Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582 (brakeman caught between the lumber projecting from one car and another car and the conductor, without waiting to see which he was coupling to it cried out for help, whether the cars were connected, ordered the engineer to go ahead quickly, the result being that the brakeman fell when released through the taking up of the slack, and was run over); *Richmond & D. R. Co. v. De Butts* (1894) 90 Va. 405, 18 S. E. 837 (assumed, but case turned on contributory negligence); *Richmond & D. R. Co. v. Brown* (1893) 89 Va. 749, 17 S. E. 132 (order to unload car in an unnecessarily dangerous manner by crossing a track where a train might be expected to pass); *Richmond & D. R. Co. v. Williams* (1889) 86 Va. 165, 9 S. E. 990 (demurrer to evidence properly overruled where a brakeman was injured by the negligence of his conductor in ordering him to ascend a defective ladder while the train was standing, and in starting the train knowing the dangerous position in which the brakeman was placed).

The argument of the court in *Norfolk & W. R. Co. v. Donnelly* (1892) 88 Va. 853, 14 S. E. 692, evinced a strong disposition on its part to discard the superior servant doctrine altogether, and to adopt the rule that the character of the delinquent servant's act is the true test by which to determine whether the relation of co-servic exists. But the change of opinion thus foreshadowed did not immediately take effect, for in 1895 a yard master was assumed, for the purposes of a decision, to be a vice-principal. *Norfolk & W. R. Co. v. Brown* (1895) 91 Va. 668, 22 S. E. 496.

See also *Norfolk & W. R. Co. v. Lindamood* (1892; Va.) 14 S. E. 694, where it is distinctly implied that the plaintiff might have recovered if his decedent had been subject to the control of the delinquent servant.

In 1896 a stone company was held liable for the negligence of the foreman in full charge of its quarry. *Richmond Granite Co. v. Bailey* (1896) 92 Va. 554, 24 S. E. 232 (breach of duty to warn). But this is a decision which might possibly have been arrived at without reference to the superior-servant doctrine.

The definite abandonment of that theory seems to be indicated by two decisions in 1897, denying the right to recover for the negligence of a gang boss in locomotive works. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509.

And of a gang foreman in quarry. *Moore Lime Co. v. Richardson* (1897) 95 Va. 826, 28 S. E. 334.

So, also, in 1898, when a mining boss was held to be a vice-principal in respect to the performance of nonassignable duties, and a mere servant as regards duties affecting the near administration of the work. *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614.

Finally the decisions as to conductors were overruled by *Norfolk & W. R. Co. v. Houchins* (1897) 95 Va. 398, *sub nom.* *Norfolk & W. R. Co. v. Swaine*, 46 L. R. A. 359, 28 S. E. 578. The court of appeals considered that the *Ross* Case had been "completely overturned" by later decisions. So far as regards the decisions rendered up to the time when this opinion was expressed, this statement is clearly erroneous, as will be apparent from an examination of *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. But the statement certainly indicates what is probably the actual effect of the *Conroy* Case, V. d, 2, *supra*.

51 L. R. A.

Washington.

That a general manager was a vice-principal was recognized in *Bateman v. Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996; *McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334.

Following the principle of the *Ross* Case (VII. d, *supra*), this court also holds employers liable for the negligence of managers of departments, by giving that expression a more liberal construction than it receives in some jurisdictions.

Thus, the servant is allowed to recover where the delinquent is an assistant superintendent in charge of the lumber yard of a saw-mill company. *Zintek v. Stimson Mill Co.* (1893) 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055 (1894) 9 Wash. 395, 37 Pac. 340.

The foreman of an important piece of railway construction work carried on at a distance from the headquarters of the general road master of the line. *McDonough v. Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334 (see V. b, *supra*).

And either a captain and a mate of a ship. *Keating v. Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224. But this ruling, so far as the mate is concerned, is clearly inconsistent with any reasonable construction of the doctrine of departmental control.

Employers are not liable for the negligence of a foreman below the grade of departmental manager, as—

A "fire boss," whose duty it is merely to direct the miners to leave dangerous places at which gas accumulates, but who has no control over their work. *Morgan v. Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (no right at the time of the accident to control the action of the other miners, even if a vice-principal at other times).

A "pit boss" in a mine. *Hughes v. Oregon Improve. Co.* (1898) 20 Wash. 294, 55 Pac. 119.

A "top boss" in a mine. *Hughes v. Oregon Improv. Co. supra*.

The doctrine of dual capacity (VI. f, *supra*) is recognized in this state. *Sayward v. Carlson* (1890) 1 Wash. 29, 23 Pac. 830.

West Virginia.

Upon the authority of the *Ross* Case (VII. d, *supra*) a conductor was in several decisions held to be a vice-principal. *Madden v. Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695 (breach of rules as to running orders caused a collision); *Haney v. Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748 (collision caused by conductor's neglect of signal to reduce speed; in one of them, even as to a brakeman on another train); *Daniel v. Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162 (track not kept clear for other trains).

But this construction of the *Ross* Case is inconsistent with a later decision of the Supreme Court of the United States. See VII. d, *supra*.

In another decision a railway company was even made to answer for the negligence of a section foreman. *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31. But the *Ross* Case plainly did not warrant such a ruling, though, as we have already seen (VII. d) a similar misconception as to its meaning prevailed, even in some of the Federal courts, for several years.

None of these cases are any longer law in this state. A conductor is held not to be a departmental vice-principal, but merely an employee who performs a particular piece of work in the operating department. *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 357, 27 S. E. 278, 31 S. E. 258 (negligent order to engineer while brakeman was coupling), where the rule was adopted

that the nature of the function discharged at the time of the injury is the true test, except where the supervising employee is a general or departmental manager.

The court seems to have assumed that the *Ross* Case was overruled by *Northern P. R. Co. v. Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, and *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. This theory if such was the basis of the decision, is not justified by anything said in the cases cited, but it represents what is now the theory of the Supreme Court of the United States.

Wisconsin.

General managers are vice-principals. *Klochlinsky v. Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934 (negligent act here was held to be nonofficial); *Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399.

The doctrine of departmental control does not seem to have been explicitly adopted in this state; but a captain of a ship, who is, for all practical purposes at all events, a departmental manager as respects the business of a ship owner (see *V. d. supra*), has been held to be a vice-principal. *Thompson v. Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579. *Contra, Mathews v. Case* (1884) 61 Wis. 401, 50

Am. Rep. 151, 21 N. W. 513, declared a captain to be a mere fellow servant of his mate.

In two other cases railway companies were held liable for the negligence of a foreman in full charge of a pile driver (*Schultz v. Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399), and of a master mechanic. *Brabbits v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289. But these decisions were probably based rather on the ground of a breach of a nondelegable duty, than on the theory of departmental control.

A master is not required to answer for the negligence of a foreman of a water company in charge of the pipe-laying. *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807.

A foreman of a switching crew in a railway yard. *Flannagan v. Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 837.

A conductor. *Heine v. Chicago & N. W. R. Co.* (1883) 58 Wis. 525, 17 N. W. 420.

The dual capacity of vice-principals is recognized in *Dwyer v. American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471, and *Klochlinsky v. Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934.

Wyoming.

A gang boss in a railway shop under a master mechanic. *McBride v. Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687. C. B. L.

GEORGIA SUPREME COURT.

T. I. MITCHELL, *Plff. in Err.*,

v.

GEORGIA & ALABAMA RAILWAY.

(111 Ga. 760.)

*1. While at common law and by statute in this state, "mere possession of a chattel . . . will give a right of action for any interference therewith," such possession must be in the plaintiff's own right, and not as agent of another. The above rule is not contravened by § 3038 of the Civil Code. The word "agent," as used therein, is to be construed as meaning an agent who has a property, either general or special, in the personality in his possession.

2. A petition brought, in the name of a person who had not such a possession, to recover personal property taken from him, cannot be so amended as to proceed in the name of the plaintiff for the use of the real owner.

(*Lewis, J., dissents.*)

(August 9, 1900.)

ERROR to the Superior Court for Wilcox County to review a judgment in favor of defendant in an action brought to recover possession of property delivered to defendant for transportation and disposed of by it without plaintiff's order. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by COBB, J.

NOTE.—On the question as to who may maintain replevin, see other cases in this series, as follows: *Kent v. Bothwell* (Mass.) 9 L. R. A. 258; *Odd Fellows Hall Assn. v. McAllister* (Mass.) 11 L. R. A. 172; *Keystone Lumber Co. v. Kolman* (Wis.) 34 L. R. A. 821; and *Clifford v. Hall County* (Neb.) 50 L. R. A. 733. 51 L. R. A.

Messrs. Eldridge Cutts and Hal Lawson, for plaintiff in error:

At common law mere possession of goods is sufficient to maintain trover against a wrongdoer, and the latter cannot set up the *jus tertii*.

Armory v. Delamirie, 1 Strange, 504, 1 Smith, Lead. Cas. 151, notes; *Berry v. Heard*, Cro. Car. 242; *Roberts v. Wyatt*, 2 Taunt. 268; *Sutton v. Buck*, 2 Taunt. 302; *Burton v. Hughes*, 1 Bing. 173; *Webb v. Fox*, 7 T. R. 391; *Jeffries v. Great Western R. Co.* 5 El. & Bl. 802; *Broom*, Com. § 802.

And this principle is retained in all its strength in this state: "Mere possession of a chattel, if without title, or wrongfully, will give a right of action for any interference therewith, except as against the true owner, or the person wrongfully deprived of possession."

Code, § 3886; *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Gillespie v. Okeastain*, 57 Ga. 218; *Harpes v. Harpes*, 62 Ga. 394.

A mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of goods, whose possession he has wrongfully invaded.

2 Greenl. Ev. § 637.

If the plaintiff has the right of possession as against the defendant, he may maintain trover.

26 Am. & Eng. Enc. Law, p. 748; *Fairbank v. Phelps*, 22 Pick. 535; *Nicolls v. Bastard*, 2 Crompt. M. & R. 659.

At common law in all classes of bailments "there is a special qualified property transferred from the bailor to the bailee, together with the possession. . . . And on account of this qualified property of the bailee,

he may (as well as the bailor) maintain an action against such as injure or take away these chattels."

2 Bl. Com. 452; *Vining v. Baker*, 53 Me. 544; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671; *Shaw v. Kaler*, 106 Mass. 448.

Even though plaintiff expects to rely on possession, he must allege title.

1 Am. Lead. Cas. 8th ed. p. 695.

And proof of a special or limited possession will sustain the averment of property.

1 Am. Lead. Cas. 8th ed. p. 695; *Newnham v. Stevenson*, 10 C. B. 713; *Krug v. McGilliard*, 76 Ind. 28; *Webb v. Fox*, 7 T. R. 391.

Messrs. Charlton, Mackall, & Anderson, D. B. Nicholson, and W. A. Hawkins for defendant in error.

Cobb, J., delivered the opinion of the court:

T. I. Mitchell, describing himself as "agent," brought an action against the Georgia & Alabama Railway to recover possession of a certain described lot of lumber alleged to be in the possession of the defendant. The petition averred that the plaintiff was the owner of the property sued for, and that he had demanded the same of the defendant, who had refused to deliver it to him or pay him the profits thereof. At the trial the plaintiff testified that he was in possession of the property described as agent for his wife, and that he had no other interest therein; that he had the lumber loaded on one of the cars of the defendant, intending to sell it to one Gibbs if he paid cash for it as he agreed; that Gibbs did not pay for the lumber, and the defendant, before delivery to it, and without authority of plaintiff, shipped the lumber to Gibbs; that plaintiff made a demand on the defendant for the lumber, but it refused to deliver the same to him. At the conclusion of the evidence the court granted a nonsuit on the ground that the evidence showed the title to the property sued for was in the plaintiff's wife, and that he had no such possession as entitled him to recover. The plaintiff then offered an amendment inserting in the petition the name of his wife as usee. The court refused to allow the amendment, and the plaintiff sued out a bill of exceptions, complaining of this refusal and of the granting of a nonsuit.

1. The exception to the granting of a nonsuit brings up for determination the question whether a person in possession of a chattel as agent for another, and having no special property or interest therein, can maintain against a person wrongfully converting the goods an action of trover. A proper solution of this question requires a somewhat extended examination into the nature of some of the actions which were at common law employed in cases of injury to or interference with the personal goods of another. Our action of trover is purely statutory. In *McBain v. Smith*, 13 Ga. 315, Judge Warner said that it was a substitute for the old common-law action of detinue, while in *McElhannon v. Farmers' Alliance* 51 L. R. A.

Warehouse & Commission Co. 95 Ga. 670, 22 S. E. 686, Mr. Justice Atkinson said that it combined some of the characteristics of both of the common-law actions of trover and detinue. We think it perhaps more accurate to say that our action of trover may be employed in any case in which replevin, detinue, or trover could be used at common law. We shall therefore inquire into the nature of these three forms of action, with a view to ascertaining what persons were authorized to maintain them.

Replevin was employed to recover goods unjustly taken and wrongfully detained. It was generally used in cases of distress, when the person whose goods were seized gave security and replevied the property, in which event he was bound to bring replevin against the distrainer. 3 Bl. Com. pp. 146 et seq. It seems, however, that it could be brought in any case where the owner had goods wrongfully taken from him by another. 1 Chitty, Pl. 16th Am. ed. *181; Stephen, Pl. Heard's ed. *20. And in many of the states the action of replevin is by statute employed to recover personalty in any case in which possession is wrongfully withheld from the person entitled thereto. In this form of action at common law the goods themselves could be recovered, with damages for their wrongful detention. The action of detinue was used to recover goods wrongfully detained, though lawfully taken. In order to maintain this form of action, it must have appeared (1) that the defendant came lawfully into possession; (2) "that the plaintiff have a property;" (3) that the goods were of some value; and (4) that they were capable of identification. In this action the plaintiff recovered the goods themselves, if they could be had, and, if not, their respective values, and also damages for the detention. The gist of this action was the unlawful detention. 3 Bl. Com. p. 151. The common-law action of trover and conversion lay to recover damages equal to the value of the goods wrongfully withheld, but not the goods themselves. The gist of this action was the unlawful conversion. Id. p. 152. Under our action of trover the plaintiff may elect whether he will take a verdict for the property or its value, or for damages alone, or for, the property alone and its hire, if any. Civil Code, § 5335. It is well settled that, to support any one of the three common-law actions, the plaintiff must have had either a general or special property in the goods seized. "To support replevin, the plaintiff must, at the time of the caption, have had either the general property in the goods taken, or a special property therein." 1 Chitty, Pl. 16th Am. ed. p. 239, *183. "It is a general rule that the plaintiff must have the property of the goods in him at the time of the taking." Co. Litt. 145b. See also *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441, 40 Am. Dec. 198; *Beckwith v. Philleo*, 15 Wis. 224; *Pattison v. Adams*, 7 Ill. 126, 42 Am. Dec. 59; *Walpole v. Smith*, 4 Blackf. 304. To maintain the action of detinue, it must appear "that the plaintiff have a property." 3 Bl. Com.

p. 152. "It seems to be a general rule that the plaintiff must have a general or special property in the goods at the time the action was commenced, in order to maintain detinue." 1 Chitty, Pl. 16th Am. ed. *137. See also 6 Enc. Pl. & Pr. 645 *et seq.* In reference to the common-law action of trover, Mr. Chitty says that in order to support the action the plaintiff must at the time of the conversion "have had a complete property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession, of it." 1 Chitty, Pl. 16th Am. ed. *167. And on the next page he says: "Without an absolute or special property, this action cannot be maintained." See also 26 Am. & Eng. Enc. Law, 1st ed. p. 744. In this state the general rule is that in order to maintain trover the plaintiff must show title in himself. *Gilmore v. Watson*, 23 Ga. 63; *Jacques v. Stewart*, 81 Ga. 81, 6 S. E. 815; *Palmour v. Durham Fertilizer Co.* 97 Ga. 244, 22 S. E. 931. While a property in the goods, either general or special, must appear, to authorize any one of the three forms of action, "in an action of replevin against a wrongdoer prior possession is alone sufficient to enable the plaintiff to recover." Shinn, Replevin, § 200. See also, 18 Enc. Pl. & Pr. 505; Cobbey, Replevin, § 423. The same is true of trover. In discussing what is meant by having a special property in a chattel, Mr. Chitty says, "It is a general rule that the bare possession of goods, without any strict legal title, confers a right of action against a mere wrongdoer, having no right, and not clothed with any authority from the real owner." 1 Chitty, Pl. 16th Am. ed. *170. "Possession is prima facie proof of ownership of a chattel not unlawfully acquired, and, whatever the interest of the possessor in the thing may be, is sufficient to enable trover to be maintained, as against all the world except the rightful owner, for a conversion committed in respect to it." 26 Am. & Eng. Enc. Law, p. 748. See also Broom, Com. 9th ed., by Arch. & C. p. 912; [*Armory v. Delamirie*, 1 Strange, 504] 1 Smith, Lead. Cas. p. 632. This principle is well settled, and has been incorporated in our Code in the following language: "Mere possession of a chattel, if without title, or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." Civil Code, § 3886. This section, as stated, is but a codification of the common law, and the principle intended to be announced therein is the same as that above quoted from Chitty and the Encyclopædia. As this case turns, to a large extent, on the construction of this section, it is necessary to ascertain the meaning of the words "mere possession," as used therein. As a general rule, as is laid down in the decisions from this court cited above, a plaintiff, in order to recover in trover, must show title in himself. Possession is presumptive evidence of title, and becomes conclusive evidence against a mere wrongdoer; he not be-

ing allowed to set up the *jus tertii*. Dicey, Parties to Actions, *356, citing *Jeffries v. Great Western R. Co.* 25 L. J. Q. B. N. S. 109, 110, in which the judgment was rendered by Lord Campbell, who, in his opinion, uses this language: "The law is that, if a person is peaceably and quietly in possession of a chattel as his own property that a person who takes it from him, having no good title, is a wrongdoer; and that such person cannot defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person."

Whatever language of Lord Campbell there is in the opinion in that case which seems to support the proposition that an agent who is in possession can maintain an action in his own name must be qualified by the language above quoted, in which the learned chief justice states that the case with which he is dealing is one where the plaintiff was in possession of the chattel "as his own property." An examination of the authorities has satisfied us that the possession referred to is a possession in the possessor's own right, or under a claim of property, either general or special. Even in the case of a thief, who, according to many authorities, can maintain trover, or a finder or a bailee, the possession which the plaintiff claims is for himself and in his own right. It cannot be a possession simply as the agent or servant of another, who has no interest in the property itself. The action of replevin "cannot be maintained by one whose right of possession is for another.—as, for example, an agent or servant. The plaintiff must be entitled to possession in his own right." Shinn, Replevin, § 32. "A mere servant or a depositary for safe custody has not such property as will support this action, his possession being that of the master or bailor." 2 Greenl. Ev. 15th ed. § 561. "A mere servant who has possession at the will of the owner has not such a right of possession as will sustain the action." Cobbey, Replevin, § 423, p. 224. Mr. Chitty states that the rule that a mere servant cannot maintain trover is an exception to the general rule that bare possession will authorize it. 1 Chitty, Pl. 16th Am. ed. *170. "The possession by a mere servant of his master's goods is ordinarily deemed to be so far the possession of the master as to give the servant no right of action against one who disturbs that possession." Mechem, Agency, § 765. The case of *Lockhart v. Western & A. R. Co.* 73 Ga. 472, 54 Am. Rep. 883,—seems to be almost decisive of this question. In that case the plaintiff brought suit against the defendant for "damages to personal property," the subject-matter of the suit being an oil painting of a landscape. On the trial it appeared from the testimony for the plaintiff that the picture belonged to her brother, who had given it to her to keep until he called for it, and, if he never did so, it was to be her property. It was held that as the plaintiff had no property, either general or special, in the picture, but was a mere borrower, she could not maintain the action. The plain-

tiff was in possession of the picture, but her possession was in the right of another, and no presumption of ownership arises from such a possession. The principle that, when possession is shown, a mere wrongdoer could not set up the *jus tertii*, as the presumption arising from such possession would be conclusive against him, was recognized in the decision, but it was ruled that that principle has no application to a case in which the plaintiff shows that he is not entitled to possession in his own right. In the case of *Philips v. Robinson*, 4 Bing. 106, the declaration alleged that the plaintiff delivered to the defendant certain deeds belonging to the plaintiff. The defendant pleaded that the plaintiff was not lawfully possessed of the deeds as of his own property, and that they were not the property of the plaintiff. At the trial it was proved that the deeds in question were the title deeds to an estate belonging to the plaintiff's wife, and that the plaintiff or his agent had delivered them to the defendant. It was held that the plaintiff could not maintain detinue for the deeds or their value. Park, J., said: "In order to support an action of detinue, the plaintiff must have a general or a special property in what he seeks to recover." Burrough, J., remarked: "At the time of this action the plaintiff had no interest in these deeds; they were of no value to him; and therefore the nonsuit was right." See also *Solomons v. Bank of England*, 13 East, 130, note; *De La Chaumotte v. Bank of England*, 9 Barn. & C. 208. In the case of *Williams v. Millington*, 1 H. Bl. 81, it was held that an auctioneer could maintain against a buyer an action for goods sold and delivered; but it was said that he stood in a different relation to a bare servant or shopman, as he had possession coupled with an interest, which was a lien for the charges of the sale, the commission, and the auction duty, which he was bound to pay. In *Ludden v. Leavitt*, 9 Mass. 104, 6 Am. Dec. 45, it was held: "Where a sheriff, having attached personal chattels on an original writ, delivers them to a third person for safekeeping, such person is the mere servant of the sheriff, and has no legal interest in the chattels. He cannot, therefore, maintain trover for them." In *Scott v. Elliott*, 61 N. C. (Phill. L.) 104, it was held: "Possession of a chattel by one who holds for himself, in respect to either a general or a special property, will support replevin or trover, such possession for another will not support an action." In *Harris v. Smith*, 3 Serg. & R. 20, it was held: "A mere servant who has the care of goods cannot maintain replevin, but if they are delivered to him by the master, as bailee, he may." In *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302, it was held that the owner of goods can maintain replevin against a sheriff or other officer who takes them from the custody of a servant or agent of the owner by virtue of an execution against such servant or agent; "the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant

in the execution." In *Dillenback v. Jerome*, 7 Cow. 294, it was held: "One who receipts property levied upon by a constable or sheriff by virtue of an execution, and engages to deliver to the officer, has neither a general nor special property. He is the mere servant or agent of the officer, and cannot maintain trover in his own name, though the property be taken and converted by a stranger." See also the following cases: *Thorp v. Burling*, 11 Johns. 285; *Stephenson v. Little*, 10 Mich. 433; *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502; *Donahoe v. McDonald*, 92 Ky. 123, 17 S. W. 195; *Linscott v. Trask*, 35 Me. 150; *Tuthill v. Wheeler*, 6 Barb. 362; *Waterman v. Robinson*, 5 Mass. 303; *Brownell v. Manchester*, 1 Pick. 232; *Rosentreter v. Brady*, 63 Mo. App. 398; *Baker v. Campbell*, 32 Mo. App. 529; *Rockwell v. Saunders*, 19 Barb. 473; *Faulkner v. Brown*, 13 Wend. 64. These authorities abundantly settle the proposition that a mere agent or servant, having no special property therein, cannot, on bare possession alone, maintain an action to recover the goods from a person wrongfully in possession thereof; and this for the reason that his possession is that of his principal. The rule that a person wrongfully in possession of goods taken from another cannot set up title in a third person, or dispute the plaintiff's title, is perfectly consistent with the principle above announced. As stated above, a general or a special property in the personalty is essential to maintain trover; but, as against a wrongdoer, possession will be held to be conclusive evidence of such a property. But certainly a defendant, though a wrongdoer, will be permitted to dispute the possession itself; and he does this successfully by showing that the bare physical possession upon which the plaintiff relies was not in his own right, but in that of another. As the plaintiff's right of recovery rested in the present case upon bare possession, and as the evidence introduced in his behalf shows that such possession was in the right of his wife, and not in his own right, and that he had no interest whatever in the property, the presumption of ownership arising from possession was rebutted; and, under the authorities above referred to, he was not entitled to recover.

It is said, however, that § 3038 of the Civil Code changes the rule recognized by the decisions and authorities above referred to. That section is as follows: "An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons." If this section be construed literally, its language is such as to support the position that the possession of an agent is sufficient to sustain an action in his own name against one who wrongfully interferes with such possession. The rule on this subject as it existed at common law is thus stated in 1 Am. & Eng. Enc. Law, 2d ed. p. 1166: "An agent who is in the possession of, or entitled to the possession of, property belonging to his principal

pal by virtue of the agency, and having a special or general property therein, has a right of action against a third person who unlawfully injures or converts such property." The rule is stated in substantially the same language in *Mechem, Agency*, § 765. The provisions of § 3038 of the Civil Code appear for the first time in the statute law of this state in the Code of 1863. It has been embodied in the same language in every Code since adopted. If this section be so construed as to authorize an agent to maintain an action in his own name on a possession which is founded on nothing more than a right of property in his principal, the effect of the section was to make a radical change in the law as it existed at the time of the adoption of the Code of 1863. The authorities above cited demonstrate clearly that there can be no escape from this proposition. Was it the intention of the codifiers in framing this section, and of the legislature in adopting it, to change the law existing at the time the Code was adopted, or was it intended merely as declaratory of the law as it then stood? The codifiers were not authorized to make new law, but "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitutions, the statutes of the state, the decisions of the supreme court, or the statutes of England, of force in this state." See the preface to the Code of 1863. In *Shumate v. Williams*, 34 Ga. 245, 249, Chief Justice Lumpkin, in speaking of the Code, said: "It is mainly a declaratory exposition, in a concise and systematic form, of the body of laws, common and statute, which the codifiers found already established." In *Mechanics' Bank v. Heard*, 37 Ga. 401, 412, Judge Harris uses this language: "It should be kept in mind that the codifiers were commissioned to embody the principles of the common law in force in Georgia. They had no authority to originate new matter for legislative sanction. It, therefore, is incumbent on those who assert that they went beyond their commission . . . to prove it." In *Phillips v. Solomon*, 42 Ga. 192, 195, Judge McCay said: "It must be remembered that the object of the codification was not to make laws, but to codify or declare those already in existence. Act Dec. 9, 1858. It is true that in some instances the Code has changed the law, though these changes are less frequent than is supposed. But in the main it cannot be doubted that the Code is to be looked at as what it purports to be,—a codification of our laws as they existed at the time,—and its provisions are not to be considered as changing the law unless the intent to change be clear." In *Gardner v. Moore*, 51 Ga. 269, the same judge remarked: "The Code is not to be construed as changing the old law unless the change be very apparent, and it would be specially dangerous to take the definitions of the Code as absolutely accurate, and as excluding the common-law definitions, unless it be plainly manifest that the

intent was to make an exclusive and inclusive definition." The language of Judge McCay in 42 Ga. *supra*, was quoted approvingly by Mr. Justice Hall in *Atlanta v. Gate City Gaslight Co.* 71 Ga. 119, 120, who took occasion to add that: "Many similar views may be found scattered through our reports and the reports of other states, but these are deemed sufficient. We are well satisfied that in this instance no change of the provision in question was intended, or was in fact made." In that case the court was dealing with a section of the Code which apparently changed the existing law. In *Gillis v. Gillis*, 96 Ga. 1, 10, 30 L. R. A. 143, 146, 23 S. E. 107, 110, Mr. Justice Lumpkin, in dealing with a section of the Code which it was claimed altered the existing law with reference to witnesses attesting wills by their marks, used this language: "There is no act of our legislature or decision of our supreme court, before the adoption of our Code, that ever changed or attempted to change the old law as to witnesses attesting wills by their marks; and there is at least one case decided by this court, before the Code went into effect, which is in harmony with, and upholds that law. See *Horton v. Johnson*, 18 Ga. 397. How, then, can it be said that the compilers of our Code intended to incorporate into it any other than the prevailing rule of law? It is not to be presumed that they, learned in the law, would, except in rare instances, themselves make a rule of law, when they were only empowered to codify existing laws of force in this state." In *Lamar v. McLaren*, 107 Ga. 591, 598, 34 S. E. 116, 119, Mr. Justice Fish uses this language: "The rule is that, unless the contrary manifestly appears from the words employed, the language of a Code section should be understood as intending to state the existing law, and not to change it." The court was dealing with a section of the Code in that case which, if construed literally, clearly changed the existing law. In *Rome Grocery Co. v. Greenwich Ins. Co.* 110 Ga. 618, 36 S. E. 63, Mr. Justice Lewis, in dealing with a section which, according to its literal terms, changed the existing law, says: "The object of the codifiers in compiling the first Code was to embody, not only the statute law, but the common law of force in this state. As there was no effort by the codifiers, to codify any statute upon that subject we think it clearly proper, in determining the meaning of this section, to ascertain what was the general law of force in this country at the time of the adoption of the Code." The ruling in that case followed what was the law existing at the time of the adoption of the Code, and not what the terms of the section, literally construed, would have required. The rule on the subject under investigation in the present case being well settled when the Code was adopted, and there being no sufficient reason suggested why such rule should not have been allowed to remain unchanged, and it not being "clear" that there was an "intent to change the law on the subject," the sec-

tion of the Civil Code now under consideration should be construed as a mere codification of the existing law; and therefore the word "agent," as used therein, should be held to mean an agent who has a special property or interest in the chattel. Without such an interest, his possession is the actual possession of his principal, as was held in *Hillyer v. Brogden*, 67 Ga. 24. The word "agent," appearing after the plaintiff's name in the petition, is merely "*descriptio personæ*," and is to be treated as surplusage; and hence the action is to be regarded as one brought in the name of the plaintiff, as the person entitled to recover in his own right. Civil Code, § 2998; *Owsley v. Woolkopter*, 14 Ga. 124; *McDuffie v. Irvine*, 91 Ga. 748, 17 S. E. 1028; *Atlanta Brewing & Ice Co. v. Bluthenthal*, 101 Ga. 542, 28 S. E. 1003; *Lester v. McIntosh*, 101 Ga. 676, 29 S. E. 7. So treating it, the action was not maintainable, and there was no error in awarding a nonsuit.

2. When the plaintiff relies on title to recover possession of personal property wrongfully withheld from him, he must show a legal title. A mere equitable title will not suffice. When, therefore, it appears that the legal right of action is not in the plaintiff, he has no right of action at all,—either in his own name or in that of another. He cannot sue for the use of the person who has the legal right of action, but the action should be brought in the name of the real plaintiff. See *Richmond & D. R. Co. v. Bedell*, 88 Ga. 591 (syl., point 3) 15 S. E. 676; *Cunningham v. Elliott*, 92 Ga. 159, 18 S. E. 365. "It is well settled that an action of replevin cannot be brought in the name of one person for the use of another; for the action involves nothing but legal rights, and, if equities are to be settled, another form of action must be resorted to. While the name of the usee might be treated as surplusage, a recovery can only be had where it is shown that the plaintiff is entitled to recover. The usee's title cannot be considered in the action, and if the plaintiff have no title the action must fail." *Cobbey, Replevin*, § 425. See also 18 Enc. Pl. & Pr. 507; *Moore v. Watson*, 20 R. I. 495, 40 Atl. 345; *Meyer v. Mosler*, 64 Miss. 610, 1 So. 837; 20 Am. & Eng. Enc. Law, pp. 1056, 1057. What is said above applies also to the action of trover. 26 Am. & Eng. Enc. Law, 1st ed. p. 744. There was no error in rejecting the amendment.

Judgment affirmed.

All the Justices concur, except Lewis, J.

Lewis, J., dissenting:

It is inferable from the testimony in this case that, prior to the conversion of the property in dispute by the defendant, the transactions the husband had with the railway company were in his individual name. It is true, he stated that the real title to the property was in his wife; that he was manager of his wife's business, and the property was actually in his peaceable and lawful possession. I think it quite evident that

the nonsuit was granted in the present case upon the ground that the evidence showed that the title to the property was not in the plaintiff, but his wife. The entire argument of counsel for defendant in error, in endeavoring to uphold the judgment of the court below granting the nonsuit, is based purely upon this idea. While the plaintiff testified that the lumber belonged to his wife, and that it was cut on her land, and sawed with her engine and mill, yet he further testified, positively and without contradiction: "I had an interest in it, by reason of acting as agent for her and having charge of her business." There is no doubt but that at common law an action of trover is maintainable in favor of anyone having possession of property, against any wrongdoer who deprives him of such possession, and this peaceable possession on the part of the plaintiff, without further proof of title, is amply sufficient to maintain the action. In *Dacey, Parties to Actions*, 2d Am. ed. p. 376, it is declared: "A person who has the actual possession of goods has a right to possess them against anyone who cannot show a better title, or, what is the same thing, who cannot show that in interfering with possession of the goods he is acting under the authority of some one who has a better title than the possessor." In the case of *Jeffries v. Great Western R. Co.* 25 L. J. Q. B. N. S. 109, 110, Lord Campbell, Ch. J., enters into a discussion of this question. In his opinion he says that he thinks "that the *jus tertii* could not be set up. . . . I conceive the law is that, if a person is peaceably and quietly in possession of a chattel as his own property, that a person who takes it from him, having no good title, is a wrongdoer, and that such person cannot defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person. . . . It is of the greatest importance that a man shall not, having no good title of his own to the property, be allowed to seize it, and thereby probably bring about a breach of the peace, and occasion great mischief and confusion. . . . It is allowed that, if an action of trespass is brought by the party in possession, the defendant cannot set up the *jus tertii*, he having no right in himself. I think there is no difference whatever, for this purpose, between an action of trespass and an action of trover. In both cases the plaintiff rests on his possession of the property, and the question is whether a person who has no title whatever of his own shall be allowed to show that the plaintiff has not the right of property. The right of property is presumed from the possession; and is that presumption to be rebutted by evidence on the part of the defendant, a mere stranger and wrongdoer, showing that the plaintiff was not the real owner of the chattel?" See also *Rogers v. Spence*, 13 Mees. & W. 579, 580. In discussing this right of a mere possessor of property to maintain trover against a wrongdoer, it was decided in that case: "These rights of action are given in respect of the immediate and present viola-

tion of the possession of the bankrupt, independently of his rights of property. They are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred." The decision of Lord Campbell in the case of *Jeffries v. Great Western R. Co.* above cited, is extensively quoted in *Dacey, Parties to Actions*, p. 378. The same case is also reported in 85 Eng. C. L. Rep. 802. See also *Faulkner v. Brown*, 13 Wend. 64; *Sutton v. Buck*, 2 Taunt. 302.

Our Civil Code (§ 3886) clearly adopts that common-law rule, in the following language: "Mere possession of a chattel, if without title, or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In the case of *Harpes v. Harpes*, 62 Ga. 394, it is decided: "One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration." Chief Justice Warner, delivering the opinion in that case, says: "The mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In that case the suit was by a widow of the deceased to recover possession of a certain described horse. No administration had been granted upon the estate, and it was clear that the plaintiff in that case had no title whatever in the property. It is said in the opinion: "If the plaintiff had sued for the horse as a part of the estate of her deceased husband, then a grant of administration on his estate to her would have been necessary to have entitled her to recover; but she declared against the defendant as a wrongdoer, upon her own possession of the property sued for. The dismissal of the plaintiff's action was error." This doctrine is recognized in *Greenleaf on Evidence* (vol. 2, § 637), in his chapter on trover. In discussing the right of one having a special interest in property to maintain an action of trover for same, he adds: "But a lower degree of interest will sometimes suffice, against a stranger; for a mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods, whose possession he has wrongfully invaded." See also 20 Am. & Eng. Enc. Law, 1st ed. pp. 744-748. The idea, therefore, of the law embodied in the section of the Code above recited is evidently to give one who has possession of property, even if he has wrongful possession of it, a right of action against anyone who interferes therewith, unless he should be the true owner, or the person wrongfully deprived of possession. The bare possession of the plaintiff makes out, in law, title sufficient to recover in such a case; and the wrongdoer is estopped from denying his title by showing a legal title in another. This, however, is a stronger case

than a suit by one in wrongful possession of property; for there is no question, under this evidence, but that the plaintiff was in its rightful possession. The defendant was guilty of a conversion of the property when it moved the same from where the plaintiff had placed it without his authority or consent.

But it is contended that, the evidence in this case showing that the plaintiff was not the owner of this property, he was not, in contemplation of law, in possession thereof in his own right, and that his possession was therefore not his own, but really that of his principal. I do not think the word "possession," in Civil Code, § 3886, will bear any such construction. The term "mere possession" must have some significance, and I think it necessarily means the party having the actual, manual custody of the property at the time his actual possession thereof is interfered with. It seems, from the ingenious argument of Mr. Justice Cobb in his opinion in this case, that he has reached the conclusion that in order to maintain an action of trover the possession of the plaintiff, which has been interfered with, must have been coupled with some interest in the property sued for. But that is entirely inconsistent with the language of this section; for it is therein plainly stated that even if the party, though in possession, is without title, or is in possession wrongfully, he can maintain an action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession. This language, then, is entirely inconsistent with the idea that such a possession, to authorize the action, must be in a person having some interest in the property. If that had been the intention of the codifiers, evidently lawyers of their learning would have made it appear in language unmistakable,—for instance, by simply adding that the possession of a chattel, "coupled with an interest in the same," will give a right of action, etc. They would not have written, "Mere possession of a chattel," etc., will give a right of action; for the expression "without title or wrongfully" implies that the party need not have had any interest whatever in the property in dispute. But, apart from this, from the evidence above referred to it will be seen that this plaintiff, while he did not claim title to the property, did actually claim an interest therein by virtue of the services rendered in the management of his wife's affairs.

It is contended, however, that, being the agent of the owner, he was not, in contemplation of law, in possession of the property; that his possession was the possession of his principal. This proposition is completely answered by the provisions of Civil Code, § 3038, which declares: "An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons." So, if there was ever any doubt about the right of an agent to bring this action against a wrongdoer, it strikes me that it is forever set at rest by

this provision in the Code. In the opinion of Mr. Justice Cobb, however, it is contended that this section of the Code was intended as an embodiment of the common law, and that under the common law an agent had no such right of action, even against a wrongdoer, unless the agent's possession was coupled with an interest he had in the property. In the first place, I do not think this is a correct view of the common law. There can be no doubt but that, as a general rule of law, to maintain an action of trover the plaintiff must have had either a general or special property in the goods seized; and abundant authority can be cited from text-books, as well as from decisions of courts, which recognizes this general principle. The truth is, actions of trover in this country are not often based upon a mere possession of the plaintiff, of which he has been deprived by a wrongdoer who has no interest whatever in the property. The majority of trover cases are of such a nature that the plaintiff cannot recover unless he shows title to or interest in the property sued for. Often is it the case that the defendant never derived any possession from the plaintiff at all, and that he claims a right to the property entirely under a different chain of title. Hence we find many authorities announcing this principle in general terms. But there is absolutely nothing in them at all inconsistent with the view I entertain in this case. Take, for example, some of the cases cited by Mr. Justice Cobb. To support an action of this character, he cites a number of authorities to the effect that the plaintiff at the time of the action must have either a general or a special property in the personality. In *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441, 40 Am. Dec. 108, it was decided that replevin cannot be maintained unless the plaintiff has at the time of the taking either a general or special property in the goods. But that case did not involve any principle whatever touching the right of recovery on actual possession alone against a wrongdoer. That was a general principle in an action of replevin. On page 199, 40 Am. Dec., and page 446, 14 N. H., it will appear that the defendant was a deputy sheriff, and he set up title in the property in one Hayden, and that the same was seized by defendant, as deputy sheriff, by virtue of an attachment against Hayden. The same general principle is declared in *Pattison v. Adams*, 7 Hill, 126, 42 Am. Dec. 59, cited by Mr. Justice Cobb. It does not appear from the facts therein that it has any reference whatever to the questions involved in the case at bar. The same general principle is announced in *Beckwith v. Phillee*, 15 Wis. 224, likewise cited; but it will appear from the facts in that case, on page 229, that the defendants, instead of taking possession of the property involved, to wit, lumber, from the plaintiff, were rightfully in possession of the premises at the time of bringing the suit, and that the cutting of the timber by them, instead of being a wrongful act, was perfectly legitimate, under the contract they made, by virtue of which they acquired pos-

session of the premises. He also cites 1 Chitty, Pl. 16th Am. ed. *137, to the effect that the plaintiff must have a general or special property in the goods at the time the action was commenced; and he also quotes from page *167 of this work, to the effect that in order to support the action the plaintiff must, at the time of the conversion, "have had a complete property, either general or special, in the chattel." But in another place in his opinion he adverts to page *170 of the same work, where Mr. Chitty lays down the general rule that "the bare possession of goods, without any strict legal title, confers a right of action against a mere wrongdoer, having no right, and not clothed with any authority from the real owner." In the same connection, and on the same page, the author adds: "The only exception which appears to exist is in the case of a mere servant acting professedly as such, and having only the custody of goods." He also quotes from 2 Greenl. Ev. 15th ed. § 561, as follows: "A mere servant or a depositary for safe custody has not such property as will support this action, his possession being that of the master or bailor." The writer has above quoted from the same author where, further on in the same work, he takes quite a different view of a right of action against a mere wrongdoer, who is not permitted to question the title of a person in the actual possession and custody of goods, whose possession he has wrongfully invaded. Great reliance is placed by Mr. Justice Cobb upon the decision of this court in the case of *Lockhart v. Western & A. R. Co.* 73 Ga. 472, 54 Am. Rep. 883. Upon a careful review of that decision and the facts in that case, I cannot see that it in the least sustains the view of the majority of this court. That was not an action of trover, but an action for damages resulting from an injury done to an oil painting by the defendant. Civil Code, § 3886, has no application whatever to that case. It clearly appears that the defendant did not wrongfully get possession of the property from the plaintiff. On the contrary, the property that was damaged was received by the defendant for transportation. It appears in the case that the plaintiff was only a borrower, and acquired no title in the picture loaned. She brought suit against the defendant, not because of any unlawful possession of the picture by it, but because of injury it sustained while in its lawful possession. It is there expressly recognized that the carrier cannot dispute the title of the party delivering goods for transportation, either by setting up title in himself or in a third person, which is not being enforced against him; but, says the court, on page 474, "that is not this case. He sets up no adverse claim; does not refuse to deliver the property to the consignee." In such a case, where the plaintiff had no interest in or title to the property which has been damaged, she, of course, had no right of action; for she had not been damaged. I think this is really authority to sustain my view; for it is intimated in the opinion that,

if the railroad company had unlawfully deprived the plaintiff of possession of the property, she could have maintained an action against it, although she had no title to same. I fail to find any of the authorities cited by Mr. Justice Cobb which sustain his theory of what the common law is,—that possession of an agent of his principal's chattels will not enable him to maintain an action against a wrongdoer who has unlawfully deprived him of such possession, because his possession is in law possession of the principal. As a general rule, an agent cannot maintain an action in trover for the recovery of his principal's property; but that rule does not apply when he is in possession of the principal's property, and has been deprived thereof by the wrongful act of a person who has no interest whatever in that property. To say that Civil Code, § 3038, refers not only to an agent who has possession, actual or constructive, of the property of his principal, but to one who has an interest in the property, would be giving it a construction which was evidently never contemplated by the codifiers. If the agent's right of action be based upon the fact that he has an interest in the property, then he necessarily occupies some other relation than that of mere agent. If that is the only thing that gives him a right to sue, then his possession is not that of an agent, but of an owner, and he has the right to protect his interest in the property against a wrongdoer independently either of § 3038 or § 3686 of the Civil Code. Chitty, the authority relied upon by Mr. Justice Cobb, recognizes but one exception which even appears to exist, and that is where the possession is that of a mere servant. I know of no authority that recognizes the possession of an agent as an exception. But suppose it did, and at common law an agent did not have a right of action of this sort; then, manifestly, under our Civil Code, that principle of the common law has been changed. Suppose the word "servant" had been used instead of the word "agent" in § 3038; no one could contend that the servant could not bring this action. If, therefore, under the common law mere possession by an

agent of his principal's property will give him no right of action against a wrongdoer for interference with such possession, then that section of the Code (3038) changes the common law by declaring exactly the contrary.

It is true that the main purpose of the codifiers was to embody in the Code of laws of this state not only the statutes, but the common law in force, and also the decisions of this court, and that in case of a want of absolute clearness as to what a section might mean, or in case of ambiguity, if it relates to a principle of the common law, a determination of what the common law on the subject is is entirely proper, and often of great aid in arriving at the true intent of the codifiers, and of the action of the legislature in adopting their work. But, when we find in the Code a provision as clear and unmistakable in its meaning as is embraced in § 3038, the invariable rule of this court has been to treat it as law, although it may never have been law before the adoption of the Code. Now, that section says "an agent having possession, actual or constructive." Of what? Of the property of his principal. It necessarily implies, so far as the absolute legal title is concerned, that the principal alone is the holder thereof; and yet that section gives the agent in possession a right of action for any interference with that possession by third persons. What possession? Manifestly and unquestionably, the possession he holds for his principal. If the agent has an interest in the property himself, he would have a right of action, not by virtue of his possession as agent of his principal, but by virtue of his possession in an entirely different capacity. The effect, then, of the construction of the majority of the court, as I conceive it, is to change the clear and unmistakable meaning of the language employed in the Code, and to add to its words a thought that simply amounts to its absolute repeal.

For the above reasons, I feel constrained to differ from the views of the majority of my brethren, and think that the court below erred in granting a nonsuit.

IOWA SUPREME COURT.

STATE of Iowa

v.

Irwin CHAUVET, Appt.

(.....Iowa.....)

1. A statutory requirement of corroboration of an accomplice to warrant a conviction on his testimony is sufficiently met

by admissions and acts of the accused tending to connect him with the commission of the offense.

2. A covered wagon traveling from place to place, in which prostitution is carried on, may constitute a house of ill fame within the meaning of a statute prohibiting the keeping of such houses.

(October 2, 1900.)

NOTE.—On the subject of municipal power as to houses of ill fame there is a note in this series with the case of *People v. Hanrahan* (Mich.) 4 L. R. A. 751, and some cases in a note to *State v. Karstendiek* (La.) 89 L. R. A. 521; also the case of *L'Hote v. New Orleans* (La.) 44 L. R. A. 90.
51 L. R. A.

As to ordinance prohibiting prostitutes on streets between certain hours, see *Dunn v. Com. use of Catlettsburg* (Ky.) 43 L. R. A. 701.

For a case holding that a private room in a hotel may be a "place" or "house" within the meaning of an ordinance as to gambling, see *Greenville v. Kemmis* (S. C.) 50 L. R. A. 725.

A PPEAL by defendant from a judgment of the District Court for Sac County convicting him of keeping a house of ill fame. *Affirmed.*

The facts are stated in the opinion.

Mr. C. R. Metcalfe, for appellant:

There can be no doubt that the prosecuting witness, *Blanche Billings*, was an accomplice of the defendant, *Chauvet*.

There is no corroboration of *Blanche Billings*'s evidence that tends to connect defendant with the commission of the offense, as required by § 5489 of the Code of Iowa.

Upton v. State, 5 Iowa, 465; *State v. Tulley*, 18 Iowa, 88; *State v. Clemens*, 38 Iowa, 257; *State v. Willis*, 9 Iowa, 582.

The covered wagon described in the indictment is not a "house" of ill fame. The statute refers exclusively to the common and ordinary definition of house, which means a substantial structure built or used specifically as a place of abode. Primarily it must be a house in its ordinary sense, as distinguished from a vehicle—a wagon, buggy, or carriage. A wagon is too frail a structure to rise to the dignity of a "house."

State v. Mullen, 35 Iowa, 207; *Roscoe*, *Crim. Ev.* p. 270, foot note; 9 *Am. & Eng. Enc. Law*, p. 778; *Bishop*, *Statutory Crimes*, § 220.

No case is to be brought by construction within a statute unless it is completely within its words.

Bishop, *Statutory Crimes*, § 220.

To hold that a wagon is a house would be putting the very strictest construction against defendant possible.

State v. McGowan, 20 Conn. 245, 52 *Am. Rep.* 336; *Equitable L. Ins. Co. v. Gleason*, 56 Iowa, 47, 8 N. W. 790; *Blackman v. Wadsworth*, 65 Iowa, 81, 21 N. W. 190.

Messrs. Milton Remley, Attorney General, *Charles A. Van Vleet*, and *Miles W. Newby*, for appellee:

Witness was not an accomplice with the defendant in the act of which he was accused. He was indicted for committing the crime of keeping a certain house resorted to for a certain purpose. The gist of the crime is the keeping of such a house.

State v. Hand, 7 Iowa, 412, 71 *Am. Dec.* 453; *State v. Lee*, 80 Iowa, 81, 45 N. W. 545; *State v. Alderman*, 40 Iowa, 376; *State v. Young*, 96 Iowa, 262, 65 N. W. 160.

One who merely occupies a room in a disorderly house is not liable as a keeper unless she is the proprietress.

Moore v. State, 4 *Tex. App.* 127.

To charge defendant, it is not necessary to prove that he was the owner of the house, nor by positive testimony that he was the keeper of it. But the jury may conclude that he was such keeper, by proof that he acted as such, or so held himself out to the world.

State v. Hand, 7 Iowa, 412, 71 *Am. Dec.* 453.

A covered wagon is a house as the term is used in the statute.

State v. Mullen, 35 Iowa, 207; *Killman v. State*, 2 *Tex. App.* 223, 28 *Am. Rep.* 432. 51 L. R. A.

The statute does not require that the place be habitually used, or for any length of time.

State v. Lee, 80 Iowa, 75, 45 N. W. 545; *Shuster v. State*, 62 N. J. L. 521, 41 *Atl.* 701.

Sherwin, J., delivered the opinion of the court:

The defendant was convicted of keeping a house of ill fame, which consisted in the use of a covered wagon, with which he traveled from place to place, and in which prostitution was carried on. The principal witness for the state was a young woman who testified that she was engaged to go with the defendant in a wagon furnished by him, for the purpose of sexual commerce for hire throughout the country, and that she did very frequently indulge therein in the wagon in question, with the knowledge and at the solicitation of the defendant, and that the wages of her sin were given over to the defendant. The defendant insists that this witness was an accomplice, within the meaning of the law, and that her evidence as to his keeping the wagon is not sufficiently corroborated. It may well be doubted whether this position is tenable, but, if it is, the evidence in corroboration is ample. His admission, and his apparent control of the wagon and team, authorized the jury to find as it did, for they tended to connect him with the commission of the offense, and this is all the statute requires. *State v. French*, 96 Iowa, 255, 65 N. W. 156.

The defendant contends that the keeping of a covered wagon for the purpose of prostitution and lewdness cannot be brought within the statute prohibiting the keeping of a house of ill fame; that a structure, to constitute a house, must be fixed in some particular locality, and be substantial and abiding. The statute does not say that these conditions shall exist, or define what shall be considered a house, within its meaning. That houses may be built of stone, brick, wood, iron, glass, or any other material, or combination thereof, which may suit the fancy of the builder, cannot, we opine, be successfully controverted. If this be true, then it may be built of such materials as are commonly used in the construction of wagons and the covers thereto. Nor are we aware of any fixed and definite size or shape necessary to create a house in legal contemplation. The *Century Dictionary* defines a house as "an abiding place; an abode; a place or means of lodgment." The evidence shows this wagon to have been fixed up with a black cover,—likely to correspond with the shades of night. It had a curtain in front, which was dropped when occasion required the concealment of the harlot and her lascivious visitor. In it alone the defendant and his companion in sin abode and found lodgment and shelter for several weeks prior to his arrest. If a stone house were being moved from one point to another in the same city or town, or from one town to another, as has been done, and during the time of such moving it was used for purposes of prostitution, could it be held that the mere fact of its being on wheels de-

stroyed its character? We think not. If used as a place of abode for human beings, it would still be a house. The boat which floats for months each year upon some beautiful sheet of water, and carries the entire family and numerous friends of its opulent owner, is denominated a "house boat." And why? Because it is the temporary abiding place of its occupants, and answers the purpose, for the time being, of the most expensive and stationary palace. In *State v. Mul-*

len, 35 Iowa, 207, it was held that a boat on the Mississippi river was a house of ill fame, within the meaning of the statute. It does no violence to the statute nor to sound reason to hold that a wagon, under the conditions shown in this record, is also within the contemplation thereof.

The judgment is affirmed.

Granger, Ch. J., not sitting.

MINNESOTA SUPREME COURT.

Rose WALKER, *Respt.*,
v.
ST. PAUL CITY RAILWAY COMPANY,
Appt.

(.....Minn.....)

- *1. It is not the duty of a person seeking passage on an electric street car to assume that proper signals to stop the car will be disregarded, but such passenger may have regard to the probable conduct of the person in charge of the car, and act accordingly, when such reliance is not apparently attended with danger.
2. It is not, as a matter of law, negligence for a person intending to take passage on a street car to assume that such car is running at the customary rate of speed, and to act with reference to such custom, in the absence of evidence to the contrary.
3. Evidence considered, and held to support the finding of the jury that defendant negligently disregarded signals to stop one of its electric cars, which was run at a reckless rate of speed past the proper stopping place, and that plaintiff was not negligent, under the facts found by the jury in this case, in passing before such car, when intending to enter the same as a passenger.

(*Collins and Brown, JJ., dissent.*)

(November 22, 1900.)

APPEAL by defendant from an order of the District Court for Ramsey County denying a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Mcers. Munn & Thygeson, for appellant:

It is negligence (contributory negligence) to take close and unnecessary chances.

Bolton v. Baxter, 54 N. Y. 245, 13 Am.

*Headnotes by LOVELY, J.

NOTE.—The above case is sufficiently peculiar in its facts so that there do not seem to be any exact precedents for it.

On the general question of negligence in getting on or off a moving street car, see note to *Jagger v. People's Street R. Co.* (Pa.) 38 L. R. A. 780.

51 L. R. A.

Rep. 578; *Williamson v. Metropolitan Street R. Co.* 29 Misc. 324, 60 N. Y. Supp. 477; *O'Connell v. St. Paul City R. Co.* 64 Minn. 466, 67 N. W. 363; *Clancy v. Troy & L. R. Co.* 88 Hun, 496, 34 N. Y. Supp. 877; *May v. Metropolitan Street R. Co.* 26 Misc. 748, 57 N. Y. Supp. 277; *Beach, Neg.* 3d ed. § 269; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391; *Hickman v. Nassau Electric R. Co.* 36 App. Div. 376, 56 N. Y. Supp. 751; *Sheehan v. Philadelphia & R. R. Co.* 166 Pa. 354, 31 Atl. 120; *Watson v. Mound City Street R. Co.* 133 Mo. 240, 34 S. W. 573; *Myers v. Baltimore & O. R. Co.* 150 Pa. 386, 24 Atl. 747; *Oulbertson v. Metropolitan Street R. Co.* 140 Mo. 35, 36 S. W. 834; *Studley v. St. Paul & D. R. Co.* 48 Minn. 249, 51 N. W. 115; *Greenard v. St. Paul City R. Co.* 72 Minn. 181, 75 N. W. 221.

Respondent cannot rely upon the slowing down of the car to excuse her negligence.

Studley v. St. Paul & D. R. Co. 48 Minn. 249, 51 N. W. 115; *Carney v. Chicago, St. P. M. & O. R. Co.* 46 Minn. 220, 48 N. W. 912.

If the headlight prevented respondent from seeing, she should have waited.

Heaney v. Long Island R. Co. 112 N. Y. 122, 19 N. E. 422; *Olson v. Chicago, M. & St. P. R. Co.* 81 Wis. 41, 50 N. W. 412, 1096; *West Jersey R. Co. v. Eitan*, 55 N. J. L. 574, 27 Atl. 1064; *Beynon v. Pennsylvania R. Co.* 168 Pa. 642, 32 Atl. 84; *Hovenden v. Pennsylvania R. Co.* 180 Pa. 244, 36 Atl. 731.

On petition for reargument.

Where one approaching a railroad crossing sees or hears an approaching train, and attempts to cross before it reaches him, he is negligent as a matter of law.

Myers v. Baltimore & O. R. Co. 150 Pa. 386, 24 Atl. 747; *Mulherrin v. Delaware, L. & W. R. Co.* 81 Pa. 366; *Moore v. Philadelphia, W. & B. R. Co.* 108 Pa. 349; *Pennsylvania R. Co. v. Mooney*, 126 Pa. 244, 17 Atl. 590; *Bacon v. Delaware, L. & W. R. Co.* 143 Pa. 14, 21 Atl. 1002; *Sheehan v. Philadelphia & R. R. Co.* 166 Pa. 354, 31 Atl. 120; *Holden v. Pennsylvania R. Co.* 169 Pa. 1, 32 Atl. 103; *Pennsylvania R. Co. v. Bell*, 122 Pa. 58, 15 Atl. 501; *Reilly v. Metropolitan Street R. Co.* 61 N. Y. Supp. 785; *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153; *Calligan v. New York C. & H. R. R. Co.* 59 N. Y. 651; *Woodard v. New York, L. E. & W.*

R. Co. 106 N. Y. 374, 13 N. E. 424; *Louisville, N. A. & C. R. Co. v. Stommel*, 128 Ind. 35, 25 N. E. 863; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Ill. App. 307; *Brown v. Milwaukee & St. P. R. Co.* 22 Minn. 165; *Miller v. Truesdale*, 58 Minn. 274, 57 N. W. 861; *Turner v. Hannibal & St. J. R. Co.* 74 Mo. 606; *Kwiatkowski v. Grand Trunk R. Co.* 70 Mich. 549, 38 N. W. 463.

Means of knowledge is equal to knowledge. Plaintiff had the means of protecting herself. Can she neglect the means at hand, entirely neglect her duty and wholly rely on the conduct of others to whom she owes the reciprocal duty of exercising care?

The ordinance leaves the speed as to street cars unlimited at the point of this accident.

Plaintiff was bound to know the ordinance of the city.

Buffalo v. Webster, 10 Wend. 99; *Palmyra v. Morton*, 25 Mo. 593; *Heland v. Lowell*, 3 Allen, 408, 81 Am. Dec. 670; *Eastwood v. La Crosse City R. Co.* 94 Wis. 163, 68 N. W. 652.

The decisions cited in the majority opinion are from states where the rule no longer prevails, and such decisions have been implicitly, if not expressly, overruled.

Myers v. Baltimore & O. R. Co. 150 Pa. 386, 24 Atl. 749; *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 526, 26 N. E. 741; *Cullen v. Delaware & H. Canal Co.* 113 N. Y. 607, 21 N. E. 716; *McGee v. Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300, 60 N. W. 293; *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 105, 34 L. R. A. 350, 46 Pac. 889, 43 Pac. 207; *Watson v. Mound City Street R. Co.* 133 Mo. 246, 34 S. W. 573.

One is guilty of contributory negligence who crosses a street railroad track when it is evident to him that he cannot pass in safety unless the motorman stops or slackens the speed of an approaching car.

Williamson v. Metropolitan Street R. Co. 29 Misc. 324, 60 N. Y. Supp. 477; *Knoker v. Canal & C. R. Co.* 52 La. Ann. 806, 27 So. 270; *Hickman v. Nassau Electric R. Co.* 30 App. Div. 376, 50 N. Y. Supp. 751; *Swanson v. Central R. Co.* 63 N. J. L. 605, 44 Atl. 852; *Louisville, N. A. & O. R. Co. v. Stephens*, 13 Ind. App. 145, 40 N. E. 148; *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *Beem v. Tama & T. Electric R. & Light Co.* 104 Iowa, 563, 73 N. W. 1045; *Cleveland, O. C. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445.

Mr. Henry Conlin, for respondent:

The character of plaintiff's conduct must be adjudged in the light of the probable or apprehended conduct of defendant and its servants, and the right on her part to assume that defendant and its servants would act with reasonable caution, and not with culpable negligence.

At this stopping place appellant, in approaching it with its cars, owes the duty to every person who may be there intending to become a passenger, to anticipate their presence, and the fact that they will be passing across there in just the manner appellant has provided for them; to be on the lookout

for them; to regulate the speed of its cars in approaching with reference to the probability of persons being there, and so that they can be readily stopped if people are discovered there, or after being signaled a reasonable distance from the platform; and to stop its cars there when such a signal is given.

Booth, Street Railways, § 347; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Coller v. Frankford & S. R. Co.* 9 W. N. C. 477; *Bowie v. Greenville Street R. Co.* 69 Miss. 196, 10 So. 574; *Strutzel v. St. Paul City R. Co.* 47 Minn. 543, 50 N. W. 690; *Anderson v. Minneapolis Street R. Co.* 42 Minn. 490, 44 N. W. 518; *Oincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L. R. A. 276, 43 N. E. 207; *Dahl v. Milwaukee City R. Co.* 65 Wis. 371, 27 N. W. 187; *Humbird v. Union Street R. Co.* 110 Mo. 76, 19 S. W. 69; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179, 28 Pac. 674; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Little v. Street R. Co.* 78 Mich. 205, 44 N. W. 137; *Ellick v. Metropolitan Street R. Co.* 15 App. Div. 556, 44 N. Y. Supp. 523; *Winters v. Kansas City Cable R. Co.* 99 Mo. 519, 6 L. R. A. 536, 12 S. W. 652.

If a car is operated at an unusual rate, in the absence of a statute or ordinance governing it, the question of what was, under the circumstances, a reasonable rate, would be for a jury to decide.

East St. Louis Electric Street R. Co. v. Burns, 77 Ill. App. 529; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Holmgren v. Twin City Rapid Transit Co.* 61 Minn. 85, 63 N. W. 270; *Howard v. St. Paul, M. & M. R. Co.* 32 Minn. 214, 20 N. W. 93; *Fullerton v. Metropolitan Street R. Co.* 37 App. Div. 386, 55 N. Y. Supp. 1068; *Bitner v. Crosstown Street R. Co.* 153 N. Y. 76, 46 N. E. 1044; *Boyer v. St. Paul City R. Co.* 54 Minn. 128, 55 N. W. 825; *Shearm. & Redf. Neg.* § 485 B.; *Cooke v. Baltimore Traction Co.* 80 Md. 551, 31 Atl. 327; *Newark Pass. R. Co. v. Blook*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067; *Flewelling v. Lewiston & A. Horse R. Co.* 89 Me. 585, 36 Atl. 1056; *Cleveland, C. & U. R. Co. v. Keary*, 3 Ohio St. 209.

The absence of any fault on the part of the plaintiff may be inferred from the circumstances, and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration.

Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 114.

If the character of an act by which one exposes himself to peril is to be judged by its result alone, a person would in most cases be condemned as negligent who would voluntarily place himself in a position of possible danger, if harm should come to him.

Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 332; *Loucks v. Chicago, M. & St. P. R. Co.* 31 Minn. 526, 18 N. W. 651; *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 369, 37 L. R. A. 529, 70 N. W. 1018; *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *Langhoff v. Milwaukee & P. du Oh. R.*

Co. 19 Wis. 516; Thoresen v. La Crosse City R. Co. 87 Wis. 597, 58 N. W. 1051; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 255, 40 N. W. 165; 2 Thomp. Neg. p. 1172; *Johnson v. St. Paul City R. Co.* 67 Minn. 260, 36 L. R. A. 580, 69 N. W. 900; *Watson v. Minneapolis Street R. Co.* 53 Minn. 551, 55 N. W. 742; *Newson v. New York C. R. Co.* 29 N. Y. 383; *Gordon v. Grand Street & N. R. Co.* 40 Barb. 540; *St. Louis, V. & T. H. R. Co. v. Dunn*, 78 Ill. 197; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Robinson v. Western P. R. Co.* 48 Cal. 409.

This case, under any theory of it, was at least for the jury.

Kosluch v. St. Paul City R. Co. 78 Minn. 459, 81 N. W. 215; *Lang v. Houston, W. S. & P. Ferry R. Co.* 75 Hun, 151, 27 N. Y. Supp. 90; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 580, 9 N. E. 263; *McClain v. Brooklyn City R. Co.* 116 N. Y. 460, 22 N. E. 1062; *Erd v. St. Paul*, 22 Minn. 443; *Hooper v. Great Northern R. Co.* (Minn.) 83 N. W. 440; *Hendrickson v. Great Northern R. Co.* 52 Minn. 340, 54 N. W. 189; *Struck v. Chicago, M. & St. P. R. Co.* 58 Minn. 298, 59 N. W. 1022; *Consolidated Traction Co. v. Glynn*, 59 N. J. L. 432; *Carroll v. Minnesota Valley R. Co.* 14 Minn. 57, Gil. 42; *Fonda v. St. Paul City R. Co.* 71 Minn. 438, 74 N. W. 166; *Callahan v. Philadelphia Traction Co.* 184 Pa. 427, 39 Atl. 222; *Walls v. Rochester R. Co.* 92 Hun, 582, 36 N. Y. Supp. 1102; *Wharton, Neg. § 420; Beach, Contrib. Neg. § 163; Hoge v. Chicago & N. W. R. Co.* 62 Wis. 666, 23 N. W. 14; *Farrell v. Waterbury Horse R. Co.* 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; *York v. Maine C. R. Co.* 84 Me. 117, 18 L. R. A. 60, 24 Atl. 700; *Bronson v. Oakes*, 22 C. C. A. 520, 40 U. S. App. 413, 76 Fed. Rep. 737; *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 36 L. ed. 489, 12 Sup. Ct. Rep. 679; *Ernst v. Hudson River R. Co.* 35 N. Y. 9, 90 Am. Dec. 761.

Lovely, J., delivered the opinion of the court:

Action for damages sustained by plaintiff while attempting to take passage on one of defendant's Interurban cars. Plaintiff had a verdict. After motion for judgment upon the verdict, or for a new trial in the alternative, which was denied, defendant appeals.

In adopting the required inferences in favor of the verdict, the following facts must be accepted as true on this appeal: The Interurban electric line between St. Paul and Minneapolis runs over University avenue upon double tracks, the eastern-bound cars running on the south and the western-bound cars on the north track, making it necessary for St. Paul passengers approaching a car from the north side of the avenue to cross both tracks in order to enter the car gate, which opens on the south side on the stoppage of the car. At the first stopping place west of the Minnesota Transfer Bridge there is a crosswalk leading from the sidewalk on the north of the avenue transversely across the same to plank platforms, 16 feet wide, on 51 L. R. A.

either side of the car tracks, which were placed there by defendant. There was no sidewalk along the south side of the avenue, and the only purpose of the crosswalk or the plank platforms referred to was the convenience of passengers who had occasion to get on or off the cars at that point. The distance from the north sidewalk to the planking on the south side is 68 feet. At the time of the accident all cars running over the Interurban line were required to stop at this point upon signal, and the public were apprised of this fact by a sign placed upon one of defendant's adjacent electric poles, which reads, "Electric trains stop here." There were numerous business places and dwellings in the vicinity, and frequent occasion to stop the cars at this place, which is commonly known as "Minnesota Transfer." At the time in question the plaintiff had been visiting friends near the Minnesota Transfer, and had gone to that point from St. Paul on the afternoon in question. Returning, about 11 o'clock at night, she and two gentlemen friends went to the point on the north side of the avenue sidewalk where the plank crosswalk leaves the same for the street-car platforms. At this point an Interurban car coming from Minneapolis was discovered by its headlight approaching, more than 700 feet distant. One of the gentlemen (William Ryan) left plaintiff, and ran rapidly across the tracks to the south platform, for the purpose of signaling the car to stop. Plaintiff immediately followed, walking at a quick pace, supposing that she would have ample time to reach the platform before the arrival of the car. Ryan, standing on the platform, signaled the car with his hands in the usual manner several times. As near as the evidence can justify estimates of distances, the car was 400 feet away when Ryan commenced signaling. The headlight of the car was burning brightly at the time, and enabled the motorist to see ahead 400 or 500 feet. The plaintiff, in passing to the platform, looked in the direction of the approaching car, between the north rail and the sidewalk, and also looked again while she was passing over the north rail, and says that it seemed to her at both times that the car was slackening speed. The glare of the headlight was so strong that she was unable to distinctly determine either its distance or speed, but was inclined to believe, from the signals that she had seen given for her benefit, that the car was coming to a stop, and, relying upon this fact, and that she would have time to cross the tracks in safety, kept on until at the moment of leaving the south rail she was struck and seriously injured by the approaching car, which was running at the rate of 45 miles an hour, and was not stopped until 300 feet after the collision. There was evidence tending to show that the maximum rate of speed at this crossing, where no stoppage was to be made, was 20 miles an hour. The car in question had an admitted speed capacity of 45 miles an hour, and there is nothing improbable in the view that it

was running at that rate of speed at the time of the accident.

The serious contention on the part of defendant is that the plaintiff was guilty of contributory negligence in passing in front of the car. If it is so clear, as a matter of law, that plaintiff's conduct was negligent, under the circumstances detailed, it is our duty to set the verdict aside and order a new trial. If not, the jury were the proper arbiters to determine this question, and we have no right to interfere with their conclusion. It must be conceded, in reviewing this record, that the defendant was negligent in disobeying proper signals, and in running its car at a reckless rate of speed over the crossing. Again, at the time the signal to stop was given by Ryan, for plaintiff's benefit, she had no apparent reason to doubt that it would be obeyed, or to doubt either that the car was running at its usual rate of speed at that place. If such had been the fact, there is no doubt that she would have had ample time to have safely passed over the tracks to the platform, which was the place provided by defendant to receive her as a passenger. It may be conceded that if the plaintiff was aware that the car was running at its full speed, and knowingly took chances in rushing before it, her conduct would have been negligent, but this is far from being clear. The evidence shows that the injured lady was above the average stature, and, with her wearing apparel, it would have been extremely difficult for her in the night-time, to have moved faster than a quick walk. It is true that she moved rapidly from the sidewalk to the south platform, but not more so than is usual among people taking passage on electric cars, the movements of which are often characterized by haste, in an anxiety to make quick time. She states that she walked quickly, for fear that she would be left, which supposition is not unreasonable. She might not, in the night-time, accurately determine the speed of the approaching car by its headlight. Neither do we think the claim of counsel that she must have known of its speed from observing the flash of the car lights upon the poles by the side of the track is certain. She was not required, if she could do so, to make nice calculations of that kind. Nor, as a matter of law, can we hold that plaintiff was bound to divert her steps from the crosswalk, which was the usual and proper approach to the platforms, in order to go around to the rear of the car. Had she done so, the car might not have waited for her, and such a diversion required her to leave a safe and convenient place for foot travel to pass upon the uneven irregularities of the highway, and to pick her way over four tracks, and to adopt this insecure course upon a supposition that the car would disregard proper signals, and run by her at a reckless rate of speed. Had there been good reason for such a supposition, she should not, and probably would not, have approached the car at all. After plaintiff had observed the car the last time before she was struck, the inference is not unreasonable, 51 L. R. A.

and may have been adopted by the jury, that she walked upon the south track when the car was 100 feet distant. If she then knew it was running at 40 miles an hour, and was disregarding her signals and would not stop, it might be said, as a matter of law, that she was negligent in going forward; but we cannot, without weighing diverse speculations and usurping the functions of the jury, decide upon the effect of this headlight upon her vision, or the reasonableness of her necessarily instantaneous views at the time. It may have been extremely difficult to discriminate between the effects of a headlight at night, and decide upon its probable distance from her, or to calculate upon the rate of speed of the car; and it must not be forgotten either that the judgment of plaintiff in these respects may have been influenced by the reasonable supposition that the car was running at its proper speed, and that it would stop upon the signals given for her benefit. We cannot hold, upon the record, that such suspicions as would convict this plaintiff of contributory negligence must be indulged in by those who patronize defendant, to relieve it from the consequences of its own misconduct. Amidst the complicated affairs of city life in the use of street cars by their patrons, the same confidence should be indulged in in behalf of passengers that is due on the other hand to the company. Neither are obliged to assume that legal duties by the other will be neglected, where the instincts of self-preservation by the traveler or the demands of duty by the company require the exercise of proper care; and, under the circumstances of this case, it was not, as a matter of law, negligence for the plaintiff to assume and rely upon the fact that defendant would perform its duty and pursue the regular and usual course.

We cannot, in passing upon the conduct of the injured lady, criticize her course of action, or censure her for want of care, because, in the light of subsequent events, it can be seen how she might have avoided the unfortunate accident; for, as expressed by high authority, "if the character of an act by which one exposes himself to peril is to be judged by its result alone, a person would in most cases be condemned as negligent who should voluntarily place himself in a position of possible danger, and harm should come to him." *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 332. It is always possible that injury may follow from the negligent acts of others, but to assume beforehand that it will occur in any case is more than the law demands in behalf of defendant, and requires a greater caution than the majority of us exhibit in the affairs of daily life. This reasonable rule has not been better stated abstractly than by this court in an early case, where it was held that "one who is called upon to exercise care to avoid danger from the acts of others may, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they will act with reasonable caution, and

not with culpable negligence." *Loucks v. Chicago, M. & St. P. R. Co.* 31 Minn. 526, 18 N. W. 651, citing *Ernst v. Hudson River R. Co.* 35 N. Y. 9, 90 Am. Dec. 761; *Reeves v. Delaware, L. & W. R. Co.* 30 Pa. 454, 72 Am. Dec. 713; *Kennayde v. Pacific R. Co.* 45 Mo. 253; *Langhoff v. Milwaukee & P. du Ch. R. Co.* 10 Wis. 490. The case last cited was one of collision between a pedestrian and locomotive. It was argued by eminent counsel, and, in the opinion of the court, Dixon, Ch. J., appropriate to the view we have taken, says: "It must be assumed that she [the injured lady] knew the law, and, knowing it, she might properly assume that the defendants were acting in conformity to its provisions. Seeing the trains at such a distance from the intersection of the street upon which she was passing that she might safely cross if they had been moving at a lawful rate of speed, she might well have exercised less care and watchfulness, without the imputation of negligence, than if there had been no such limitation. It is not an easy matter for one standing upon or near the track to judge correctly of the speed of an approaching train." The case at bar is stronger in the facts which relieve plaintiff from contributory negligence than the one last cited. In this case, added to the right to expect a reasonable and customary speed, plaintiff also had a right to suppose that the street car would stop for her at the time she passed on to the catastrophe she could not anticipate. Later decisions of courts of the highest respectability affirm these views. *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 369, 37 L. R. A. 529, 70 N. W. 1018; *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *St. Louis, V. & T. II. R. Co. v. Dunn*, 78 Ill. 197; *Cleveland, O. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 80 N. E. 37; *Robinson v. Western P. R. Co.* 48 Cal. 409; *Johnson v. St. Paul City R. Co.* 67 Minn. 230, 36 L. R. A. 586, 69 N. W. 900; *Watson v. Minneapolis Street R. Co.* 53 Minn. 557, 55 N. W. 742. We might sustain this reasonable rule by a citation of many other authorities, but it is unnecessary. The charitable presumption that our fellow men will treat our rights to personal safety with due respect is founded in the instincts of nature, the demands of necessity, the dictates of humanity, as well as the practical experiences of common life; and we shall not disturb its beneficial influence by holding that, under the circumstances of this case, the consequences of defendant's negligence can be visited upon the victim for her mistaken belief that its servants would do their duty in her behalf.

We are aware that there are decisions (cited from this court) where it has been held that parties approaching a railway crossing at grade must, at their peril, look and listen for approaching trains; also, that parties crossing the street in front of a rapidly approaching car have no right to rush in front of it, and do so at their peril. Leading cases to support this view are *Oarney v. Chicago, St. P., M. & O. R. Co.* 46 Minn. 220, 48 N. W. 912; *Hickey v. St. Paul* 51 L. R. A.

City R. Co. 60 Minn. 119, 61 N. W. 893; *Torrien v. St. Paul City R. Co.* 70 Minn. 532, 73 N. W. 412. The duties of a traveler at a steam-railway crossing and of a pedestrian on a street used by a street-railway company are not parallel, in several respects. The distinction has been pointed out in *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902, to which we refer; but, in the several cases cited above where recovery was denied, the misfortunes which were held to be remediless occurred in each case where it was apparent that the injured party had no right to suppose that the car would stop, but endeavored, without excuse or being misled by the defendant, to pass in front of it. We have noted the facts above which distinguish the case at bar from those referred to, viz., that the car in this case was expected to stop, and that plaintiff had a right to indulge in that expectation, and, to a certain extent, regulate her conduct accordingly.

In conclusion, we emphasize the fact that this is a review of the action of a jury, and has passed the critical consideration of the able and impartial trial judge. A different question is therefore presented to us than was before the jury or the trial court. We repeat, if it conclusively appeared that plaintiff was herself guilty of the negligence that was the proximate cause of her injury, it would be our duty to set the verdict aside; but upon this contention there were opposing views to be taken of her conduct, upon which the opinions of candid men may differ.

The jury have said plaintiff was not negligent, the trial court approves that finding, and we cannot disturb the result without depriving the successful party of her constitutional right of trial by jury, which we decline to do.

The order of the Trial Court is affirmed.

Collins, J., dissenting:

I dissent. The place where the accident occurred is well known to all who travel on the Interurban car line along University avenue. It is about 700 feet west of the long bridge over the Minnesota Transfer Company's tracks, and, although within the limits of the city of St. Paul, the neighborhood is wholly suburban in its character,—so much so that no streets have been opened across the avenue for more than 1,200 feet on either side of the point where plaintiff was injured, and the cars are not stopped for passengers, except at intervals of about 700 feet; and this without regard to intersecting streets, which exist on paper only, signs being put up to indicate these stopping places. On the south side of this avenue, and just west of the bridge, are three or four buildings; and then for a space of about 400 feet east of the point where plaintiff was injured, and for about 1,000 feet west therefrom, there are no buildings in sight, except defendant's car barn and a few stock sheds and cornercribs; the country being open commons. North of the avenue there are a few buildings at the end of the bridge, and then west for a space of about 200 feet to the place of the accident, and for over 800 feet

to the west of that place the only building on the avenue is a small hotel or boarding house. Back from the avenue, northerly, some 300 or 400 feet, are a half dozen houses. It is safe to say that there are not to exceed one dozen dwellings of any description within 1,000 feet of the point where plaintiff was injured. The *locus in quo* was in fact no different from that involved in *Wosika* against this defendant ([Minn.] 83 N. W. 386), except, probably, that more people travel on the University avenue line of electric cars than upon the Seventh street line. From the bridge for nearly a mile westerly the avenue is nothing more than a well-traveled country road, as was Seventh street where the *Wosika* accident occurred. The night was very dark. The plaintiff had never gotten on or off the cars at that point, and was comparatively a stranger in that locality. It was after 11 o'clock in the evening when she and her companions discovered the car approaching, with a very bright headlight, in plain sight. They were then on the north sidewalk of the avenue, at the end of the crosswalk which led to the planked stopping place, and at least 70 feet from the southerly rail of the south track, on which was the approaching car. In the opinion of the witness Ryan, the car, when they first saw it, was about 700 feet away, which would locate it about 300 feet west of the hotel before mentioned. Ryan ran immediately, as fast as he could, to the south, crossed the tracks until he came to the south rail, and there gave his first signal to the motoneer. He was in plain sight at that time, because of the powerful headlight, and the car was 400 feet away,—about opposite the hotel. He continued his signals, and plaintiff saw this until the car was within 150 feet, when the light was so strong in his eyes that he was obliged to step to one side. When plaintiff first saw the car, "it looked to be quite a ways. I couldn't say how far." She knew that Ryan ran as fast as he could to signal, and she saw the signals given. She followed Ryan "on a quick walk," looked up when she was on the north track, and saw the car crossing about 200 feet distant (halfway to the hotel), "looked as though it was slacking up." It made a good deal of noise, and she heard it. "I couldn't tell the rate it was coming," and "I went right on, and when I crossed over the second track I looked again up the track, and I couldn't see anything, for the headlight was so strong it seemed to kind of—I couldn't see the car then." On cross-examination, questions were asked, and the plaintiff answered, as follows:

Q. And that was while you were in the middle of the track,—the first track?

A. Of the first track.

Q. And you looked down and saw that car, and saw the headlight on it, and saw it running?

A. No; I seen it when I was in the middle of the track. I seen it more to the side.

Q. You could see the side and see the front, and what kind of a car it was?

51 L. R. A.

A. Yes; I could see the car was coming.

Q. And then you took some steps until you got up to, or close to, the last track?

A. Yes; just as I was going over the first track I looked up again, and I couldn't see anything but the headlight.

Q. Well, that shone right out in your face?

A. Yes; it was very bright there.

Q. Of course, you had seen that when you looked the first time?

A. Not the headlight. Of course, I seen it, but it didn't affect my eyes any.

Q. But you saw it was bright and strong?

A. Of course, it was bright, but not so strong as when I was in front.

Q. And when you looked again, you say that—

A. I looked that once there, when I was on the last track.

Q. And you looked again before you crossed the last track?

A. Yes, sir; I supposed the car was stopping, because Mr. Ryan was right there to stop it, and I thought it was stopping.

Q. Now let me understand you. Now, you looked when you were in the middle of the first track?

A. Yes, sir.

Q. No question about that. Looked square at this car then, and you took a step or two more?

A. Yes, sir.

Q. And you looked again?

A. Yes, sir.

Q. And you were hurrying for fear that that car would run away?

A. I was afraid I wouldn't be on the right side to take the car. I thought it wouldn't wait for me if I wasn't there.

Q. And that is the reason you hurried across the track in front of the car?

A. Well, yes; certainly. I thought the car was stopping.

Again, when examined concerning her knowledge of the local custom to stop after the rear of the car had crossed the intersecting street, or had reached the place to get on and off:

Q. What I want to get at is, didn't you know that that car, or didn't you expect that car, to stop, with the rear end of it at the point where you were crossing?

A. Well, I didn't know it might go further than what I was.

Q. And you expected, of course, it would go at least that far, so that the rear end would be where you were crossing?

A. I thought it had already stopped before. I thought it had already stopped when I seen the light. I shouldn't cross, certainly, if I hadn't thought it had stopped.

Later on the last answer was qualified by the witness stating that she meant to say, not that the car had stopped, but that it had slackened its speed. And finally she testified: "Well, I thought, by the looks of it, it was going to. It was slacking up. I thought I was perfectly safe to cross it,

because I didn't think I was in any danger whatever, just the same as if you cross downtown here on a crossing when cars is coming. I thought I was all perfectly safe, as long as he was ahead of me, to flag the car, and would have been over all right if he had slacked up the least bit, because I was most over."

Of course, there was the usual contradiction between witnesses, especially as to the rate of speed attained by the car, and as to when Ryan gave the first signal; the motoneer claiming, on the last point, that he did not signal until it was too late to stop at the usual place. But, taking the most favorable view of the case made out by the plaintiff, I regard it as the clearest example of contributory negligence, almost amounting to criminal carelessness, ever presented in this court. I am also of the opinion that well-established rules long since adopted here, and in the past consistently and strictly adhered to and applied, have been departed from and practically wiped out of existence. I am also of the opinion, and cases hereinafter cited will show, that the doctrine of contributory negligence, as laid down in the courts in other jurisdictions, has either been steadily misapplied, or that the decision here is radically wrong and directly at variance with what has been regarded as settled law. This is not a case where the person injured did not look or listen for the car, nor one where she came suddenly upon an unexpected, unknown danger, nor one where, because of some obstruction, the approaching car could not be seen. On the contrary, she knew the car was coming, for she saw it when she was 70 feet from the rails on which it was running. She had it in mind as she crossed the street, and she did not forget or neglect to again look when she was between the rails of the north track, 10 feet from a dangerous place, and in perfect safety. The headlight then blinded her eyes so that she could not tell where the car was, or how far distant, and yet she persisted in hastening in front of it, simply because she was anxious to be on the side on which the gates opened, that she might promptly get on board. She acted on the belief, as she testified, that the car had stopped, or was stopping, in response to Ryan's signal. This excuse might be given by any person who runs in front of a moving car or locomotive as it approaches a stopping place or station. There is not a recent case in the books in which such an excuse has been held adequate. The car had not stopped, nor was it stopping, when she attempted to cross the track. It was going at the time at the very unusual and rapid rate of speed of about 40 miles per hour. It seems incredible that she could have thought or been led to believe that the car had stopped or was stopping, or even slackening up, when it was in fact running at such a furious speed. Had she paid the slightest attention to the car, she could not have failed to discover the great danger and peril of attempting to cross in front of it. And the conclusion is inevitable that she was ut-

51 L. R. A.

terly unmindful of her surroundings or situation. It may be true that she supposed the car would stop, but she had no right to go blindly upon the track in reliance upon such supposition. Again, there was no reason whatever for hastening across the track. This was not a case where, if the car had stopped, plaintiff would have crossed the rails in front of it; for its usual stopping place was beyond, or east, of the point where she crossed. If this point had been west of the point where plaintiff hastened into the dangerous place, there would have been some excuse for her carelessness, although insufficient in law; for it might have been argued with some plausibility that she would have been justified in assuming that the car would stop at its usual place, before it reached the point where she crossed. Nor was it at all necessary for her to cross in order to give the signal, for that had been done by Ryan. She knew this, and, as she says, thought the signal had been acted upon by the motoneer. She could have stood in a place of safety, just where she was, when the light blinded her eyes, until the car passed; and when it had stopped she could have safely stepped in its rear without stepping off the planking, and have reached the gates before they were fairly open. Her further reason for crossing, that she was afraid the car would not wait, is equally as untenable; for Ryan was on the right side for the express purpose of signaling and holding the car for his companions. Even if there was insufficient time for her to go behind the car and board it, the exercise of reasonable prudence would have demanded that she should remain out of the way of a car of the class which are ordinarily run on the Interurban line, of nearly 200-horse power each, of great weight, capable of seating 60 people, and with a speed capacity of from 40 to 45 miles an hour.

The established doctrine of this court in reference to contributory negligence, before referred to, may be found stated in a number of cases. Perhaps that of *Carney v. Chicago, St. P. M. & O. R. Co.* 46 Minn. 220, 48 N. W. 912, is more directly in point than any other. Carney was killed when attempting to cross defendant's tracks on a street immediately contiguous to its depot building. The facts were that the night was dark, and there was some snow in the air. Passenger trains were accustomed to approach the depot near where the accident occurred at a slow rate of speed,—at from 3 to 5 miles an hour. On the occasion in question there was evidence that the speed of the train was 40, 50, and even 100 miles an hour. The court said: "It seems to us to be so self-evident that Carney did not exercise the ordinary care which the law requires of one in his situation,—that of using his own senses of sight and hearing as a means of protection from a known danger,—that we would not be justified in sustaining this verdict. . . . He was walking, and his movements wholly under his own control. There was nothing in the situation to distract his attention, or to ex-

cuse a failure on his part to observe, if he could do so, before crossing the track, whether the train might not be so near at hand as to make it unsafe to cross. The fact that the train was accustomed to come up to the station at a slow rate of speed would not excuse him from the duty of attention at such a place. While it is true that the care which one ought to exercise may be measured to some extent by the danger to be apprehended, that does not justify one in needlessly placing himself in the track of such dangerous machinery, without watchfulness suitable to such a situation, relying implicitly upon the probability that a train will not approach at a rapid rate of speed. While it might be deemed probable, from what was customary, that trains would come up to the depot slowly, one could not be certain that this would always be so." See also *Studley v. St. Paul & D. R. Co.* 48 Minn. 249, 51 N. W. 115; *Arine v. Minneapolis & St. L. R. Co.* 76 Minn. 202, 78 N. W. 1108, 1119. These were cases arising out of accidents upon steam railways, but it seems to me that it is wholly immaterial what power is used,—whether steam or electric,—and that it is also immaterial whether the injured party is guilty of contributory negligence at the crossing of a country road or in a city street. No such distinction was made in *Hickey* against this defendant (60 Minn. 119, 61 N. W. 893), in which it was assumed that the electric car was running at an unreasonable and unlawful rate of speed, and it was held that "a person about to cross a street along which cars are propelled by electricity, having full appreciation that to do so he must act hastily or be run down, is guilty of negligence *per se* if he rushes upon the track without listening or looking for the whereabouts of a car which he expects and knows is rapidly approaching the place of crossing." Another case in which the plaintiff failed to look and listen for a street car, and was run down, is *Terien* against this defendant (70 Minn. 532, 73 N. W. 412). He was guilty of contributory negligence *per se*, which precluded a recovery. See also *Greengard* against this defendant (72 Minn. 181, 75 N. W. 221), and *Wosika* against this defendant (Minn.) 83 N. W. 386. It should be said in passing that in these cases the injured parties failed to look, and therefore failed to see the approaching cars, and for that reason were held guilty of contributory negligence, while in this case the party did look, and not only did see, but saw so indubitably that she was blinded by the headlight, and then immediately disregarded the warning. The lesson to be gathered from the main opinion is that it is safer, in case injury results, for the person who rushes in front of a car to see it and appreciate its presence, than it is to ignore its approach by failing to look, or, looking, by failing to see. Carelessness and indifference which result in ignorance of the impending danger are of no avail as 51 L. R. A.

against a charge of contributory negligence, but full knowledge thereof and a total disregard of such knowledge relieve and release the party. Referring again to cases outside of this jurisdiction, it has been said that, as the use of electricity as a motive power has increased the degree of care to be exercised by street-railway companies, "the reverse of the proposition would seem to be reasonable; that is, that by the application of electricity as a motive power for street cars, travelers, either on foot or in vehicles, should be held to a higher degree of care than before its use." *Siek v. Toledo Consol. Street R. Co.* 16 Ohio C. C. 393. And it has been held that a traveler crossing a street on which there are street-car tracks should be required to observe the same degree of care as a street-car company is required to exercise. *Burgess v. Salt Lake City R. Co.* 17 Utah, 406, 53 Pac. 1014. But, whether these propositions are correct or not, the following very recent cases are authority for the statement hereinbefore made,—that this plaintiff herein should be held guilty of contributory negligence as a matter of law: *Jacksonville R. Co. v. Lamb*, 86 Ill. App. 487; *Griffith v. Denver Consol. Tramway Co.* 14 Colo. App. 504, 61 Pac. 46; *Helber v. Spokane Street R. Co.* 22 Wash. 319, 61 Pac. 40; *Knoker v. Canal & C. R. Co.* 52 La. Ann. 806, 27 So. 279; *Blaney v. Electric Traction Co.* 184 Pa. 524, 39 Atl. 294; *Watkins v. Union Traction Co.* 194 Pa. 564, 45 Atl. 321; *Lyons v. Bay Cities Consol. R. Co.* 115 Mich. 114, 73 N. W. 139; *Macon & I. Street R. Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563; *Hickman v. Nassau Electric R. Co.* 36 App. Div. 376, 56 N. Y. Supp. 761; *May v. Metropolitan Street R. Co.* 26 Misc. 748, 57 N. Y. Supp. 277; *Petri v. Third Ave. R. Co.* 30 Misc. 254, 63 N. Y. Supp. 315; *Law v. Lake Shore & M. S. R. Co.* 120 Mich. 115, 79 N. W. 13; *Bennett v. Detroit Citizens' Street R. Co.* (Mich.) 7 Det. L. N. 83, 82 N. W. 518.

The two cases last cited emphasize what has been said here concerning an enforcement of the rule, because the persons injured were bicycle riders, and all courts have required a higher degree of care upon the part of pedestrians, who have easy and prompt command of their movements, than of persons who are riding or driving or wheeling. I am opposed to the doctrine that although a failure to look for an approaching car, and, as a consequence, a failure to see it, will not relieve an injured party from the charge of contributory negligence, full and complete knowledge of such approach will excuse and avoid a reckless disregard of such knowledge. The order appealed from should be reversed.

Brown, J. I concur with Mr. Justice Collins.

Rehearing denied.

Walter C. BALDWIN *et al.*, *Respts.*,
v.
GREAT NORTHERN RAILWAY COM-
PANY, *Appt.*

(.....Minn.....)

- *1. A common carrier, after acceptance of freight for shipment from a place within the state to a place without, is not required to forego the right to transport the same and receive compensation therefor, by reason of the service upon it of a garnishee summons in a suit by a third party against the owner of such goods.
2. The service of a garnishee summons in such a case upon the carrier, after the goods have been received, placed in a car for transportation, and a bill of lading issued by the carrier to the shipper, although the car has not been as yet put in the train, does not excuse the carrier from its duties as such, or authorize an unreasonable delay in forwarding the property to its destination without the state.
3. *Stevenot v. Eastern R. Co.* 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256, is decisive of the rule above stated, and is approved and followed.

(October 23, 1900.)

APPPEAL by defendant from a judgment of the Municipal Court of St. Paul in favor of plaintiffs in an action brought to recover damages for injuries caused by the alleged wrongful detention of property placed in defendant's possession for transportation. *Modified.*

The facts are stated in the opinion.

Messrs. Squires & Begg, for appellant.

Seizure of shipment under garnishment process is a good defense, provided notice be seasonably given thereof.

Cooley v. Minnesota Transfer R. Co. 53 Minn. 327, 55 N. W. 141; *Langdon v. Thompson*, 25 Minn. 509; *McVeagh v. Atchison, T. & S. F. R. Co.* 3 N. M. 327, 5 Pac. 457; *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Bliven v. Hudson River R. Co.* 36 N. Y. 403; *Roberts v. Stuyvesant Safe Deposit Co.* 123 N. Y. 57, 9 L. R. A. 438, 25 N. E. 294; *Stiles v. Davis*, 1 Black, 101, 17 L. ed. 33; *French v. Star Union Transp. Co.* 134 Mass. 288; *Illinois C. R. Co. v. Cobb*, 48 Ill. 402; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 290, 19 N. W. 72; *Landa v. Holck*, 129 Mo. 663, 31 S. W. 900; *Gen. Stat.* 1894, §§ 5309, 5325.

A common carrier is not an insurer against delay. It is liable for delay only when the same is due to its negligence.

Geismer v. Lake Shore & M. S. R. Co. 102 N. Y. 563, 7 N. E. 828; *American Exp. Co. v. Smith*, 33 Ohio St. 511.

Due and timely notice of the seizure and detention of the car of potatoes was given to plaintiffs.

McVeagh v. Atchison, T. & S. F. R. Co. 3 N. M. 327, 5 Pac. 457.

*Headnotes by LOVELY, J.

NOTE.—As to liability of carrier to garnishment, see the earlier case in this series of *Stevenot v. Koch* (Minn.) 28 L. R. A. 600, and *note*, 51 L. R. A.

The potatoes were not in transit when garnished.

Landa v. Holck, 129 Mo. 663, 31 S. W. 900.

The goods were not in transit to a point outside of the state, within the meaning of the *Stevenot Case*.

Ortti v. Minneapolis & St. L. R. Co. 36 Minn. 396, 31 N. W. 519.

Goods in transit from one point to another within the state are subject to garnishment.

Adams v. Scott, 104 Mass. 164; *Landa v. Holck*, 129 Mo. 663, 31 S. W. 900; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 19 N. W. 72; *Western R. Co. v. Thornton*, 60 Ga. 300; *Montrose Pickle Co. v. Dodson & H. Mfg. Co.* 76 Ohio, 172, 2 L. R. A. 417, 40 N. W. 705; *Illinois C. R. Co. v. Cobb*, 48 Ill. 402; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Michigan O. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399; *Pennsylvania R. Co. v. Pennock*, 51 Pa. 244.

Mr. O. J. Cook, for respondents:

The potatoes were in transit when garnished.

Stevenot v. Eastern R. Co. 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256.

The shipment was a subject of interstate commerce, protected by, and subject only to, the regulations of the United States Congress, which is exclusive.

Ray, Negligence of Imposed Duties, 83; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 125 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The option of carrier to retain goods in its hands for transit to a point without the state, being exercised under *Gen. Stat.* 1894, § 5325, by actual transit to such point, takes the goods out of the jurisdiction of this state.

Stevenot v. Eastern R. Co. 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256.

The delay of five days caused by defendant, and that the potatoes were in good condition when delivered at Anoka for shipment, but were decayed on arrival in Chicago, is admitted, which establishes a prima facie case of negligence by the carrier.

Shea v. Minneapolis, St. P. & Ste M. R. Co. 63 Minn. 229, 65 N. W. 458.

Plaintiffs are entitled to recover necessary expense incurred, by reason of defendant's negligence, in efforts to prevent loss.

Sutherland, Damages, 5.

There is a legal presumption of negligence in all cases of all loss not occasioned by act of God or the public enemy.

Christensen v. American Exp. Co. 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

The measure of damages is the difference between the market value when delivered and when they should have been delivered,—between sound and unsound goods,—both values computed at the time and place at which the goods should have been delivered.

1 Am. & Eng. Enc. Law, p. 85; *Shea v. Minneapolis, St. P. & S. Ste M. R. Co.* 63 Minn. 228, 65 N. W. 458; *Sedgw. Damages*,

§§ 198-853; Sutherland, Damages, § 769, and cases.

Lovely, J., delivered the opinion of the court:

This is an appeal from a judgment of the municipal court of St. Paul in favor of plaintiffs, who complain of the unlawful detention by defendant of a carload of potatoes while being transported over its line from Anoka, in this state, to Chicago, Illinois. This review is limited to the question whether the findings of fact support the conclusions of law upon which the judgment rests.

The facts found by the court are, in brief, as follows: The plaintiffs were partners in the produce business. They delivered to defendant, at its station in Anoka, a quantity of potatoes for transportation to Chicago, which were loaded in one of defendant's cars, and placed on a side track for shipment. The loading had been completed, the defendant had accepted the potatoes for transportation, and had issued to plaintiffs its bill of lading, in which the place where the same was received and the place of destination were designated, and the plaintiff's firm was named as the consignor as well as the consignee of the property. While the car of potatoes was still awaiting shipment on a regular train of defendant's road, but before it had been placed therein for that purpose, a garnishee summons, properly issued, was duly served upon defendant in a suit against plaintiffs by a third party, upon the claim, regularly made, that the property of plaintiffs, above referred to, should be arrested, and held by defendant for the benefit of the plaintiff in that suit. The carload of potatoes was hauled by defendant to St. Paul, and within a reasonable time notice was sent to plaintiffs, at Anoka, of the service of the garnishee summons upon the company. After the arrival of the potatoes at St. Paul, they were detained and held by defendant in observance of the garnishee summons, and plaintiffs were again notified (this time at Chicago) of the fact and reason of such detention; whereupon one of the plaintiffs came to St. Paul from Chicago, and, upon negotiations with defendant (while reserving the right to claim damages, if any, for delays), secured the shipment of the car to its destination, when the potatoes were sold at a loss of \$45.52, occasioned by the detention of the same for five days at St. Paul, which detention was unreasonable and unnecessary unless the defendant was required to retain and hold the same by the garnishee proceedings. The trial court held that the potatoes were perishable, were in actual transit, were injured by the unnecessary delay, and that the garnishee service furnished no excuse for their detention; also that the expenses of the trip by one of the plaintiffs to St. Paul to secure their shipment was a proper item of claim by plaintiffs; and ordered judgment for the loss on the potatoes as well as the expenses of such trip.

We think there is no doubt that the find-

ings of fact show that the delay occasioned the damages to the extent found, and, if it is not excused by the garnishment, the conclusions of the court and judgment thereon to that extent must be sustained; and this view involves the question whether, under the law as previously laid down by this court, the garnishment required the defendant to retain the car of potatoes subject thereto. It was the unquestionable duty of the common carrier to fulfil its contract of carriage unless it was prevented by legal process from doing so, and this is the question which we are required to determine in this case. In *Stevenot v. Eastern R. Co.* 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256, it was held that "property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons." This rule was held in a case where the property was in a train already made up, standing on a siding at the place of shipment. The defendant in that case disregarded the garnishee summons, and transported the property to its destination, where it was then delivered to the consignee.

It is urged by the defendant that, the court having found the fact that defendant's line terminated at St. Paul, its duty to the plaintiffs as a common carrier ended there, and that it owed no further obligation to the plaintiffs than to transport their property to that point (within the state), which fact would distinguish this from the *Stevenot Case*. The answer to this contention seems to us very clear. Defendant had contracted as a common carrier to transport the potatoes to Chicago, and was bound by that contract, whether it hauled its car over its own road or other lines.

It only remains to be considered whether defendant, after having received the carload of potatoes on its side track, and given its bill of lading to the shippers, was then required to forego its rights, and hold the property because it had been garnished, instead of transporting it to the place where it was stipulated between the parties it should be delivered, which was its plain right, under the terms of the garnishee statute. Gen. Stat. 1894, § 5325. We are unable to distinguish this case from the *Stevenot Case* in this respect. It is true that the car in that case had been placed in a train for shipment; in this case it was on the side track, to be placed in the train as soon as it arrived. But the contract between the parties for transportation had been completed, the bill of lading had been delivered to the consignors, and it was the privilege of the carrier, under the statute last cited, to retain the consigned property, and fulfil its contract with the shippers, which alone entitled it to compensation for carriage. For this reason the plaintiffs' creditor in the garnishee suit could not arrest it by that process so as to deprive the defendant of its right under such contract.

Upon the facts found with reference to the trip of one of the plaintiffs from Chica-

go to St. Paul, we are unable to sustain the conclusion of law reached by the trial court. While under proper circumstances and upon proper proofs it might be held that it was necessary for one of the plaintiffs to come from Chicago to St. Paul to secure the release of the car, to diminish the damages in favor of defendant which would otherwise be suffered, yet the plaintiffs could not claim reimbursement for such expenses unless it was established that they were necessary and reasonable (1 Sutherland, Damages, § 88), which involves facts not found by the trial court. We hold, therefore, that the trial court was justified in its conclusion that plaintiffs were entitled to damages sustained by the diminution in the value of the potatoes occasioned by defendant's unreasonable detention of plaintiff's property, but that the judgment was erroneous in including the amount of the expenses from Chicago to St. Paul. It is ordered that the case be remanded, with directions for a new trial, unless plaintiffs consent to release the defendant from the payment of \$30, the sum allowed for such expenses, within ten days from the time the remittitur is returned, in which case the judgment is to be modified in that respect. In view of the particular facts of this case, we direct that no statutory costs be allowed to defendant on this appeal.

Judgment modified.

Re Will of Robert F. CUNNINGHAM, Deceased.

Emery H. CUNNINGHAM, *Resp't.*,

v.

Ripley L. CUNNINGHAM *et al.*, *Appts.*

(.....Minn.....)

*C. duly signed an instrument intended to be his last will and testament, two physicians being present at his request to attest as witnesses. C. was then sitting on the side of his bed, the paper lying on a book in front of him, the book being upon a chair. One of the physicians took the paper, and both stepped through a doorway into an adjoining room, and affixed their signatures at a table which stood 10 feet from the testator. He could have seen the table by stepping forward 2 or 3 feet, but did not do so. The attestation consumed not to exceed two minutes of time. The witnesses returned to the testator; their signatures were pointed out to him; he took the paper into his own hands, looked it over, and pronounced it "all right." *Held*, that Gen. Stat. 1894, § 4426, which requires that wills must be attested and subscribed by the witnesses in the "presence" of the testator, was sufficiently complied with.

(June 13, 1900.)

A PPEAL by contestants from a judgment of the District Court for Olmsted Coun-

*Headnote by COLLINS, J.

NOTE.—As to when will is sufficiently signed in presence of testator, see also *Ex parte Leonard* (S. C.) 22 L. R. A. 302.
51 L. R. A.

ty sustaining the admission to probate of the last will of Robert F. Cunningham, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas Fraser and George W. Somerville, for appellants:

No will shall be effectual unless attested and subscribed in the testator's presence.

Minn. Stat. 1894, par. 4426.

If this statute is to be changed it is the duty of the legislature to make the change; the court must construe it as it is.

Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069; *Re Ludwig* (Minn.) 81 N. W. 758; *Lewis v. Lewis*, 11 N. Y. 220.

Can this court say that the two witnesses could not fraudulently have substituted another will for the one signed by the testator, or have changed some of the provisions of the one signed by him had they felt so disposed, and then have palmed it off on the testator as his genuine will? The statute is intended to prevent the possibility of just such a transaction.

A subscription made in the same room with the testator is treated as *prima facie* in his presence, while a subscription made in another room is treated as *prima facie* not made in his presence.

29 Am. & Eng. Enc. Law, p. 217; Smith, Probate Law, p. 23; 2 Greenl. Ev. § 678; *Chase v. Kittredge*, 11 Allen, 53, 87 Am. Dec. 687; Schouler, Wills, 2d ed. §§ 319-342.

Where such subscription takes place in a room other than the one in which the testator signs, the subscription by the witness must actually be seen by the testator.

Mandeville v. Parker, 31 N. J. Eq. 242; *Hill v. Barge*, 12 Ala. 687.

A subsequent recognition by the witnesses of their signature in the presence of the testator will not cure the original omission to sign in his presence.

Lamb v. Girtman, 33 Ga. 289; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464; *Pawtucket v. Ballou*, 15 R. I. 58, 23 Atl. 43; *Hindmarsh v. Charlton*, 8 H. L. Cas. 100; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; 1 Redf. Wills, 3d ed. 246, note; *Reynolds v. Reynolds*, 1 Speers L. 253, 40 Am. Dec. 599; *Den ex dem. Compton v. Mitton*, 12 N. J. L. 70; *Combs v. Jolly*, 3 N. J. Eq. 625; *Mickle v. Matlack*, 17 N. J. L. 86; *Raglund v. Huntingdon*, 23 N. C. (1 Ired. L.) 561; *Edelen v. Hardey*, 7 Harr. & J. 64, 16 Am. Dec. 292; *Boldry v. Parris*, 2 Cush. 433; *Duffie v. Corridon*, 40 Ga. 122; *Watson v. Pipes*, 32 Miss. 467; *Rash v. Purnel*, 2 Harr. (Del.) 458.

The attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing if he wishes, without a material change of his position; and he must be mentally observant of the act while in progress.

Doe ex dem. Wright v. Manifold, 1 Maule & S. 294; *Russell v. Falls*, 3 Harr. & M'H. 457, 1 Am. Dec. 380; *Chase v. Kittredge*, 11 Allen, 53, 87 Am. Dec. 687; *Mandeville v. Parker*, 31 N. J. Eq. 242; *Witt v. Gardiner*,

158 Ill. 170, 41 N. E. 781; *Neil v. Neil*, 1 Leigh, 28; *Reynolds v. Reynolds*, 1 Speers L. 253, 40 Am. Dec. 599; *Graham v. Graham*, 32 N. C. (10 Ired. L.) 219; *Eccleston v. Petty*, Carthew, 79; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Hill v. Barge*, 12 Ala. 687; 20 Am. & Eng. Enc. Law, pp. 215, 217; Schouler, Wills, 2d ed. §§ 319, 342; Smith, Probate Law, 3d ed. 22; 1 Woerner, American Law of Administration, 40, 67; 2 Greenl. Ev. 636, 637; 1 Jarman, Wills, 5th ed. 221, 224, 6th ed. §§ 87, 90, p. 219; Beach, Wills, §§ 47, 49; 1 Redf. Wills, 4th ed. 244.

It would not be an attestation in the presence of the testator if he could not see the act of attestation, but merely understood from the surrounding circumstances that the act was taking place.

Schouler, Wills, 2d ed. § 342; *Witt v. Gardiner*, 158 Ill. 170, 41 N. E. 781; *Sturdivant v. Birchett*, 10 Gratt. 67; *Mendell v. Dunbar*, 109 Mass. 74, 47 N. E. 402.

Mr. Charles C. Willson, for respondent:

In England, prior to Henry VIII. (1509), nearly every man of any considerable property, dying at home in peace, was attended by the Catholic clergy, who administered extreme unction and usually drew his last will. In that extreme moment large bequests to the church, for masses and other holy purposes, were sure to be included.

Popular distrust of legacies to the priest or to the church, made by testators on death beds, led the common-law judges and juries impaneled in those courts to sanction a strict construction of the law, and to exercise great scrutiny of the circumstances under which these priest-written wills were executed.

2 Bl. Com. chap. 18.

The common-law courts construed the statute of wills (29 Car. II. chap. 3, § 5), requiring attestation in the presence of witnesses, so strictly that if the priest's back was between the testator and the hand engaged in writing the signature of the witness it was enough to invalidate the will.

The word "presence" in other statutes and in common parlance is not necessarily limited to "in sight."

It is important to determine whether or not the testator actually saw the subscribing witnesses subscribe their names.

Re Allen, 25 Minn. 39.

In the definition of the phrase "in the presence of" due regard must be given to the circumstances of each particular case.

Cook v. Winchester, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106.

The statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet in the same room with him. If they sign within his hearing, knowledge, or understanding, and so near as not to be substantially away from him, they are considered to be in his presence.

Re Allen, 25 Minn. 39; *Cook v. Winchester*, 81 L. R. A.

ter, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464; *Sturdivant v. Birchett*, 10 Gratt. 67; Schouler, Wills, § 343; 1 Jarman, Wills, pp. 87, 89; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

Since *Mandeville v. Parker*, 31 N. J. Eq. 242, the tendency has been, where the question is open, to sustain wills witnessed as this one was,—especially in a case where the trial court admitted the will to probate.

Meurer's Will, 44 Wis. 302, 28 Am. Rep. 591.

Collins, J., delivered the opinion of the court:

Gen Stat. 1894, § 4426, provides: "No will, except such nuncupative wills as are hereinafter mentioned, shall be effectual to pass any estate, real or personal, or to change, or in any way affect the same, unless it is in writing, and signed at the end thereof by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence, by two or more competent witnesses." And the only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses. The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both of the physicians went away. They were again summoned November 12, 1899, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory, and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which had been laid upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting room, which stood about 10 feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about 3 feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said, in effect,

that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving 2 or 3 feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham. These are the salient and controlling facts found by the court below, on which it based an ultimate finding that the instrument so witnessed was attested and subscribed in the presence of the testator, and then affirmed the order of the probate court admitting it to probate as the last will and testament of the deceased.

The appellants (contestants below) insist that the attestation and subscription by the witnesses was insufficient, because Mr. Cunningham did not and could not see the witnesses subscribe their names from where he sat, and their contention has an abundance of authority in support of it from jurisdictions in which statutes copied from the English law on the subject, and exactly like our own, are in force. The rule laid down in these authorities is that the attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress. Lord Ellenborough thus stated it in *Doe ex dem. Wright v. Manifold*, 1 Maule & S. 294: "In favor of attestation it is presumed that, if the testator might see, he did see. But I am afraid that if we get beyond the rule which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the deviser's presence, as to which the rule is that, where the deviser cannot, by possibility, see the act doing, that is out of his presence." Construing the same words in the Illinois statute, it was recently held: "This act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation by subscribing their names to the will as witnesses thereto which the statute requires to be in the presence of the testator. The object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will; and to effectuate that object it is necessary that the testator shall be able to see and know that the witnesses subscribe their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses, or some part of them, but the act of attestation is the thing which must be in the presence of the testator. . . . It would not be an attestation in the presence of the testator, if he could not see the act of attestation, but merely understood from the surrounding circumstances that the act was taking place." *Drury v. Connell*, 51 L. R. A.

177 Ill. 43, 52 N. E. 368. In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the "presence" of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. And yet an examination of the decided cases wherein the ever-varying circumstances and conditions have been considered, and this rule applied, will convince the reader that the task of application has not been an easy one, and has led to surprising results at times. Some years ago a large number of American and English cases were collected in a note appended to *Mandeville v. Parker*, 31 N. J. Eq. 242, and an examination thereof will show the absurd and inconsistent positions in which the courts have frequently placed themselves. As will be seen from the facts surrounding the cases mentioned in this note, or cited in the text-books in support of this rule, it has been held almost universally that an attestation in the same room with the testator is good, without regard to intervening objects which might or did intercept the view; and also that an attestation outside the room or place where the testator sat or lay is valid if actually within his range of vision. And no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his "conscious" presence, whatever that means. Exactly why or how an exception in the case of one temporarily or permanently blind can be injected into this statute has not been attempted by any court or writer, so far as we know. Nor has there been any success in the effort to show why one kind of an intervening object—a partition wall, for instance—is better calculated to afford an opportunity for the perpetration of a fraud upon the testator than is another kind, say, the closed curtains of an old-fashioned bed, or the head or foot board of a bedstead, or any other article of furniture which happens to be an obstruction to the sight. Again, it is difficult to see what sound distinction can be made, when applying the rule, between a case where the testator can see the witnesses attest, if he chooses to lean his body forward a few inches, and the case where the act can be seen if he steps forward the same distance. Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested 10 feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room? Take the case at bar. The testator sat on the

edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically he was capable of stepping 2 or 3 feet forward, and from this point the witnesses would have been within his range of vision. It is extremely difficult to distinguish between the two cases, and yet it has been done again and again in applying the rule. We might continue these suggestions and queries, as has been done quite frequently by courts which have not been entirely satisfied with a very rigid construction of the statute, and have not hesitated to say so; but it seems unnecessary, for there is one feature in these findings of fact which is sufficient, in our judgment, to warrant an affirmance, although there are many decisions to the contrary. As before stated, the court found that the witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator while Dr. Dugan came to the doorway, not over 5 feet distant, whereupon the former "showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said in effect that it was all right." To say that this was not a sufficient attestation within a statute which requires such attestation to be in the "presence" of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute, even if it has met the approval of the courts, should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property. In *Cook v. Winchester*, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 108, it was said: "In the definition of the phrase 'in the presence of,' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence." But, as was said, in substance, in the same case, we agree that this will was validly executed expressly on the ground that the whole transaction was an entirety in fact, and that, immediately after the witnesses had at- 51 L. R. A.

tested, the instrument was returned by them to the hands of the testator, his attention was called to their signatures, and he expressed his satisfaction and approval of what had been done. This view, which does no violence to the spirit and intent of the statute, is not without precedent and authority aside from the Michigan case, although it may, as said by the court below, run contrary to a majority of the decisions. See *Sturdivant v. Birchett*, 10 Gratt. 67, and *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

Judgment affirmed.

Andrew G. ERICKSON, Admr., etc., of Anna Charlotte Erickson, Deceased, Appt.,

v.
GREAT NORTHERN RAILWAY COMPANY, *Respnt.*

(.....Minn.....)

*The defendant set fire to stumps and rubbish on its right of way, and the plaintiff's intestate, a child four years old, went to the fire, and while playing with it she was burned so that she died. This action was brought to recover damages for her death, on the ground that the right of way was not fenced, and also on the ground that the defendant left the fire unguarded. *Held*: 1. That the complaint does not allege any facts showing that the child went upon the right of way at any point which it is alleged was unfenced, or at any point which the defendant might lawfully have protected by a fence. 2. That as a general rule, the doctrine of *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 206, 18 Am. Rep. 393, should be limited in its application to cases of attractive and dangerous machinery and to other similar cases where the danger is latent. 3. That the defendant was not bound to exercise due care to so guard the fire on its right of way that children intruding thereon could not come in dangerous contact with the fire, though induced so to do by its attractiveness.

(*Start, Ch. J., and Lewis, J., dissent from proposition 1.*)

(December 14, 1900.)

A PPEAL by plaintiff from an order of the District Court for Mille Lacs County denying a motion for new trial after verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. H. V. Mercer, for appellant:

In an action for negligence, the complaint is not demurrable as not stating a cause of

*Headnotes by START, Ch. J.

NOTE.—For liability of railroad company in case of injury to child who strays upon the track for want of a fence, see earlier case in this series, of *Rosse v. St. Paul & D. R. Co.* (Minn.) 37 L. R. A. 591.

action unless the particular acts are such that they could not be negligent under any evidence admissible under the pleading, for it is a mixed question of law and fact.

Kolseth v. Smith, 38 Minn. 14, 35 N. W. 565; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 809.

The defendant violated a statutory duty in failing to fence its railroad on the border of its right of way at the place where the fire was located.

Gen. Stat. 1894, §§ 2692-2695; *Gould v. Great Northern R. Co.* 63 Minn. 37, 30 L. R. A. 590, 65 N. W. 125; *Rosse v. St. Paul & D. R. Co.* 68 Minn. 216, 37 L. R. A. 591, 71 N. W. 20; Gen. Laws 1897, chap. 346; *Nickolson v. Northern P. R. Co.* (Minn.) 83 N. W. 454.

Statutory enactments of this nature are police regulations, and are for the benefit of every member of the state.

Rosse v. St. Paul & D. R. Co. 68 Minn. 216, 37 L. R. A. 591, 71 N. W. 20; *Baater v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Tvedt v. Wheeler*, 70 Minn. 161, 72 N. W. 1062.

Wherever such a statutory duty is imposed upon a person, the failure to exercise that duty is negligence and a ground for action by any person injured thereby.

Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Walkenhaur v. Chicago, B. & Q. R. Co.* 3 McCrary, 553, 17 Fed. Rep. 136; *Corwin v. New York & E. R. Co.* 13 N. Y. 42; *Moymihan v. Whidden*, 143 Mass. 287, 9 N. E. 645; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Blair v. Milwaukee & P. du Ch. R. Co.* 20 Wis. 267; *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 186, 99 Am. Dec. 158; *Stuetgen v. Wisconsin C. R. Co.* 80 Wis. 498, 50 N. W. 407; *Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 9, 10 N. W. 53, 49 Mich. 99, 13 N. W. 374; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311; 1 Jaggard, Torts, p. 96; 12 Am. & Eng. Enc. Law, 2d ed. p. 1084; *Bott v. Pratt*, 33 Minn. 326, 53 Am. Rep. 47, 23 N. W. 237; *Baater v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Tvedt v. Wheeler*, 70 Minn. 161, 72 N. W. 1062; *Rosse v. St. Paul & D. R. Co.* 68 Minn. 216, 37 L. R. A. 591, 71 N. W. 20; *Fleming v. St. Paul & D. R. Co.* 27 Minn. 111, 6 N. W. 448; *Gillam v. Sioux City & St. P. R. Co.* 26 Minn. 263, 3 N. W. 353.

The defendant was negligent in setting and leaving these fires unguarded at the place and under the circumstances alleged.

Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 809, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735; *Lynch v. Nurdin*, L. R. 1 Q. B. Div. 29; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Ramsey v. National Contracting Co.* 49 App. Div. 11, 63 N. Y. Supp. 286; 51 L. R. A.

Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Mackey v. Vicksburg*, 64 Miss. 779, 2 So. 178; *Whirley v. Whitman*, 1 Head, 610; *Bransom v. Labrot*, 81 Ky. 643, 50 Am. Rep. 193; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 203, 39 N. E. 484; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

Wherever a statute creates a duty or obligation without an express remedy, the proper legal remedy follows as an incident.

Bott v. Pratt, 33 Minn. 327, 53 Am. Rep. 47, 23 N. W. 237; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

Mr. W. E. Dodge, for respondent:

The essential fact to be pleaded by the plaintiff as the proximate cause of the injury is that at the point where the child strayed upon the defendant's right of way the same was unfenced, or, if fenced at all, that the same was out of repair.

Rosse v. St. Paul & D. R. Co. 68 Minn. 216, 37 L. R. A. 591, 71 N. W. 20; *Nickolson v. Northern P. R. Co.* (Minn.) 83 N. W. 454.

A landowner is not bound to fence or otherwise guard his premises so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such premises, or of any objects lawfully placed thereon by the owner.

The only recognized exception to this rule is contained in the doctrine of the so-called turntable cases.

Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440; *Hacsley v. Winona & St. P. R. Co.* 46 Minn. 233, 48 N. W. 1023.

This exception is clearly defined and limited in *Stendal v. Boyd*, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735.

Start, Ch. J., delivered the opinion of the court:

The plaintiff's intestate was a child four years old, who on September 15, 1899, while playing with fire on the defendant's right of way, was so seriously burned that she died. This action was brought to recover damages for the benefit of her next of kin, on the ground that her death was due to the negligence of the defendant. On the trial the court sustained the objection of the defendant to the admission of any evidence, on the ground that the complaint did not state facts constituting a cause of action, and ordered judgment for the defendant. The plaintiff appealed from an order denying his motion for a new trial. The complaint, after alleging that the defendant owns and operates a railroad through the village of Milaca, this state, and that the plaintiff was the father of the child, and had been duly appointed administrator of her estate, alleged substantially these facts: On the 15th day of September, 1899, it was the duty of the

defendant to keep its right of way in the village of Milaca fenced, but it unlawfully and negligently failed to fence its right of way, or any portion thereof, in such village. On the right of way north of the depot of its railway, near a public street, which was used for travel, and near several dwelling houses occupied by people having children of immature years, and on the 13th day of September, the defendant negligently caused to be set fires to three piles of stumps and rubbish then upon its right of way, and it negligently left the fires burning and unguarded until on and after the 15th day of September. At the time the fires were set, and for a long time prior thereto, its right of way at this place had not been fenced, and was then open and entirely without fence, and was located about the center of the village of Milaca. This location on its right of way had long been a common playground for the children of tender years living near by, all of which was well known to the defendant. But the plaintiff's intestate had not played thereon prior to the 15th day of September. If its right of way had been well and properly fenced at such point, the children could not and would not have gone thereon to play at any time, and the deceased child would not have gone thereon to play, as she did on the 15th day of September. The fires so set and so left burning were attractive to children of tender years, and had a strong tendency to allure them to play in and around the fires, and thus allure and entrap them into great dangers, which were a menace to their lives, and which, by reason of their tender years and immature judgment, they could neither apprehend nor appreciate, all of which was well known to the defendant, whereby the deceased was induced to and did so enter upon the right of way of the defendant to play in and with the fires so set, without knowing the danger thereof, and thereby her clothing was set on fire, and she was so badly burned that she died as a result of such injuries. It was the duty of the defendant to refrain from setting such fires, unless they were properly guarded, and it was its duty to have prevented the child from going upon its right of way and playing around the fires. But it negligently set the fires and negligently permitted them to burn without being guarded, and it thereby invited her upon its premises to play in and around the fires.

1. It is claimed by the defendant that the complaint does not allege any facts showing that the child went upon its right of way at any point which it is alleged was unfenced, or at any point which it might lawfully have protected by a fence. A majority of the justices of the court are of the opinion that this contention is correct. It is true that the complaint alleges that it was the duty of the defendant to keep its right of way in the village of Milaca fenced, and that it negligently failed to fence any portion in such village; but it was necessary for the plaintiff to allege with reasonable certainty the place where the child entered upon the defendant's right of way, so that

51 L. R. A.

the defendant might allege and show, if such were the fact, that such place was its depot grounds or a public street, which public convenience required to be left open, and which it was therefore not only not bound to fence, but which it had no right to inclose. Now, for aught that appears from the allegations of the complaint, the child may have gained access to its right of way from the defendant's depot grounds or a public street. The conclusion alleged in the complaint, that, if the right of way had been fenced at the place on its right of way where the fire was left burning, the child could not and would not have gone thereon to play, cannot be construed as an allegation of fact, to the effect that she entered upon the right of way at the point where the fire was. On the contrary, it is affirmatively alleged "that the place in question was on the right of way north of the depot, near a public street which was used for travel, and was located about the center of the village." Such being the case, and there being no direct allegation as to the point where she entered upon the premises of the defendant, if any inferences are to be indulged as to the point of entry, it is not unreasonable to infer that she entered from the street. The court therefore holds that, in so far as the plaintiff's alleged cause of action depends upon the neglect of the defendant of its statutory duty to fence its right of way, the complaint does not state a cause of action. Whether the absence of the fence, if such were the case, was the proximate cause of the child's injury, we do not decide. See *Nelson v. Chicago, M. & St. P. R. Co.* 30 Minn. 74, 14 N. W. 360. I dissent as to the court's construction of the complaint. The question was raised for the first time on the trial of the action, and if, even argumentatively, the complaint states a cause of action, it ought to be sustained. I am of the opinion that the fair inference from all of its allegations, considered together, is that the child entered upon the right of way at the place where it was the duty of the defendant to maintain a fence, and that it did not do so.

2. The only other question necessary to be considered is: Was the defendant guilty of actionable negligence, independently of any question as to its statutory duty to fence its right of way, in setting the fires and leaving them unguarded at the place and under the circumstances alleged in the complaint? It was not, unless the allegations of the complaint in this respect show that the defendant failed in some duty which the law imposed upon it, or, in other words, show that it owed a legal duty to the class of children to which the plaintiff's intestate belonged, in the exercise of due care, to prevent them from coming in contact with the fires. The question then is, Did the defendant owe a legal duty to this child and others, to exercise ordinary care by guarding the fires so that, if they intruded upon its land to play with the fires, they would not be injured thereby? The tender and loving regard which every true man has for children, and his impulse

to protect them from harm, are liable, unless repressed, to lead courts to an unsound conclusion on questions of this character. It is important, then, to inquire dispassionately just what the defendant did, according to the allegations of the complaint. It set fire to rubbish on its right of way, presumably for the purpose of getting rid of it. In so doing it was executing upon its own premises, in a lawful way, necessary work. It exercised no actual force against the child, and the danger of injury from the fire was not concealed. The child was an intruder upon the defendant's land, and by her own act was injured by meddling with the fire. It is true, she knew no better, and was an innocent trespasser, but the innocence of the intruder in cases of this kind does not necessarily establish the legal duty of the landowner to protect him from injury. The law does not, as a general rule, impose restraints and conditions upon an owner's lawful and necessary use of his land, which is only dangerous to persons who intrude thereon. See 11 Harvard Law Rev. 349, 434. But a notable exception to this rule was declared by this court, as early as 1875, in the leading case of *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393, which was to the effect that the owner of dangerous machinery (a turntable), who leaves it unfastened or unguarded on his own land, where he has reason to believe that young children will be attracted to play with it, is bound to use due care to protect such children from the danger to which they are thus exposed. The basis of this decision was that the turntable, when left unfastened, was attractive to young children, and that the owner, by leaving it unguarded, was not only inviting young children to come upon it, but was holding out an allure-ment which, acting upon the natural instincts by which such children are controlled, drew them into a hidden danger. This exception to the rule of nonliability of land-owners for injuries sustained by trespassers from the condition of their premises, or, as it is usually expressed, the "doctrine of the turntable cases," has never been extended by this court to cases like the one at bar, or to any others which upon their facts did not come strictly and fully within the *Keffe Case*. *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899. In *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337, which was a case where a child five years old was killed by climbing upon a portable dump car, the court declined to apply the doctrine of the *Keffe Case*, and stated that the basis of liability in the latter case was that the premises were such as to invite the presence of children, and the danger was not apparent, but concealed. In *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402, the court stated the necessity of limiting the doctrine in these words: "To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost

anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. This court itself, if it has not modified the *Keffe Case*, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application." In *Huesley v. Winona & St. P. R. Co.* 46 Minn. 233, 48 N. W. 1033, the court held that a railroad company was not guilty of negligence, as to young children, by leaving cars on a gravity track, with the brakes set, which were loosened by them, whereby one of their number was killed. Again, in the case of *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, it was held that a landowner was not liable in damages for the death of a child three years old, caused by the caving of an unguarded embankment on his premises, made by excavations for sand. In *Stendal v. Boyd*, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735, the court refused to extend the doctrine of the turntable case so as to include an unguarded pond caused by the excavation in a stone quarry which had been abandoned. The court in that case said: "The liability of a landowner to children who are induced to come upon his premises by reason of attractive and dangerous machinery thereon was carefully limited in the original decision, and the limitations have been enforced by the subsequent decisions of this court. . . . The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accident from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises childproof. . . . It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery." The suggested limitation necessarily had no reference to cases where the danger was not open, but concealed. This court also refused to extend the doctrine to a case where a child was injured by falling from an unguarded retaining wall 7½ feet high. *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038. It is not practicable to lay down any absolute rule as to the limitations of the doctrine. The manifest trend, however, of all the decisions of this court is to limit its application to attractive and dangerous machinery, and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine ought to be extended, but we do hold that as a general rule the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery, and to other similar cases where

the danger is latent. This rule may not be strictly logical, but it is a necessary one, unless landowners are to be made insurers of the safety of children when trespassing upon their premises. It necessarily follows that this case falls within the limitation, and that the defendant was not bound to exercise ordinary care to so guard the fire on its right of way that children intruding thereon could not come in dangerous contact with the fire, though induced so to do by its attractiveness. Therefore the complaint does not state a cause of action.

Order affirmed.

Lewis, J., dissenting:

The complaint states that at the place

where the fires were set the right of way was not fenced; that said location was on the right of way, and had long been a common playground for young children living in the vicinity; and that, if the said right of way had been properly fenced at the said point, the deceased would not have gone thereon to play at the time of the accident. These allegations, together with the statement that the child entered upon the premises and played around the fire, being attracted thereto, are sufficient to constitute a declaration that she went to the fire at a point where the right of way was not fenced. Upon that point I concur with the views expressed in the opinion, and dissent from the views of the majority of the court.

MISSISSIPPI SUPREME COURT.

J. T. PENDLETON, Receiver of the Home Building & Loan Association, Apts.,
v.

Mike LUTZ.

(.....Miss.....)

1. A state court which has obtained jurisdiction of a suit against a corporation cannot be ousted thereof by the subsequent appointment of a receiver for the corporation by a Federal court and the removal of the cause, based on the fact of such appointment, when the case is not otherwise removable.
2. A suit against a receiver appointed by a Federal court is not removable from a state court to a Federal court, when the amount in controversy is less than \$2,000, on the ground that such suit necessarily arises under the laws and Constitution of the United States, since the act of March 3, 1887, as re-enacted by the act of August 13, 1888, § 3 (25 U. S. Stat. at L. 433, chap. 866), authorizing suits against receivers of Federal courts without previous leave of the court, has the effect to make such a suit a distinct and independent suit, which is not ancillary to the suit in which the receiver was appointed, and to authorize it, not only to be brought in a state court, but to be prosecuted to final judgment therein.

(December 10, 1900.)

A PPEAL by the receiver from an order of the Lauderdale County Chancery Court refusing to permit him to remove to the Federal Court a suit which had been begun against the insolvent corporation prior to his appointment. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. A. Wimbish and Cochran & Boseman, for appellant:

The cause was properly removable to the

Federal court upon the facts stated in the petition.

White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; 1 *Desty*, Fed. Proc. 9th ed. § 96, p. 446; *Gableman v. Peoria, D. & E. R. Co.* 82 Fed. Rep. 790; *Landers v. Felton*, 73 Fed. Rep. 311; *Hot Springs Independent School Dist. No. 10 v. First Nat. Bank*, 61 Fed. Rep. 417; *Ray v. Peirce*, 81 Fed. Rep. 881; *Sullivan v. Barnard*, 81 Fed. Rep. 886; *Hallam v. Tillinghast*, 75 Fed. Rep. 849; *Follett v. Tillinghast*, 82 Fed. Rep. 241; *Jewett v. Whitcomb*, 69 Fed. Rep. 417.

The action of the Federal court in seizing all of the assets of the defendant association by its receivers deprived the association of all means of either prosecuting or defending suits.

The court having rendered the association helpless, and having undertaken to wind up its affairs and administer all its assets, it became necessary to grant the injunction, and to assume exclusive jurisdiction. All suits for and against the association became ancillary to the main cause.

The dissolution of the corporation abates all pending actions for and against it, in the absence of a saving statute.

5 *Thomp. Corp.* § 5725; 7 *Thomp. Corp.* § 8793; *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

All attachments against its property are likewise dissolved.

Wilcox v. Continental L. Ins. Co. 56 Conn. 468, 16 Atl. 244.

With building associations, the appointment of a receiver under a winding-up bill is fatal.

2 *Thomp. Corp.* § 8791; *Endlich, Bldg. Asso.* 2d ed. §§ 508, 522.

A practical and virtual dissolution renders the association incapable of prosecuting pending suits. The converse of this proposition must be equally true.

Van Pelt v. Home Bldg. & L. Asso. 87 Ga. 370, 13 S. E. 574; *Cooper v. Oriental Sav. & L. Asso.* 100 Pa. 402.

In such cases the liability of members for

NOTE.—As to exclusiveness of jurisdiction by appointment of receiver, see earlier cases in this series of *Re Schuyler's Steam Tow-Boat Co.* (N. Y.) 20 L. R. A. 391, and note; and *Rogers & B. Hardware Co. v. Cleveland Bldg. Co.* (Mo.) 31 L. R. A. 385.
51 L. R. A.

dues, fines, and premiums ceases, and the obligations of the borrowers are matured.

7 *Thomp. Corp.* § 8796; *Towle v. American Bldg. Loan, & Invest. Soc.* 61 Fed. Rep. 446.

The test of the dissolution of a corporation for all purposes is to consider whether it has lost its capacity to sustain itself by a new election of officers.

5 *Thomp. Corp.* §§ 6579, 6658; *Philips v. Wickham*, 1 Paige, 590.

If suits by and against the association are subject to be determined by courts of the various states, applying different rules for the adjustment of the rights of the parties, all equality will be destroyed, and confusion will result. To prevent this, especially in the case of an association engaged in business in several states, the rules of equity provide for one concentrated and homogeneous administration of affairs, in one court of primary jurisdiction, assisted by various courts which assume ancillary jurisdiction.

Miles v. New South Bldg. & L. Asso. 95 Fed. Rep. 919; *Towle v. American Bldg. Loan & Invest. Soc.* 60 Fed. Rep. 135; 5 *Thomp. Corp.* § 6697; *Connecticut River Bkg. Co. v. Rockbridge Co.* 73 Fed. Rep. 709; *Temple v. Glasgow*, 25 C. C. A. 540, 42 U. S. App. 417, 80 Fed. Rep. 441.

Messrs. Hall & Hall for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

In this case the plaintiff brought his suit by an attachment in chancery, and by proper process, duly served, the court acquired actual possession of the property attached. All this was done before the corporation became insolvent and receivers were appointed by the Federal court at Atlanta, Georgia. Some months after the institution of the suit, receivers appointed by the Federal court appeared and asked to remove the case to the Federal court in the proper district in Mississippi, at Meridian. This motion the court denied. That is the chief error assigned. The authorities relied on by appellant are *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018, and certain authorities set out at page 446, 1 *Desty, Fed. Proc.*; the last authorities being decisions of inferior Federal judges, but all of them relating to suits against receivers. In this case the matter in dispute is less than \$2,000. This is not a suit against a receiver at all, and all these authorities are inapplicable (*White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018, was not a removal case), since the state court acquired jurisdiction and actual possession of the property by attachment long before the Federal court appointed receivers. As the amount in dispute is less than \$2,000, it is clear that the action of the court below was correct. This is made perfectly plain by the following authorities: *Gilmore v. Herrick*, 93 Fed. Rep. 525 (a masterly opinion by Judge Taft); 51 L. R. A.

Ray v. Peirce, 81 Fed. Rep. 881; *People's Bank v. Calhoun*, 102 U. S. 256, *sub nom. People's Bank v. Winslow*, 26 L. ed. 101; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. Rep. 263. Even were this a suit against a receiver appointed by the Federal court prior to the bringing of this suit, since the amount involved is less than \$2,000 the case would still not be removable under the act of March 3, 1875, amended by the act of March 3, 1887, as re-enacted by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866). See the authorities just cited, which are conclusive. There is a case (*Carpenter v. Northern P. R. Co.* 75 Fed. Rep. 850), which holds the contrary of this last proposition; but the ruling is put upon the ground, expressly, that such suit against the receiver is ancillary to the principal action in the Federal court, arises under the laws and Constitution of the United States, grows out of the transactions of the receiver in his operations as receiver, and was hence removable without reference to citizenship or amount; and this reasoning is not sound, since the adoption of § 3 of said act of March 3, 1887, which provides "that every receiver or manager of any property appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." It is true that a suit against a receiver of a Federal court is one arising under the laws and Constitution of the United States, but § 3 of the above act has the effect now to make a suit against a Federal receiver a distinct and independent suit. It is no longer ancillary, and whether it is removable is to be determined by looking at it as an independent suit, and not as an ancillary suit; and the last clause of said § 3 does not continue or save the right to remove a suit brought against a Federal receiver, as it existed before the passage of § 3 of the act above.

All these propositions are made perfectly clear by the case of *Gilmore v. Herrick*, 93 Fed. Rep. 525, and of *Ray v. Peirce*, 81 Fed. Rep. 881. Judge Taft, in the first case, says: "It is true that, before the enactment of § 3 of the act of 1888, litigants against Federal court receivers were prevented from resorting to the state courts by their inability to sue such receivers except with the permission of the court appointing them. Such suits were then purely ancillary to the suit in which the receivers were appointed, and were completely subject to the control of the court in which the main action was pending. They were kept within the control of the court, not by removal, however, but by the process of

contempt against anyone who should attempt to sue the receivers without leave. So, too, suits in which it is sought to deal with the property in the custody of the receivers, to subject it to sale or other remedy, can still be brought only by intervening petition, or by dependent bill filed by leave of the court. *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 524, 68 Fed. Rep. 263. In this sense it is said that a court having custody of property draws to itself jurisdiction to consider and decide all questions arising concerning its disposition and management, even between persons not parties to the original suit in which it became necessary to take custody of the property. This is not effected, however, in a Federal court, by virtue of any statute of removal, but solely through the inability of any other court to grant relief in respect of such property, because it is in the custody of the Federal court, and thus is beyond the jurisdiction of such other court. Anyone claiming an interest in such property may appeal to the Federal court for relief, which, in order to prevent injustice, through its process may exercise a purely ancillary jurisdiction to administer justice between such claimant and anyone else claiming an adversary interest. Such ancillary jurisdiction is exercised only upon the prayer of the claimant filed in the principal cause. It is not exercised against one who might be a claimant by removing a suit lawfully begun by him in another jurisdiction. Congress, by § 3 of the act of 1888, has, in effect, declared that suits against receivers touching their transactions as such are no longer to be brought only where and in the form which the court appointing them shall permit, but in any court of competent jurisdiction, and in the form in which suits against other persons may be brought. They have ceased to be ancillary in the sense that they can be drawn to the court and cause in which the defendants were made receivers, either by process of contempt or otherwise. As suits they are no longer part of the original litigation. When reduced to judgment, of course, payment can only be enforced against the property and the priority of the claim determined in the court in which the original litigation is pending, and in which the receivers were appointed; and this is the scope and meaning of the second paragraph of § 3 of the act of 1888. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 523. Under that section suits against receivers are to be conducted, so far as their trial is concerned, not as ancillary suits, but as suits of original cognizance. If, thus considered, they come within the removal statute, and can be removed to the same court in which the receivers have been appointed, that court must try them, not as ancillary proceedings, but as independent suits, and can exercise no power to change their form from that which they had in the state court. Thus, 51 L. R. A.

if brought as suits at law in the state court, when removed they must be tried before a jury as suits at law."

Judge Baker says in the second case: "The fact that the suit is one arising under the laws of the United States does not entitle the defendant to remove the same from the state to the national court unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. 25 Stat. at L. 434, chap. 866, § 2. Hence, if the suit is removable on the application of the receiver, such right of removal is dependent on the ground that the suit is one growing out of the acts and transactions of the receiver as an officer of this court, and as such is ancillary to the suit now pending in this court, in which the defendant was appointed receiver. When a court exercising jurisdiction in equity appoints a receiver to hold the property of an insolvent corporation, that court assumes the administration of the estate. The possession of the receiver is the possession of the court, and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018. The possession of the court, through its receiver, draws to the jurisdiction of that court the control of the assets of the insolvent, so far as persons having claims to participate in the distribution of such assets are concerned; and parties must go into that court in order to assert their rights, prove their claims, and secure whatever may be due them, or their share or interest in the estate. It is the settled law that every person having a claim or demand against an estate in the possession of a receiver, or against the receiver for any act or transaction of his in his official capacity, must assert such claim or demand in the court in which such receiver was appointed, without regard to the nature of the controversy, the citizenship of the parties, or the sum or value of the matter in dispute. The prosecution against the receiver of any such claim or demand in any other court without the leave of the court appointing such receiver would be regarded as a contempt of its authority, and any judgment recovered against him in his official capacity in any other court would be treated as unauthorized and void by the court having jurisdiction of the estate of the insolvent in the possession of its receiver. Such are the general principles of the law, uninfluenced by legislation applicable to receiverships. The consequences flowing from these principles of the law were found to be intolerably burdensome to persons having small claims and demands against the insolvent or against the receiver for his acts or transactions in his official capacity. To compel the claimant to prosecute a suit against the receiver of a railroad for a small demand in

the court of his appointment, generally remote from the claimant's residence, involves such inconvenience and expense as to amount in many cases to a practical denial of justice. Even an application to the court who appointed the receiver for leave to sue in another court nearer the residence of the claimant and his witnesses was found to be inconvenient and expensive, and frequently such applications were met with denial. With the multiplicity of railroad receiverships the evil became so intolerable that legislation was found necessary to secure relief." Section 3 of the act of March 3, 1887, as amended and re-enrolled in the act of August 13, 1888 (25 Stat. at L. 436, chap. 866), was enacted. "It is also clear that such claimants are at liberty, without previous leave of the courts of the United States, to sue the receiver of such courts in any other court in respect of any act or transaction of his in carrying on the business of such receivership. On the part of the claimant it is contended that such right to sue the receiver, given by the statute, carries with it the right to pursue the case to final judgment in the court in which the suit was brought, when the matter in controversy is \$2,000 or less in value. On the part of the receiver the contention is that the present suit is ancillary to the principal suit now pending in this court, and hence is removable from the state court into this court, although the matter in controversy is only \$2,000 in value. The question here involved has never been decided by the supreme court, and, so far as this court is advised, it has never been passed upon but once by a circuit court. The right of receivers to remove any suit brought in a state court, where the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$2,000, remains unaffected by the act of 1887-88. The right of removal in such cases rests upon the fact that the suit is one against a receiver appointed by a court of the United States, and is therefore one arising under the laws of the United States. The right to sue in the state court without procuring the leave of this court includes the right to prosecute such suit to final judgment when the amount involved is \$2,000 or less. When the amount in controversy is \$2,000 or less, perhaps, under the last clause of § 3 [of the act of 1888], if petition for removal showed a state of facts making a removal necessary to the promotion of the ends of justice, this court would permit the removal, and take jurisdiction, even though the state court had denied a removal. But no such state of facts is disclosed by the petition for removal filed in this case. As was said by the Supreme Court in the case of *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250, 256: 'Certainly the preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion

of the ends of justice, make it competent for the appointing court to determine the rights of persons who were not before it or subject to its jurisdiction; and the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision of the same section of the statute which granted it.' If, in suits involving \$2,000 or less, brought in a state court, the receiver may at once remove them into a court of the United States, then the right to sue secured to the claimant by the statute is rendered practically valueless. Such a construction would defeat the true meaning and intent of the statute. The statute abrogates the old rule on the subject of suing receivers. It is made lawful now to sue a receiver appointed by a court of the United States without procuring the leave of that court. The court has no discretion to say when or where its receiver may be sued. The right to sue is given without condition or limitation, and, as was said by the Supreme Court, it 'cannot be assumed to have been rendered practically valueless by this further provision of the same section of the statute which granted it.'"

Of course, all that has been cited is aside from the doctrine so well put in *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. Rep. 263, and in *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018. That doctrine is that where receivers have been appointed by a Federal court over an insolvent corporation, and such court, through its receivers, has first acquired possession of the property of the corporation, the possession of the receiver is the possession of the court; the receiver is a mere hand of the court, to administer and wind up the affairs of an insolvent corporation, and the Federal court will draw all suits touching such property against such receivers to itself for final adjudication; and, where suits are instituted in a state court against such receivers touching such property, they are removable without reference to citizenship or amount. But it is proper to say that the point whether a suit against a receiver of a Federal court is removable as ancillary, since the passage of § 3 of the act of 1888, *supra*, has never been before the Federal Supreme Court. The cases of *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854, and *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272, appear to hold with Judge Taft and Judge Baker, whose views we adopt. But this case is not even one against a receiver. It is an independent suit against the corporation, the state court having acquired actual possession of the property long prior to appointment of the receivers.

Affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles N. MORGAN, Appt.,
v.
RANDOLPH-CLOWES COMPANY.

(73 Conn. 396.)

An agreement by a corporation organized to take the property and carry on the business of a copartnership upon the death of one of the members, by which it binds itself to pay all the partnership debts, cannot be enforced in an action at law by a creditor of the copartnership, since he was not a party to the contract, and it was not made for his benefit.

(December 18, 1900.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County in favor of defendant in an action brought to hold it liable for a debt which was due to plaintiff from a partnership whose business defendant had been organized to continue. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward H. Rogers, for appellant:

The conveyance by Clowes to the defendant raised an implied trust in favor of the estate of Randolph, the deceased partner, to the extent that, so far as it is necessary, the property conveyed shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from one partner to the other on winding up the partnership affairs. The conveyance was therefore subject to the equity of the surviving partner to have the property conveyed appropriated to accomplish the trust to which it was thus primarily subjected.

Darrow v. Calkins, 154 N. Y. 503, 48 L. R. A. 299, 49 N. E. 61; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635; *Shearer v. Shearer*, 98 Mass. 107; *Beecher v. Stevens*, 43 Conn. 587; *Frink v. Branch*, 16 Conn. 260.

The agreement of the defendant which was the consideration for the transfer to it of the copartnership assets was to pay the plaintiff's debt, as well as to save the estate of Randolph and Clowes harmless from any liability therefrom. The neglect of the defendant to pay the plaintiff was therefore a breach of the contract which gave the estate of Randolph and Clowes an immediate right of action thereon, because of their continuing liability to pay the plaintiff.

Lathrop v. Atwood, 21 Conn. 117; *Whitney v. Cady*, 71 Conn. 166, 41 Atl. 550.

The agreement must therefore be held to have been intended for the sole benefit of the creditors of the copartnership, which is sufficient to give the creditors a right of action.

NOTE.—On the subject of the liability of a corporation formed from other companies to pay their debts there is a note in this series with the case of *Chicago & I. Coal R. Co. v. Hall (Ind.)* 23 L. R. A. 281; also the cases of *Southern R. Co. v. Bouknight (C. C. App. 4th C.)* 80 L. R. A. 828; and *Lamkin v. Baldwin & L. Mfg. Co. (Conn.)* 44 L. R. A. 786. 51 L. R. A.

Lawrence v. Fox, 20 N. Y. 268; *Arnold v. Nichols*, 64 N. Y. 117; *Hannigan v. Allen*, 127 N. Y. 639, 27 N. E. 402; *Spingarn v. Rosenfeld*, 4 Misc. 523, 24 N. Y. Supp. 733; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Seward v. Huntington*, 94 N. Y. 104; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Treat v. Stanton*, 14 Conn. 445.

In any event, the defendant stepped into the shoes of the copartnership with respect to the property conveyed and the debt to the plaintiff. There is no legal objection to such a contract.

Lamkin v. Baldwin & L. Mfg. Co. 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042; *Watterman's Appeal*, 26 Conn. 96.

Messrs. Lucien F. Burpee and T. F. Carmody, for appellee:

This action at law cannot be maintained in this state.

Treat v. Stanton, 14 Conn. 445; *Olapp v. Lawton*, 31 Conn. 95; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803; *Lamkin v. Baldwin & L. Mfg. Co.* 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042; *Morrill v. Lane*, 136 Mass. 94; *Mellen v. Whipple*, 1 Gray, 317; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Serviss v. McDonnell*, 107 N. Y. 260, 14 N. E. 314; *Buchanan v. Tilden*, 158 N. Y. 109, 44 L. R. A. 170, 52 N. E. 724; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212.

Torrance, J., delivered the opinion of the court:

The material allegations of the complaint may be thus stated: At the time the copartnership of Randolph & Clowes was dissolved by the death of Mr. Randolph, it owned property, real and personal, owed debts to the plaintiff and others, and was actively carrying on business. Soon after the dissolution the surviving partner and the administrator of Randolph caused the defendant corporation to be organized for the purpose of taking to itself the copartnership property and carrying on the business theretofore carried on by the copartnership. Soon after the corporation was organized the surviving partner and the administrator agreed with it to sell and transfer to it all the property, real and personal, of the copartnership, to enable it to carry on said business, and this agreement was carried out. In consideration of said sale and transfer the defendant promised and agreed to and with the surviving partner and the administrator, among other things, (1) that it would assume all the debts of said copart-

On the right of third party to sue on contract made for his benefit, there is a note with the case of *Jefferson v. Asch (Minn.)* 25 L. R. A. 257; see also the cases of *Baxter v. Camp (Conn.)* 42 L. R. A. 514; *Buchanan v. Tilden (N. Y.)* 44 L. R. A. 170; *Embler v. Hartford Steam Boiler Inspection & Ins. Co. (N. Y.)* 44 L. R. A. 512.

nership then unpaid and outstanding, and that it would pay the same, and save the estate of Randolph and his administrator, and the surviving partner harmless therefrom; (2) that it would issue certain shares of its stock to said administrator and to said surviving partner, and would execute a mortgage of all its corporate property to obtain a loan of money to pay all the unpaid liabilities of the copartnership. Subsequently said stock was issued as agreed, and the defendant, by a mortgage of its property, obtained a loan of money more than sufficient to enable it to pay the liabilities of the copartnership, which it had assumed and agreed to pay. The debt sued for in this action was one of the copartnership debts due and unpaid when the defendant assumed and agreed to pay the liabilities of the copartnership as aforesaid, and is still due and unpaid. The complaint asked for legal relief only. The defendant demurred to the complaint on the ground that it appeared therefrom that the plaintiff was not a party to the contract sued upon, and acquired therefrom no right to maintain this action against the defendant.

The question in this case is whether, upon the facts stated in the complaint, the plaintiff can maintain an action at law against the defendant for its refusal to pay his debt. It is probably true that in many, perhaps in most, of the state courts he could do so; but, whatever the law in relation to this matter may be elsewhere, it must now be regarded as the settled general rule in this state that where A simply agrees with B, upon a valid consideration, to assume and pay B's debts, and save B harmless therefrom, C, a creditor of B, cannot maintain an action at law against A for his refusal to pay the debt due from B to C. *Treat v. Stanton*, 14 Conn. 445; *Clapp v. Lawton*, 31 Conn. 95; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803; *Lamkin v. Baldwin & L. Mfg. Co.* 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042. This rule is based upon the principle that A, in the case supposed, for a breach of his contract obligation, agreed to be answerable to B alone, or B's assignee, and not to each and all of the creditors of B who were strangers to the contract; and this court has said that "the rule is a salutary one, and should not be departed from except for good reasons." *Meech v. Ensign*, 49 Conn. 203, 44 Am. Rep. 225. In our own state it has been departed

from by express legislation in one instance, namely, where the grantee in a deed conveying real estate subject to a mortgage or lien agrees to assume and pay the encumbrance, Gen. Stat. § 983. It is claimed by the plaintiff that independently of legislation there are exceptions, real or seeming, to this general rule, even in jurisdictions where it prevails, and that this case falls within the exceptions, or some of them. Some of these so-called exceptions are stated in *Meech v. Ensign*, 49 Conn. 203, 44 Am. Rep. 225, and *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803; but in reference to such cases, and others like them in the books, it has been well said that they can with at least equal propriety be deemed illustrations of the rightful application of the general rule itself under exceptional circumstances. *Baxter v. Camp*, 71 Conn. 248, 42 L. R. A. 514, 41 Atl. 803. The case at bar is not within any of the seeming exceptions to the rule. The agreement made between the defendant and the administrator and surviving partner was made solely for the benefit and advantage of the immediate parties to it, as is apparent from its terms, and the transactions between them out of which it sprang. The parties to it had no intention of conferring upon the plaintiff any rights in his favor against the defendant by the contract, nor did the defendant intend by such agreement to assume any legal obligation to the plaintiff to pay his debt. The plaintiff is not seeking to enforce any particular equity which he claims to have in the property of the copartnership which was transferred to the corporation, nor any equity which he claims to have, either personally or through the administrator or surviving partner, against the corporation itself. He is seeking to enforce a legal obligation, pure and simple, and nothing else. He says such obligation to pay him rests upon the defendant, by virtue of the fact that it received all the copartnership property, and agreed, in consideration thereof, with someone else,—a stranger to the plaintiff,—to do certain things which would directly benefit the promisee, and some of which would perhaps incidentally benefit the plaintiff. Upon the facts stated in the complaint, we are of opinion that no such obligation rested upon the defendant.

There is no error.

The other Judges concur.

TEXAS COURT OF CRIMINAL APPEALS.

Ex parte R. W. PATTERSON.

(.....Tex.....)

1. An original writ of habeas corpus may be granted by the Texas court of

NOTE.—On the subject of municipal power over bowling alleys, see also some cases in note to State v. Karstendiek (La.) 39 L. R. A. on page 524.
51 L. R. A.

criminal appeals notwithstanding the failure of the prisoner to appeal from his sentence to the county court, as he might have done, where, if he had done so, he could not have appealed from that court if the punishment had been a fine of not more than \$100, and the writ of habeas corpus was refused by the county judge.

2. The power to regulate tempin alleys, given by the general statutes to a city, does not authorize an ordinance forbidding

the location of such alleys within the fire limits of the city, or within 100 yards of any private residence or business house, where the only place within the corporate limits and outside of the prohibited points at which such an alley could be located would be 600 yards from the business center, and in a portion of the city remote from any thoroughfare or public place, since the power to regulate does not include the power to suppress or prohibit.

(October 24, 1900.)

APPPLICATION for a writ of habeas corpus to obtain the release of petitioner from the custody of the marshal of the City of Wills Point to which he had been committed for violation of an ordinance locating tenpin alleys. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. James H. Young, Wynne & Smith, and Kearby & Kearby, for relator:

Habeas corpus is the proper remedy to invoke, to obtain relief herein, upon the ground that said ordinance complained of is unreasonable, unconstitutional, and therefore void; and when the county judge of the county of relator's residence refused the writ because of sickness and because of the grave questions involved, this court should exercise its discretion and entertain jurisdiction of said case originally.

Ex parte Gregory, 20 Tex. App. 210, 54 Am. Rep. 516; *Ex parte Terrell*, 40 Tex. Crim. Rep. 28, 48 S. W. 504; *Ex parte Banks* (Tex. Crim. App.) 53 S. W. 688; *Ex parte Grace*, 9 Tex. App. 381; Church, *Habeas Corpus*, 2d ed. § 83.

The ordinance is unconstitutional in that its effect is to prohibit a business authorized and licensed by the state of Texas, and in that the same is an unwarranted assumption and exercise of power by a city incorporated under the general laws of the state, and the same is unreasonable in that it virtually drives said business out of said city, and is not a regulation, but is a prohibition, of said business, and is therefore void.

Austin v. Austin City Cemetery Asso. 87 Tex. 330, 28 S. W. 528; *Ex parte McCarver*, 39 Tex. Crim. Rep. 448, 42 L. R. A. 587, 46 S. W. 936; *Ex parte Battis*, 40 Tex. Crim. Rep. 112, 43 L. R. A. 863, 48 S. W. 513; *Ex parte Terrell*, 40 Tex. Crim. Rep. 28, 48 S. W. 504; *Ex parte Garza*, 28 Tex. App. 381, 13 S. W. 779; *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057; *Ex parte Grace*, 9 Tex. App. 381.

Messrs. W. C. Blanks and Robert A. John for respondent.

Henderson, J., delivered the opinion of the court:

This is an original application for a writ of habeas corpus to test the validity of an ordinance locating tenpin alleys in the city of Wills Point. The statement of facts agreed on by the parties shows: That Wills Point is incorporated under the acts of the legislature (title 18, Rev. Stat.), providing for the incorporation of cities and towns not exceeding 10,000 inhabitants. That the 51 L. R. A.

city of Wills Point contains a population of about 2,000, and that said city passed an ordinance to the following effect: "Be it ordained by the city council of the city of Wills Point that an annual occupation tax of fifty dollars, payable annually in advance, shall be levied on and collected from every person, firm, company, or association of persons exhibiting, operating or managing, for profit, a nine or ten pin alley or any other alley, by whatever name called, constructed or operated upon the principle of a bowling alley, and upon which balls, rings, or other devices are used, or substitutes thereof are rolled, without regard to the number of pins used, or whether pins are used or not, or whether the balls, rings, or other devices are rolled by hand, or not. Any such alley used in connection with a saloon, or where money or anything of value is paid, shall be regarded as used for profit. (2) And, whereas, in the judgment of the city council, such alleys are detrimental to the morals, peace, and quietude of the city, it is further ordained by the city council that such alley shall not be constructed, operated, or maintained within the fire limits of said city, nor within 100 yards of any private residence in said city, nor within 100 yards of any business house in said city, to which people resort for the purposes of trade and barter, and any person or persons, firm or association of persons violating this ordinance, shall, upon conviction in the corporation court of said city, be fined in any amount, not exceeding \$100, and each day shall be considered a separate offense. (3) And that this ordinance take effect from and after its passage." That applicant procured a license for the purpose of running a tenpin alley in said city on the 14th day of February, 1900, paying state, county, and city occupation taxes thereon; the last being paid to the city marshal, who issued a tax receipt therefor, containing no restriction as to the location of the alley, except that he was licensed to run within the corporate limits of the city of Wills Point. Said alley was constructed of wood, with an iron roof, and was attached to the rear end of a saloon. The front of the alley was some 60 feet from the front of the street, and the rear of the alley abutted on a public thoroughfare, being an alley in the rear of said saloon. That same was located within the fire limits of said city, and within less than 100 feet of business and residence houses in said city. That the only point within the corporate limits of said city where said alley could have been located outside of the prohibited points, under the ordinance, would be about 600 yards from the business portion of the town, and in a portion of the city remote from any thoroughfare or public place, but on streets which were run into pasturage or tillable lands in the suburbs of said city. It was further shown that said tenpin alley, in its operation, created noise. That it could be heard at night as much as 100 yards from its location.

Relator's contention is that said ordinance is unreasonable and is void. There is no

question as to the jurisdiction of this court to grant original writs of habeas corpus. But, as was said in *Ex parte Lynn*, 19 Tex. App. 120, a sound discretion will be exercised in granting the writ, and this court will not authorize the issuance of the writ as an appellate proceeding. And see *Ex parte Boland*, 11 Tex. App. 159. And, as was said in *Ex parte Lambert*, 37 Tex. Crim. Rep. 435, 36 S. W. 81, inasmuch as this court has jurisdiction by appeal in habeas corpus proceedings, the writ will only be granted originally in extraordinary cases, as where the proceeding is void, and an appeal will not be an adequate remedy. In this case relator had been tried in the corporation court of Wills Point, adjudged guilty, and was in custody of the officer, but did not prosecute an appeal. His appeal, however, would have been to the county judge; and, even if an appeal had been prosecuted, the punishment, if it had been less than \$100, would not have authorized an appeal to this court, and the county judge refused the writ. So we take it that this is a proper case for the granting by this court of an original writ. It may be regarded as settled law in this state that the writ of habeas corpus is the proper remedy, and relief will be granted, as against a city ordinance, where the ordinance in question is so unreasonable as to be void. *Ex parte Battis*, 40 Tex. Crim. Rep. 112, 43 L. R. A. 803, 48 S. W. 513, and authorities there cited.

It is insisted, however, by the respondent, that the General Statutes of the state, under which the city of Wills Point was incorporated, give to the municipal council of said city the power to regulate tenpin alleys, and that the power to regulate implies or carries with it the power to locate tenpin alleys. In support of this construction, we are cited to *St. Louis v. Russell*, 115 Mo. 248, 20 L. R. A. 721, 22 S. W. 470. An examination of that case indicates that this is the view taken by the court deciding that case. However, we do not deem it necessary to decide that question, inasmuch as whether the power to regulate, under the statute, refers merely to authority to control the operation of the tenpin alley, wherever it might be situated, as to such hours as it might be permitted to run, etc., or embraces the authority to locate the same in any particular part of the city, is immaterial; for, if it be conceded that the power to regulate implies also the power to locate, still the exercise of this power must be reasonable. The power to regulate does not properly include the power to suppress or prohibit, for the very essence of regulation

is the existence of something to be regulated. 20 Am. & Eng. Enc. Law, p. 723. The power to regulate includes the power to restrain, so long as the restraint imposed is reasonable. The restraint must not so confine the exercise of any occupation as to amount to a prohibition. *Horr & B. Mun. Pol. Ord. § 30*. The power to regulate a trade, business, or occupation in any given town or city is to be determined by the environments and conditions of such town or city, and what would apply to one town or city might not apply to another. *Dill. Mun. Corp. § 327*. We would further observe that, in the power to regulate, a distinction appears to be taken in some of the authorities between trades or business of advantage or utility to the community, and occupations or business for the purpose of amusement, etc. A bowling alley would be classed in the last category. But it seems a bowling alley is not *per se* a nuisance. See *State v. Hall*, 32 N. J. L. 158. However, bowling alleys or tenpin alleys are legalized in this state. Not only the state itself, but counties and cities, are authorized to raise a revenue therefrom, and towns and cities are especially authorized to regulate them. The only question we have to decide is, Was the power here exercised by the municipal council of Wills Point an unreasonable regulation? Of course, the object of the relator in establishing his tenpin alley in the city of Wills Point was to make a profit out of its operation, and it would seem that this could only be done by locating it in such part of the city as would be easily accessible to the general public. But here it was, in effect, driven out of the business portion of the city, and away from the public thoroughfares. No more effective way could have been adopted to frustrate the object of the owner than to locate it as was done in this instance. Indeed, it was conceded by the respondent in the argument that the object of the council was to discourage the keeping of a tenpin alley in the city of Wills Point; and it would appear from the facts in this case that, if the ordinance adopted is valid, it will not only discourage the operation of a tenpin alley in said city altogether, but will, in effect, prohibit its successful operation. We accordingly hold that the attempted exercise of power by the municipal corporation of Wills Point to locate the tenpin alley of the relator was unreasonable, and therefore void.

Relator is accordingly ordered discharged with the costs of this proceeding taxed against him.

51 L. R. A.

NEW JERSEY COURT OF ERRORS AND APPEALS.

COAST COMPANY, *Appt.*,

v.

Mayor, etc., of SPRING LAKE *et al.*

(58 N. J. Eq. 586.)

1. While a court of equity will not, as a rule, correct irregularities in municipal procedure, it will nevertheless restrain an irregular proceeding if it threatens irreparable injury.
2. A municipality, as the representative of the public, may sue to abate or prevent a nuisance upon public property within its limits.
3. The power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen.
4. The fact that a general statute for

*Headnotes by RRED, V. C.

NOTE.—*Right of a municipality to maintain suit to enjoin or abate a public nuisance.*

This note is confined strictly to the question as to the capacity of a municipal corporation to maintain the suit. It does not cover other questions of pleading or practice, nor the general question as to when and under what circumstances equity will interfere in case of a nuisance, since these questions are common alike to suits by municipalities and to suits by the attorney general or other law officer of the state, or by an individual, and cannot be fully presented in a note which is limited to suits by municipalities.

Upon the question of municipal control over nuisances in general, see *note* to *Grossman v. Oakland* (Or.) 38 L. R. A. 598.

The subject of municipal control by injunctions over nuisances in waters and watercourses is treated of in a *note* to *Waverly v. Page* (Iowa) 40 L. R. A. 465.

As to injunctions by municipal authorities against nuisances relating to public morals, peace, good order, health, and safety, see *note* to *Red Wing v. Gupitil* (Minn.) 41 L. R. A. 321.

As to when an injunction will be denied to restrain an alleged nuisance, see *note* to *Balentine v. Webb* (Mich.) 13 L. R. A. 321.

For cases of injunctions against nuisances in the sale of intoxicating liquors in violation of law, and which may also be punished by fine or imprisonment, see *note* to *Red Wing v. Gupitil* (Minn.) 41 L. R. A. 321.

The power of equity, in a proper case, to entertain a bill to enjoin or abate a public nuisance is well established. When the nuisance is private, as well as public, the bill may be maintained by anyone who sustains special damages different from those sustained by the general public. That such a bill may be maintained by the attorney general or other law officer of the state to vindicate and protect the rights of the public, without the necessity of showing special damages to any particular person or persons, is also established beyond dispute; but the right of a municipality, as the representative of the public and without showing special damages, to maintain such a bill, is not so clear, though, as subsequently shown, when the nuisance affects matters with reference to which a portion of the power of the state has been delegated to it, such right seems to be established by the weight of authority.

Of course, when the municipality itself owns

the formation of boroughs has been judicially declared to be unconstitutional in an action brought by the attorney general to test the *de jure* existence of one corporation formed under the act cannot, in a collateral suit, affect the existence or powers of another borough organized under the same act.

5. Where the objection that a party has an adequate remedy at law is not taken until after the testimony is all in, the court, in its discretion, will retain the cause if the court is competent to grant the relief asked for, and has jurisdiction over the subject-matter.
6. The common council of a borough, by resolution, threatened to tear down a building being erected on land which it claimed was dedicated to public use. A bill was filed to restrain the borough and its officers. The borough answered, setting up a dedication of the building site, and also

property which is specially damaged there can be no question as to its right to maintain the suit upon the same principle that an individual suffering similar damage might maintain it. Such was the case of *Dayton v. Robert*, 8 Ohio C. C. 649, where the court upheld the right of a city to maintain a bill to enjoin the making of a fill in a river, which would injure the city's levees.

But, even when the municipality owns no property which is damaged or threatened by the nuisance or proposed nuisance, it is not always necessary to refer its right to maintain the suit to its powers as the representative *pro hac vice* of the public; but such right may be, and in a number of cases has been, upheld upon the ground that, by reason of its duties, obligations, and liabilities in connection with the matter affected by the nuisance, it sustains special damages which enable it to maintain the bill, upon the same principle that a private person specially damaged in his property rights may maintain it.

Thus, it has been held that a municipality by reason of its duty to keep the highways in proper condition, and its liability for injuries occasioned by obstructions and defects therein, suffers an injury or inconvenience, beyond that of the public generally, from a nuisance in the highway, which will enable it to maintain a bill to enjoin or abate the same. *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Philadelphia v. Thirteenth & F. Streets Pass. R. Co.* 8 Phila. 648; *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 648, 34 N. W. 728.

In *Easton & A. R. Co. v. Greenwich Twp.* 25 N. J. Eq. 565, affirming 24 N. J. Eq. 217, it was held that a town has a special interest in the highway, which enables it to maintain a bill to enjoin a railroad company from obstructing and changing its location, since the town is in duty bound to keep the road in repair, and is liable in its corporate capacity to indictment for failure to do so.

And that case is followed by *Jersey City v. Central R. Co.* 40 N. J. Eq. 417, 2 Atl. 262.

Some of the courts have thought that the right of a municipality to maintain the bill must, like the right of a private individual, depend upon the fact of its having sustained special damages, and have denied its right to maintain the bill as the representative of the public interests.

The United States Supreme Court, in *George*

filed a cross bill upon the same ground, praying that the nuisance might be abated. *Held*, that the action of the borough council was irregular; that the injury threatened was irreparable, and that the nuisance was not such as a municipal officer could abate at common law; therefore their threatened acts will be restrained. But, further, *held*, that as to the case made upon the cross bill—no objection to the jurisdiction of the court having been made until the evidence was concluded, and it appearing that the dedication of the land is reasonably clear—the court will retain the cause, and decree an abatement of the nuisance.

(November 7, 1897.)

APPPEAL by complainant from a decree of the Chancery Court sustaining a cross bill filed by defendants in a suit to restrain defendants from tearing down certain build-

town v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012, seems to take that view, though the matter affected by the nuisance in that case—namely, the navigability of a river—is not one of those which is ordinarily confided to municipalities and in respect to which the municipality acts as the representative of the state; nor does it appear that it had been confided to the municipality in this instance.

The court in that case, after pointing out that the ordinary and regular proceeding at law for a public nuisance is by an indictment or information, by which the nuisance may be abated and the person who caused it punished, said: "If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage."

Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney general." Again: "The complainants, then, must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved that they were the owners of property liable to be affected by the nuisance, and that in point of fact were so affected; so as that they thereby had suffered a special damage. Now, there is no such averment in this bill. The appellants seem to have proceeded on the idea that it appertained to them as corporate authority in Georgetown to take care of and protect the interests of the citizens. In this idea we think they were in error, and that they cannot upon any principle of law be recognized as parties competent in court to represent the interests of the citizens of Georgetown."

Ward v. Little Rock, 41 Ark. 526, 48 Am. Rep. 46, was a bill filed by a city to enjoin the lessee of a penitentiary from working convicts upon the street. The court said that considering the scope and purpose of the bill to be the abatement of a public nuisance, such a bill could not be maintained unless it showed that the plaintiff had sustained, and was still sustaining, individual damage.

Ottumwa v. Chinn, 75 Iowa, 405, 39 N. W. 670, held that a city was not authorized to bring an action, for the benefit of the public, to restrain the maintenance, and for the abatement of, a slaughterhouse as a nuisance, and that it could not maintain the action under § 3331 of the Code, authorizing an action to restrain and abate a nuisance to be brought by "any person injured thereby," since it did not appear that it was especially affected by the nuisance. In that case the city based its de-

ings which were in process of erection upon land which was alleged to belong to the public. *Affirmed*.

The facts are stated in the opinion of the court below by REED, V. C., which was as follows:

"This bill is filed by the Coast Company to restrain the defendants from tearing down certain buildings, in the course of erection, along the edge of Spring lake, within the limits of the borough of Spring Lake, on land which the latter claims has been dedicated to public use. The admitted facts are these: About the year 1875, several gentlemen conceived the notion of creating a seaside resort on the Atlantic coast. They caused to be purchased a tract of land within the limits of the township of Wall, in the county of Monmouth. On March 15, 1875 (Pamph. Laws 1875, p. 100), these gentle-

mand for relief upon the alleged fact that the nuisance was injurious to its citizens.

Detroit v. Detroit & M. R. Co. 23 Mich. 173, 216, was a bill by a municipal corporation, which, in one aspect of it, sought to enjoin a nuisance in the public highway. The question was raised by counsel whether, supposing the case made by the bill to be maintainable in other respects and to be established by the proof, the city in its corporate capacity was the proper, or a competent, party to bring the suit on behalf of the public. The court said that it did not consider the rights of the city by any means clear upon the authorities, but refrained from expressing an opinion, and disposed of the case adversely to the complainant upon the merits.

Detroit Water Comrs. v. Detroit, 117 Mich. 458, 76 N. W. 70, was a bill in chancery by water commissioners of the city of Detroit to abate a nuisance consisting of a wreck in the river, in front of a park of which it has charge and control. The court said: "The complainant in this case, while charged with public functions, does not represent the public generally in the matter of the protection of the highway or river adjacent to the city. This is not claimed on its behalf, but it is contended that it has the same rights that an individual has; and this proposition we think is sound, in so far that for any infringement of its property rights the complainant would have the same right to seek redress as an individual." The court held that in this case the board suffered a sufficient private injury to entitle it to maintain the bill.

In Easton & A. R. Co. v. Greenwich Twp. 25 N. J. Eq. 565, Affirming 24 N. J. Eq. 217, the court said that if the township had no special interest beyond the public at large the proceeding should have been instituted by the attorney general in behalf of the public.

And the chancellor, in Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 394, 18 Atl. 106, held that the plaintiff, which was a public body charged with the management of Newark's water supply, and empowered by statute to maintain suits in equity or at law "for any injury or trespass or nuisance done or caused, or procured to be done, to the watercourses, pipes, machinery, or any apparatus belonging to or connected with any part of the works, or for any improper use or waste of the water," was not entitled to maintain an action to restrain the pollution of the stream, in the absence of a distinct injury to it. The chancellor said that where a nuisance is purely public the proceeding to restrain it must be by information by the attorney general, and that the statute did not

men caused an act to be passed incorporating the Spring Lake Beach Improvement Company, with power to buy land, lay it out, and locate streets and lines of division thereon, and to sell the property. The land so purchased was conveyed to this corporation. By direction of the corporation, a map of the property was made in 1875, and filed in the office of the clerk of the county of Monmouth. Within the boundaries of the tract was a fresh-water lake, which was christened 'Spring Lake.' Around this lake, on the map, was delineated a street marked 'Lake Avenue.' Between the avenue and the lake was a margin of land, and at certain points upon this strip, where the lake, by irregularities in its shores, receded from the street, there were certain marks to denote shrubbery. With the exception of another portion of the tract marked with the same

indication, and of a square marked 'Farm Land,' the remainder of the entire tract was plotted into lots and streets. In 1878 a new map was made by the same surveyor who had made the preceding map, but modifying the original map by slight changes in the course of Lake avenue around the lake, and marking two lots within the avenue, at the northwesterly end of the lake. The company, by its agents, proceeded to sell lots. Such agents, by authorization from the company represented to those whom they solicited to become purchasers that the lake would remain open to the use of the lot owners, or that the lake would remain open to the use of the public. The sale of the lands by the original corporation continued until December 10, 1880, when that corporation sold all its interests in the land to a new company incorporated under the name of the

constitute the plaintiff a public agent to sue or restrain a public nuisance, but merely clothed it with power to sue as an individual might for the protection of private property.

This decision was affirmed by the court of errors and appeals (40 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55), on another ground; but the court said it was not prepared to indorse the conclusion of the chancellor that the complainant did not have the requisite capacity to bring the suit as the representative of the rights of the inhabitants of the city.

Dover v. Portsmouth Bridge, 17 N. H. 200, was a bill by a town to enjoin the proprietors of a bridge from maintaining the same. The court said: "The corporation claims to represent and protect the rights of the inhabitants of the town who are owners of property affected by the bridge; but the corporation cannot vindicate any such rights, unless it be in some case where a corporate duty exists. Perhaps the town might be heard in its corporate capacity, where the health of the community was endangered by a nuisance, or where they might otherwise be subjected to expense by reason of pauperism, and in any other case involving corporate responsibility. But nothing of that character appears in this case, and the town cannot maintain the bill on the ground that individual inhabitants are affected in their private interests." The court further said that the town had no greater rights in respect to maintaining such a bill than any individual owner of property affected in like manner by the bridge.

Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 85, held that a city had not such an interest or property in the street as to enable it to maintain an action to enjoin a railroad company from constructing the road therein. The opinion does not expressly refer to the action as one to enjoin a public nuisance, but it appears from the report of the case that the defendant's attorney made the point that the city had no right to prosecute an action to prevent a public nuisance, unless it showed some injury to itself distinct from the public injury.

Sheboygan v. Sheboygan & F. du L. R. Co. 21 Wis. 668, also seems to take the view that the town must have sustained a special injury not common to the whole community in order to enable it to maintain an action in equity to enjoin a nuisance. In this case the nuisance consisted of the obstruction of a stream, causing injury to public bridges and highways which the town was bound to keep in repair; and the court queried whether the town received such special damage as would give it a right to main-

tain the action, but the case was decided against the town on another ground.

In *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128, the court held that even if the consequences from obstructing the channel of a river, predicted in a bill by the city to restrain such obstructions, would be produced, the city had no such corporate interest in them as would authorize it to maintain the action.

A local board of health of a district has no *locus standi* as plaintiffs in a suit in which it is sought to restrain the exercise of the statutory powers of the party constructing a system of sewers conveying the sewage of their district into a stream, but such suit ought to be brought by the attorney general alone. *Atty. Gen. v. Richmond*, 12 Jur. N. S. 544, 35 L. J. Ch. N. S. 507, L. R. 2 Eq. 306, 14 Week. Rep. 680, 14 L. T. N. S. 398.

In *Wallasey Local Board v. Gracey*, L. R. 36 Ch. Div. 593, 56 L. J. Ch. N. S. 739, 57 L. T. N. S. 51, 35 Week. Rep. 694, 51 J. P. 740, the right of a local board of health to maintain an action to enjoin a nuisance detrimental to the health of the community was denied, notwithstanding English public health act 1875, § 107, providing that "any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person, in any superior court of law or equity, to enforce the abatement or prohibition of any nuisance under the act." The decision rests upon the ground that the proceedings contemplated by the section were the ordinary proceedings known to the law, and that no person can sue in respect to a public nuisance, except either the attorney general or a person suffering particular damage.

The decision in that case was approved by *Tottenham Urban Dist. Council v. Williamson* [1896] 2 Q. B. 353, 75 L. T. N. S. 238, 65 L. J. Q. B. N. S. 591.

And in *Bermondsey v. Brown*, L. R. 1 Eq. 204, under a local act giving commissioners power to bring such action as they should think expedient, the decision of the court was to the same effect.

However, the doctrine that a municipal corporation may, as the representative of the equitable rights of its inhabitants, and without proving special damages, maintain a suit to enjoin or abate a nuisance affecting matters with reference to which a portion of the power of the state has been confided to it, seems to be firmly established.

Many of the cases cite, in support of this

'Spring Lake & Sea Girt Company.' The control of the land and the sale of the lots were thereafter conducted by the latter corporation. On February 20, 1893, the latter company sold a portion of the said tract to the complainant, the Coast Company. The part so sold included the southerly end of Sprink lake opposite the Monmouth House. The deed purported to grant the right of hiring pleasure boats on the lake, and contained a clause that the grant should not prevent the Spring Lake & Sea Girt Company from giving to resident property owners or guests the free use of the waters of the lake for the enjoyment of themselves, their friends, and visitors. The Coast Company, in 1895, began the erection of five frame stores, one story high, on the edge of the lake at its southerly point. In 1892 a new municipal corporation was created, known as the 'Bor-

ough of Spring Lake.' It included within its territorial limits all the land of the original Spring Lake Beach Improvement Company. On June 17, 1895, the borough council passed a resolution, wherein it was stated that whereas certain persons were, without authority of law, and to the common nuisance of the public, erecting a building on the lake and its banks, and said persons, although notified by the mayor to discontinue said work, and remove said structure, were still prosecuting the work, it was resolved that the mayor cause to be affixed to the said structure a notice that the same must be removed within twenty-four hours, and, if the said notice was not complied with, then the mayor was authorized to cause said structure to be torn down and removed. It was resolved that the mayor should appoint ten persons as policemen. The bill in this case

doctrine, the case of *London v. Bolt* (1799) 5 Ves. Jr. 129, where a preliminary injunction restraining a nuisance was granted on the petition of an officer of the municipality of London in anticipation of the filing of a bill by the municipality. The question whether the municipality could maintain such a bill, or whether the suit must be prosecuted in the name of the attorney general, was not discussed, but the right of the municipality in the premises was apparently assumed.

In *Nuneaton Local Board v. General Sewage Co.* L. R. 20 Eq. 127, 44 L. J. Ch. N. S. 561, an injunction was granted at the instance of a local board of health, restraining defendants who had entered into an agreement with the local board for the disposal of the sewage, from continuing a condition which caused a nuisance; but in this case the existence of those conditions constituted a violation of the contract. It is not entirely clear whether an injunction would have been granted if it had not been for the contract. The vice chancellor, in reply to the argument upon the demurrer to the bill that the attorney general ought to be a party to the suit, said: "The day may possibly come—whether it will or not I do not say—when the question whether a corporation created by statute to discharge such duties as a local board of health are created to fulfil may or may not file a bill to restrain the infringement of a public right, with or without the attorney general, will have to be decided." Again: "When the plaintiffs say, moreover, that the consequence of what the defendants have done is to create a public nuisance, the court will not listen to the complaint with indifference. The existence of a public nuisance under these circumstances is a matter to be attended to,—at least it is not by saying that if you come only to prevent a public nuisance you must come under the wing of the attorney general, that such an allegation can be got rid of."

Guelph v. Canada Co. 4 Grant Ch. (U. C.) 633, was a suit by a municipality to restrain the sale of certain property in the town, which had been dedicated to the uses of the town and was used as a market place. In reply to the objection of defendants that the attorney general should have been made a party, the chancellor said that, viewing the case as one to enjoin a nuisance, the right of the municipality to maintain a suit could not be denied. This decision seems to rest upon the ground that the inhabitants of the town had a peculiar interest in the market place, and that the acts sought to be enjoined would inflict a special injury on them, 51 L. R. A.

and that it was the duty of the municipality to protect the rights of the public from infringement. The vice chancellor said, in reply to the same objection: "I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation in this court to protect their equitable rights against the erection of this nuisance."

A municipal corporation which by its charter is authorized to abate, or to compel the abatement of, public nuisances, may maintain an action in equity to secure such result. *Red Wing v. Guptil*, 72 Minn. 259, 41 L. R. A. 321, 75 N. W. 234. The doctrine was applied in this case to a nuisance which affected the comfort and convenience of the public, but not the public health.

The doctrine has been applied in the following cases to nuisances in highways or public places under the control of the municipality: *Stamford v. Stamford Horse R. Co.* 56 Conn. 381, 1 L. R. A. 375, 15 Atl. 749; *People ex rel. Bryant v. Holladay*, 93 Cal. 248, 29 Pac. 54; *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *Huron v. Bank of Volga*, 8 S. D. 449, 66 N. W. 815; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, 627; *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255; *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197; *Watertown v. Cowen*, 4 Paige, 570, 27 Am. Dec. 80; *Moyamensing Twp. Comra v. Long* (1845) 1 Pars. Sel. Eq. Cas. 143; *Liano v. Liano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Yates v. Warrantown*, 84 Va. 337, 4 S. E. 818; *Moore v. Walla Walla*, 2 Wash. Terr. 184, 2 Pac. 187; and *Coast Co. v. Mayor, etc., of Spring Lake*.

A county through its managing board is a proper party to maintain an action to enjoin a railroad corporation from constructing and maintaining its railroad, without lawful authority, along a road in two towns so as to destroy the road for the purpose for which it was established. This is on the ground that the county is charged with the duty of opening, vacating, and resurveying such roads, and that there should be implied the corresponding power to maintain such actions as may be appropriate to prevent or abate a public nuisance destroying the highway or rendering it useless. *Stearns County v. St. Cloud, M. & A. R. Co.* 36 Minn. 425, 32 N. W. 91.

The Alabama supreme court, in *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408, said that the

was then filed for the purpose of restraining the borough and its agents from carrying out the purpose announced in the foregoing resolution. The answer to the bill sets up that the borough is organized under An Act for the Formation and Government of Boroughs, approved April 2, 1891. It insists that the borough, as the representative or trustee for the inhabitants of the borough, was invested with the authority to protect the rights of the people and inhabitants of the borough in the lake, grove, and grounds surrounding it, as property devoted to public uses.

"The question litigated at the trial was whether the site upon which the complainant was erecting the structures was public ground. Apart from the merits of its cause upon this ground, however, the complainant insists that it is entitled to a decree restrain-

ing the defendants from carrying out their purpose. It is pressed as a tenable proposition that, even if it be admitted that the *locus in quo* has been dedicated to public use, nevertheless the defendants had no authority to interfere with complainant's buildings, and that this court will restrain their threatened attempt to do so. The mayor and members of the common council, it is argued, cannot invoke any official authority to justify their proposed acts; that it therefore follows that they must be regarded, not as officials, but only as citizens of the borough; and that as citizens they have no right to abate a public nuisance, unless it inflicts some special private injury upon them, distinct from that of the public. If the first step in these series of propositions is admitted, the others legally follow. It is entirely settled that the authority of a pri-

right of a municipal corporation to enjoin the continuance of a fence erected across a street was clear on both authority and principle. It is not clear whether the court bases this right upon the ground that the city represents the rights of its inhabitants, or upon the ground that it suffers a special injury. The opinion cites *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, *supra*, which apparently takes the former view, and also the case of *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571, *supra*, which apparently takes the latter view.

And in the six cases next cited it does not clearly appear which theory the courts adopted.

A municipal corporation charged with the care of the highways may maintain a suit to protect them against threatened injury. *Woodbridge Twp. v. Inslee*, 37 N. J. Eq. 397.

In *Jersey City v. Central R. Co.* 40 N. J. Eq. 417, 2 Atl. 262, it is said to be settled that a municipality which has by law the control and supervision of the public highways within its territorial limits may maintain a suit in equity to prevent any alteration of or injury to them which will deprive the public of their safe and convenient use.

Any encroachment on the streets of a city is a nuisance which will be enjoined at the suit of the city. *Philadelphia v. Friday*, 6 Phila. 275; *Philadelphia v. Presbyterian Bd. of Publication*, 9 Phila. 499.

In *Teass v. St. Albans*, 38 W. Va. 1, 19 L. R. A. 502, 17 S. E. 400 (a case of a nuisance in the street), it is said that there is no good reason why a remedy in equity may not be resorted to by a municipal corporation where judicial proceedings are proper or necessary.

In *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 20 L. R. A. 161, 168, 16 S. E. 514, the jurisdiction of a court of equity to restrain a nuisance in the street at the instance of the city was said to be clear, for the reason that the West Virginia statutes gave it control over the streets and made it liable for defects, the city representing the public interest.

In *People ex rel. Bryant v. Holladay*, 93 Cal. 248, 29 Pac. 54, *supra*, the court remarked that some of the cases base the right of a municipal corporation to maintain the action upon the narrower ground that the corporation suffered special and peculiar injury in the obstruction of streets and squares, different from that sustained by the general public; but the court preferred to base the right upon the ground that the municipality represented the equitable rights of its inhabitants.

In *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396, *supra*, it appeared that the Code 51 L. R. A.

of Civil Procedure expressly provided that a nuisance might be enjoined or abated, but did not expressly provide that a municipality might maintain a suit for that purpose.

In *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, *supra*, the court said that municipalities, being vested with the right to control the use of highways, streets, and public grounds within their limits were therefore invested with the authority of the Crown and state to file bills to prevent and remove obstructions therefrom.

In *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197, *supra*, the court held that the municipality was the representative of the state *pro hac vice*.

And the same view is expressed in varied language by the other cases previously cited on this point.

In *Moyamensing Twp. Comrs. v. Long* (1845) 1 Para. Sel. Eq. Cas. 143, the court discusses the question somewhat at length, and distinguishes the case of *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012, *supra*, substantially upon the ground already suggested.

In *Derby v. Ailing*, 40 Conn. 410, an injunction was granted at the instance of a town to restrain a nuisance in a street. The capacity of the town to maintain the bill in a proper case is apparently assumed, but the question is not discussed.

And the same is true of *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540, which was a bill by a city to restrain a railroad company from constructing its road across a public square.

In the following cases the capacity of a municipality to maintain an action to enjoin or abate a nuisance affecting the highway or a public square was not discussed, but the relief sought was denied upon other grounds. *Waterloo v. Waterloo Street R. Co.* 71 Iowa, 193, 32 N. W. 329; *Rockland v. Rockland Water Co.* 86 Me. 55, 29 Atl. 935; *Lebanon Twp. v. Burch*, 78 Mich. 641, 44 N. W. 148; *Raritan Twp. v. Port Reading R. Co.* 49 N. J. Eq. 11, 23 Atl. 127; *Philadelphia's Appeal*, 78 Pa. 33.

And in *Winsor v. Delaware & H. Canal Co.* 92 Hun, 127, 36 N. Y. Supp. 863, it is held that under the New York highway act (chap. 568, § 15, of the Laws of 1890) the commissioners of highways may bring an action in the name of the town against any person or corporation, to maintain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto.

vate person to abate a public nuisance arises entirely from the fact that it interferes with some special, individual right possessed by him, distinct from the general right of the public. *Brown v. De Groff*, 50 N. J. L. 411, 14 Atl. 219. It is clear that nothing appears in this case to exhibit the existence of any special injury to any one of the defendants likely to flow from the presence of those buildings. The defendants, therefore, must justify by virtue of some official authority. Indeed, the defendants do not pretend to claim a power to do the proposed acts as private citizens, but they claim to have been invested with an official character, by which, as the representatives of the people, they possessed authority to abate public nuisances within the borough. Upon this point the parties are at issue.

"It is admitted that the defendants were officers of a going municipal corporation, organized under the general statute (Pamph. Laws 1897, p. 280); and that under this general charter these officers had power to pass ordinances, *inter alia*, for preventing or removing all obstruction, encroachment, encumbrances, and nuisances from the streets, roads, highways, sidewalks, alleys, and inclosures and lands in the said borough. It is thus perceived that upon the mayor and common council was conferred a general authority over nuisances existing upon the streets and elsewhere. It is upon this power that they put their jurisdiction for the acts proposed in the resolution of the mayor and common council. The complainant, however, denies that the pretended resolution possessed any official quality whatever. Its denial is put upon two grounds: First, that the act under which the borough of Spring Lake was organized, and which pur-

ports to confer upon the mayor and common council this power over obstructions in the streets and other public places, is unconstitutional; second, that if the act itself cannot be attacked upon this ground in this suit, then the charter of this municipality has defined the manner in which the power is to be exerted, namely, by ordinance; while, in fact, the common council in this instance had attempted to exert it by resolution.

"In support of the first of these propositions I am referred to the case of *State v. Cape May Point* (no opinion filed), in which it was held by the supreme court, on the authority of the case *Re Ridgefield Park*, 54 N. J. L. 288, 23 Atl. 674, that the act of 1891, under which this borough was erected, is unconstitutional. In the case of *State v. Cape May Point* the attorney general had permitted an information to be filed in his name to test the legality of the corporate existence of the borough, and the court held adversely to the existence of the municipality attacked. I am unable, however, to perceive in what way the decision in that case can, in this suit, introduce the question of the corporate existence of the borough of Spring Lake. The force of the judgment in the preceding case was spent when it annulled the corporate existence of the borough of Cape May Point. It is, of course, obvious that the decision in that case will be controlling as a precedent whenever the question of the constitutionality of the same act arises in a shape to be passed upon. The question can be raised by an attack upon any step taken to organize a borough under the provisions of the act by means of a certiorari allowed before the corporation has become an existing entity. After the corporation has been

So, also, the doctrine has been applied where the nuisance affects the public health. Thus:

An incorporated city in Texas may maintain a bill in equity to abate a nuisance consisting of the pollution of a creek running through the city, without regard to trespass upon the city's property or that of any citizen. *Belton v. Central Hotel Co.* (Tex. Civ. App.) 33 S. W. 297; *Belton v. Baylor Female College* (Tex. Civ. App.) 33 S. W. 680.

Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694, upheld the right of the selectmen of a town to maintain a bill to enjoin defendants from occupying and using a building for a trade constituting a nuisance injurious to public health, upon the ground that the right of a town in such a case to maintain the bill was recognized in *Winthrop v. Farrar*, 11 Allen, 398, and that it could not be presumed that the legislature in enacting Mass. Gen. Stat. chap. 26, § 3, empowering the court to prevent by injunction the erection, use, or enjoyment of buildings in violation of its provisions, without expressly authorizing towns to maintain the suit, intended to take from towns the power which they had exercised under the decision of the court.

Taunton v. Taylor, 116 Mass. 254, held that a board of health which was expressly charged by statute to take all necessary measures to prevent the exercise of any trade in violation of its orders might for that purpose, without special authority, bring a suit in the name of the city to restrain the exercise of such trade. 51 L. R. A.

The erection and creation of a nuisance dangerous to health may be restrained by injunction at the instance of a board of health, under the general health act of New York, as well as under the city charter of Yonkers. *Yonkers Bd. of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 485, 35 N. E. 443.

In *New Orleans Bd. of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164, the court apparently assumed without discussion that a municipal board of health was competent to maintain a suit to enjoin a nuisance dangerous to the health of the inhabitants, and held that it was entitled to an injunction.

In the following cases the question as to the capacity of a municipality to maintain such a bill with respect to nuisances affecting the public health was not discussed, but the relief was denied on other grounds: *Winthrop v. Farrar*, 11 Allen, 398; *New York Health Department v. Purdon*, 99 N. Y. 237, 1 N. E. 687; *Felkin v. Herbert*, 11 L. T. N. S. 173, 9 Week. Rep. 496.

A borough and its inhabitants may maintain a bill to enjoin the erection of a nuisance in a creek forming one of its boundaries. *Frankford v. Lennig*, 2 Phila. 403. In this case the complaint was that the nuisance interfered with the navigation of the creek.

In the following cases the capacity of a municipal corporation to bring a suit to enjoin or abate a nuisance in the channel of a stream flowing through the city was not discussed, but the relief sought was denied on other grounds:

organized, its existence can be called in question only by an information in the nature of a writ of quo warranto, allowed by permission of the attorney general. No unconstitutional feature in the scheme provided by the legislature for the institution of such a municipal corporation can be made a ground for refusing to recognize the corporate function of a municipality so created, when the corporate existence is involved in a collateral proceeding. *State ex rel. Harvey v. Philbrick*, 40 N. J. L. 374, 8 Atl. 122; *State ex rel. Steelman v. Vickers*, 51 N. J. L. 180, 17 Atl. 153. No matter how clearly unconstitutional are the provisions of the general act providing for the organization of a municipality; no matter if in some other suit similar statutes, or the same statute, has been decided to be inimical to the Constitution,—nevertheless, such a municipality is a *de facto* corporation until its municipal existence is annulled by a direct proceeding instituted for that purpose. The borough of Spring Lake, in this proceeding, must be regarded as a *de facto* corporation, possessing the powers conferred upon it by its charter.

"The second ground taken against the legality of the proceedings of the mayor and common council of Spring Lake is that they did not pursue the course marked out in their charter in their attempt to cause the removal of complainant's buildings. It is insisted that the proceedings should have been by ordinance, and not by resolution. Now, it has been decided over and over again that when a charter prescribes that a municipal action shall be taken by ordinance it cannot be exercised by resolution. But the answer made to this point is that the com-

plainant cannot avail itself of this irregularity in a suit in equity; that the question of irregularity can only be raised on certiorari; that, therefore, although it may be admitted that the course taken was irregular, yet, if there resided in the borough authorities a right to cause an obstruction upon the public domain of the city to be removed as a nuisance, and if these buildings are of this character, in such case this court will not restrain the borough from pursuing its object, notwithstanding the fact that it is not proceeding in the manner pointed out by its charter. In further pursuance of this line of argument the defendant insists that, aside from the power conferred upon the borough, which is exercisable by ordinance, it has a special interest in the public property within its limits, which invests the municipal authority with the right to abate any encumbrance upon or obstruction to its use by the public. It is therefore insisted that this court will pass upon the question whether the site upon which these buildings are placed is dedicated land; and that, if it should be found to be such, the court will dismiss the complainant's bill. In support of this position the following authorities are cited: *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 252, 547; *Newark Lime & Cement Mfg. Co. v. Newark*, 15 N. J. Eq. 64; *Pope v. Union*, 18 N. J. Eq. 282; *Van Doren v. New York*, 9 Paige, 388. These cases, however, do not support the proposition, as thus broadly stated. It is undoubtedly true that a court of equity will not, as a rule, concern itself with irregularities in municipal procedure. If, however, some other matter of equitable cognizance becomes entangled with, or is the outcome of, such

Laughlin v. Lamasco City Trustees, 6 Ind. 223; *Rochester v. Erickson*, 46 Barb. 92; *Rochester v. Curtiss*, Clarke Ch. 336.

And in the following cases the right of a municipal corporation to maintain a bill to enjoin or abate a public nuisance calculated to increase the danger from fire was not discussed, but the relief sought was denied on other grounds: *Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700; *Hudson v. Thorne*, 7 Paige, 261; *St. Johns v. McFarlin*, 33 Mich. 72, 20 Am. Rep. 671; *Williamsport v. McFadden*, 15 W. N. C. 269.

In *Waupun Trustees v. Moore*, 34 Wis. 450, 17 Am. Rep. 446, the court expressly refrained from passing upon the question, and denied the relief on other grounds.

In *Lake View v. Letz*, 44 Ill. 81, the question as to the capacity of a town to maintain a bill to enjoin the establishment of a cemetery within the limits of a town was not discussed, but the right to the relief was denied on other grounds.

In *New Orleans v. Lambert*, 14 La. Ann. 244, an injunction was granted upon the petition of a city, restraining the owner of a blacksmith shop from continuing it after an ordinance of the city council had ordered it closed as a nuisance. The right of the city to apply for such relief was apparently assumed.

The distinction above suggested, between cases that base the right of the municipality upon the theory that it represents the public interests, and those that base it upon the theory that the municipality has sustained a special injury, 51 L. R. A.

is not, perhaps, of much practical importance when the question is confined to nuisances affecting highways or other public places, since, ordinarily at least, when the control of a highway or other public place is confided to a municipality the conditions exist which make the nuisance a special injury to it, and therefore if the court repudiates the first theory the second is still applicable. But the distinction is important when, although the municipality is the representative of the public, it cannot, as a separate entity, be said to sustain any special damage.

The doctrine established by the cases herein cited upholding the right of a municipality to maintain the bill without showing special damages is limited to nuisances which affect matters that have been confided to it as a governmental agency. As to such matters it seems eminently proper that, having been confided to the municipality, the public rights in respect to them should be vindicated by it. With respect to nuisances which do not affect matters confided to it, the right of the municipality to maintain the bill depends upon the same condition as the right of an individual or private corporation; that is, it must, as a separate entity, have sustained some special injury. The vindication of the rights of the public in respect to such matters, by a resort to equity, seems to be the exclusive province of the attorney general or other law officer of the state, though doubtless he may act upon the relation of the municipality.

G. H. P.

irregularities, courts of equity do not hesitate to intervene. For instance, if an irregular municipal proceeding will lead to an injury which is otherwise irreparable, it will be restrained. In *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 252, 547, the common council of Jersey City had passed an ordinance to extend Hudson street over the canal of the complainant. It appeared that it was the intention of the city to remove a building, and to convert a part of one of the company's piers into a public street. The ground of complaint was that Hudson street did not run over this part of the canal company's property. One of the answers to the bill of complaint which was filed to enjoin the city from interfering with the building and pier was that the ordinance of the city, even assuming that no street existed where it was proposed to open the street, was merely irregular, and so the matter was not cognizable in a court of equity. Chancellor Williamson, while conceding that a court of equity was not the proper tribunal to correct irregularities in inferior jurisdictions, held that there was no irregularity in that case, because the only question was whether there was a street, which he concluded 'was a ground entirely distinct from a question of irregularity of procedure.' He also held that the case was taken out of the general rule, because it came within the well-recognized exception of irreparable injury. He also held that there was no dedication of the *locus in quo* to the purposes of a street, and thereupon restrained the city. On appeal the court took the view that there was a dedication, and so dismissed the bill. It is perceived that the only question was whether there was an existing street. If there was, then the proceedings taken by the common council to open it were entirely regular. After the chancellor had decided that the question of street or no street did not involve a matter of regularity; and, after the court of appeals held that there was a street, neither court was called upon to say what the result would have been had the city proceeded in an irregular way to open and remove obstructions from what was in reality a highway. So in *Newark Lime & Cement Mfg. Co. v. Newark*, 15 N. J. Eq. 64, there was no question of irregularity in the method of procedure in directing certain alleged encroachments upon a street to be removed. The only question was whether there was a street where the alleged obstructions were placed. If so, the regularity of the method adopted for their removal was admitted. So the case of *Pope v. Union*, 18 N. J. Eq. 282, presented the same condition of affairs. An ordinance had been regularly passed in pursuance of the municipal power granted to open streets. The only question was whether the street intended to be opened was a public street. The case of *Van Doren v. New York*, 9 Paige, 338, was a suit to set aside an irregular special assessment as a cloud upon the title to complainant's land. The court held that, as there was an adequate remedy at law, it would not interfere in this case, nor in any case of that kind, 51 L. R. A.

except where it was absolutely necessary for the preservation of the complainant's rights. None of these cases, it is perceived, involved the question whether, if a municipal corporation to whom is confided the power to remove obstructions from streets, to be exercised in a definite way, proceeds in a different way, a court of equity will interfere, even if there exists an obstructed street.

"The inference to be drawn from these cases is that, if such irregular action threatens irreparable injury, a court of equity will assume jurisdiction. In the cases of *Brooklyn v. Meserole*, 26 Wend. 132, and *Heywood v. Buffalo*, 14 N. Y. 534, the doctrine that a court of equity would not review and correct errors and mistakes in the exercise of the powers of subordinate public jurisdictions and in the official acts of public officers was subject to two exceptions: First, where the proceedings lead to the condition of irreparable injury to the freehold; and, second, where they lead to a multiplicity of suits. These cases were followed, and the first exception was recognized as one of the grounds for retaining jurisdiction, in the case of *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 252, 547. Nor do these cases, or the case of *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251, support the notion that the defendants, as representatives of the city, had a right to destroy these buildings by virtue of an inherent authority in the borough to abate a nuisance at common law. In the last-named case the court was speaking of the power of citizens as such, and not as representing the corporation. The language used in the opinion in that case in respect to the power of private citizens has been modified by the case of *Brown v. De Groff*, 50 N. J. L. 411, 14 Atl. 219. The authority to abate a public nuisance without judicial order, or without following a procedure pointed out by statute, is no greater in a person as officer than as a citizen. Either can abate an absolute obstruction in the street which prevents his passage, and so does him a special injury. The case of *Greenwich Twp. v. Easton & A. R. Co.* 24 N. J. Eq. 217, 25 N. J. Eq. 566, was an instance of an appeal to the courts. It is by confusing the right of the individual with the acts of officers that the courts in some cases have alluded to the existence of a common-law power in a municipality to abate a nuisance in a way that would mislead to the notion that the authorities had an inherent power to do what they, as citizens, could not do. But, if it should be conceded that the degree of special injury which would justify the abatement of a public nuisance is not to be so nicely measured when a citizen is also a municipal officer as when he has no official character, yet, in my judgment, the present case would not be one for private interference. It is of the utmost importance to the preservation of the rights of property, as well as of the public peace, that the exertion of this exceptional power should occur only in cases of necessity;—in cases where the nuisance is manifest and unmistakable, and where the danger or incon-

venience is imminent and serious. There exist no such conditions in this case. The structures are not in a public street, blocking traffic, nor so placed in a public park or square as to seriously impair the use of the same by the public. If they are upon dedicated land, they are a preposterous or nuisance; but the injury resulting from their presence is not of such presently grave character as calls for immediate abatement by act of the party. The importance to the city of the presence of these structures upon the site selected arises from the fact that the complainant is asserting a right which, if permitted to remain unchallenged, will lead to a series of obstructions around the lake which will practically destroy its beauty and impair its use by the public. Therefore, as I think there was no power to abate in the method adopted, and as the result of the threatened demolition of the buildings comes within the pale of irreparable injury, this court will restrain, without determining the question of dedication; for it cannot be granted that, when a person comes into this court to restrain an act of this kind, he thereby, as a matter of course, submits the question of dedication to this court. If this should be so held, then municipal officers, by a sudden and summary attack upon property which they claim to be a nuisance, can drive its owner into this court for protection, and so compel him to try in equity a matter otherwise triable only at law. I am therefore of the opinion that the complainant, upon the original bill, is entitled to a decree.

"But the case does not rest alone upon the bill and answer. There is a cross bill, which prays that the structures may be abated by a decree in this court. Against the relief prayed for by this cross bill there are interposed several objections, even assuming that there was a dedication of the land on which the buildings were erected. It is objected: First, that the cross bill is not germane to the original subject-matter; second, that the proceedings should have been taken by information at the instance of the attorney general; third, that the borough had passed no ordinance upon the subject of nuisances; and, fourth, that the remedy by ejectment or indictment is entirely adequate. None of these objections are taken in the answer to the cross bill, but are raised for the first time upon final hearing.

"First. The answer is good as an original bill in the nature of a cross bill.

"Second. The borough, as the representative of the public was entitled to file the cross bill. 1 Am. & Eng. Enc. Law, 2d ed. p. 74; *London v. Bolt*, 5 Ves. Jr. 129; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Easton & A. R. Co. v. Greenwich Twp.* 25 N. J. Eq. 565; *Woodbridge Twp. v. Insole*, 37 N. J. Eq. 397; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 394, 18 Atl. 106, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55.

"Third. The borough could bring the suit for abatement of a nuisance *per se* without the passage of an ordinance. The purpose of an ordinance would have been to declare what were nuisances aside from nuisances 51 L. R. A.

per se, to empower certain officers to act concerning nuisances, or to provide a summary method for the ascertainment of nuisances, and for their abatement. But when a general right of control over public property is vested in a municipality, it can invoke the aid of the courts for the protection of this property, without resorting to a summary method of abatement, provided by its charter. The selectmen of Jersey City, it was said in *Dummer v. Den ex dem. Jersey City*, 20 N. J. L. 86, 'by the act of incorporation, . . . represent the public or the inhabitants of Jersey City, and the rights of the public in common property are vested in them, and, if such rights cannot be enforced in their name, they cannot be enforced at all.' Mr. Justice Depue, in his opinion in *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 17-19, 97 Am. Dec. 696, says: 'The corporation of the city or town in which the square is, have, by virtue of their corporate authority, power to regulate the public use of it, and may be regarded as representatives of the public for the purpose of maintaining suits in equity or at law for the vindication of the public right.' Chancellor Walworth said in *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80: 'I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation in this court, to protect those equitable rights against the erection of this nuisance.' All the cases in this state in which similar actions have been sustained rest solely upon the right of the municipality, as representing the public, to protect the interests of the public in property devoted to public use.

"The fourth objection, had it been taken in the answer, I should have regarded as unanswerable. There arises, as I have already observed, no imminent or serious injury to the public from the presence of the structures now alleged to be nuisances. Therefore the remedy open to the borough through an indictment or by an action of ejectment would seem to be altogether adequate.

"The question, however, is whether now, after voluminous testimony has been taken, and after the case is ripe for final decision, the cross bill shall be dismissed on this ground, and the defendants sent to a court of law. In the much-cited case of *Atty. Gen. ex rel. Holtz v. Heishon*, 18 N. J. Eq. 410, Chancellor Zabriskie, while asserting the doctrine that a court of equity would never retain jurisdiction in cases of nuisance where there was an adequate remedy at law, nevertheless held that by the testimony in that case the fact whether there was a nuisance was left in doubt. Of the cases cited by Chancellor Zabriskie, it appears that in *Allen v. Monmouth County Freeholders*, 13 N. J. Eq. 68, a citizen who had suffered no special injury from the public nuisance was refused relief upon motion to dissolve an injunction; in *Thompson v. Paterson & H. River R. Co.* 9 N. J. Eq. 560, the injunction

asked for was allowed; in *Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 140, the relief was denied upon the ground that the nuisance was already there, and that injunction was a preventive remedy only. The recent case of *Karitan Twp. v. Port Reading R. Co.* 49 N. J. Eq. 11, 23 Atl. 127, was decided on a rule to show cause why an injunction should not issue. The general rule is that a court may, of its own motion, dismiss a bill at any stage of the cause, on the ground that the complainant has an adequate remedy at law. But where the defendant has not raised the objection until after testimony on the merits has been taken, the court, in its discretion, will retain the case, if the court is competent to grant the relief prayed, and has jurisdiction over the subject-matter. *Lehigh Zinc & I. Co. v. Trotter*, 43 N. J. Eq. 185, 7 Atl. 650, 10 Atl. 607, and cases cited by Mr. Justice Depue in his opinion.

"I have concluded that this suit should be retained. While it is true that the legal rights of the parties have not been once settled by an action at law, and while there is no question of irreparable injury to the public involved, yet there is involved no doubtful question of law, the material facts are not obscure or controverted, and the inference to be drawn from them in regard to the question of dedication is, in my judgment, reasonably clear. The question, therefore, remains, Was there a dedication of the ground upon which the buildings stand? It is proved beyond a doubt that the board of directors of the original land company, for the purpose of securing purchasers for their lots, empowered those persons who were to sell lots to represent to all who spoke of becoming purchasers that the lake and its surrounding ground was to be kept open. There is a mass of testimony to the effect that the power was given to make representations and that the representations made were to the effect that the lake and grounds were to be kept open for the use of the public. But it is not entirely certain whether the power given was to make representations that this land and water were to be kept open for the lotowners, or were to be kept open for the public, or were simply to be kept open. The witnesses were trying to recall language used in conversations which occurred twenty years ago, and not much reliance can be put upon their recollection of the precise words used in regard to the point whether the lake and banks were to be kept open for the use of the lotowners, or whether they were to be kept open for the use of the public. That they were to be always kept open, and that the agents of the company were authorized to so represent, and that they did so universally represent, is proved beyond all question. Again, that it was never intended that the fringe of land between Lake avenue and the waters of the lake should be the subject of profit to the land company by sale or private use conclusively appears from one fact, namely, that in arriving at the cost of the lots which were plotted upon the company's plan the cost of the whole tract was 51 L. R. A.

divided so as to fall entirely upon the plotted lots. This was done for the purpose of fixing a price for the lots, and upon the theory that from their sale alone was the original expense for the entire plot and the profits of the company to be realized. But, assuming that the representations were simply that the land and lake were to remain open, what inference, as to the intent of the company, is to be drawn? What future condition of affairs must have been in mind as the outcome of such a representation? The purpose of the company was to organize a seaside settlement. The size and the number of the lots upon which dwellings were to be erected indicate that the design of the projectors was to found a village,—an urban community. The lake and park were to be kept open undoubtedly for the use of all who owned or rented these houses. Among the first projects of those interested in the land company was the erection of an hotel,—the present Monmouth House. The lake and park were to be kept open for the use of the guests of this house. Indeed, they were to so remain for the common use of the residents and their guests, of the hotel and its guests; in fact, for all who were attracted to the place because of its character as a summer resort. It was intended that no portion of the public who were likely to enjoy them was to be excluded from such rights; and this constituted a dedication. Again, Samuel B. Huey purchased the ground for the company, and was its original secretary. He filed the map of the land company in the county clerk's office of Monmouth county, after being advised by legal counsel that a filing of the map would amount to a dedication of the streets and lake and park to public uses; and this advice he communicated to the company, who thereafter proceeded to sell lots delineated upon the plan. While the effect of filing the map would not amount to a conclusive dedication of the lake and the surrounding fringe of land, yet the appearance of the plot itself, leaving this fringe unplotted into lots, in some places too narrow for plotting purposes, in others with shrubbery marked upon it, would carry a strong implication to any person viewing it that the strip of land between Lake avenue and the lake itself was never to be inclosed, and was to be used as a park. The force of the filing of this map springs out of the information which Mr. Huey received as to its effect, of his communication of that information to the company, and of the sale of lots thereafter. And then again, from the time the map was filed, and lots were sold, and lotowners began to build, the lake, with the walk around it, was used by all; the park was kept open, walks were built upon it, and was, so far as appears, free for the use, not only for lotowners, but for all. Again, about eight years ago Gen. Lucas, who then owned nearly or quite all of the stock of the company, called a meeting of the citizens of the village, and proposed that, inasmuch as the company had disposed of most of its land, the expense of keeping the streets, park, and lake in order should be borne by

all the property owners. A committee of citizens was appointed to take charge of those affairs, under an agreement with the company that the company should pay one third of the expense, and that two thirds should be assessed upon the other lotowners. This voluntary assessment was collected, and the committee spent it in repairing streets, in cleaning out the edges of the lake, in making an island in its waters, in renewing the board walk running partly around the lake, and in planting trees in and in otherwise beautifying the park. A citizens' meeting was held in the park to raise money for the same purpose, which money was expended in building a walk on the west side of the lake. Mr. Lucas also refused permission to Mr. Truett to put up a pavillion on the peninsula, and inclose it with glass, saying that it was public property, and that there could be none built there. So from the intention of the directors, thus proved; from the representations to lotowners, which raised an equitable estoppel against the closure of the park and lake against them; from the constant use of the park by the public since 1875,—I do not see how it can be doubted that there was a dedication.

"But the complainant sets up certain conduct of the owners of this land, as well as certain acts of the borough, as tending to refute the idea of such dedication. It is first pointed out that the company changed the contour of the lake by filling in and encroaching upon the water at certain points; that it put a curbing around the lake, cleared the strip of land around it of underbrush, and trimmed the trees in the park, and laid the board walks around the lake. But all this was a part of the general plan to improve and beautify the lake and park, so as to make them more attractive, and so induce persons to purchase lots. There was no one to do these things. The township of Wall had no interest, at this stage of the enterprise, to take charge of these improvements at the expense of the people of the township for the benefit of the land company. All these acts were done as part of the scheme of improvement, which included the opening and grading of streets and forming of side-walks. As to the streets no one would contend for a moment that these acts would tend to refute the idea of dedication. Now as Mr. Huey states, the company was in the market to sell lots, and it had to have streets by which to sell lots. It was a case of necessity. There was no other authority to do it, and until there was some other organization, it was understood that the company would assume that task. These were all acts similar to those of the owner of the fee in a highway, who plants trees upon, or forms and sods the side of, the road, or even grades the wagon track. The complainant also relies upon the fact that ice houses were erected by the company upon the peninsula, and that ice was got from the lake and sold by permission of the officers of the land company. But this, in my judgment, has little or no force to disprove the intention to dedicate. The houses were not

51 L. R. A.

erected until 1886, when the dedication was complete. Besides, the presence of the ice houses was obviously for the purpose of storing ice, mainly for the use of residents, and so was a convenience to them, about which they did not care to complain. The presence of the houses in no way interfered with the use of the lake for the purposes of summer visitors. Nor did the money received from the ice sold, so far as appears, arise from the sole right of the company to cut. It is not proved that the company ever collected for ice cut by others. And the cutting of hay from the parks stands in the same posture. It interfered no more with the common use of the public than would the act of the owner of the fee in a highway in cutting grass upon or pasturing on the roadside.

"It is said that the company let the privilege of hiring boats to be used upon the lake; and it appears that the Monmouth House and the Lake House provided boats for the public use, undoubtedly mainly for the convenience of their guests. These boats were essential to the use of the lake, and were in furtherance of the purposes for which it was to be kept open. The boats were put under the charge of a keeper, who paid certain sums to the owners of the boats. No one else was excluded from the use of the lake, and the hiring of the boats no more proves a claim of any private right in the lake than would the fact that the owner of an omnibus line had hired out his vehicles to one person prove that he claimed a private right in the streets through which they ran. The platform from which the boats started was not such an obstruction to the use of the lake and its surrounding grounds as to provoke a question of right. So the permission asked of and given by the employees of the land company to permit lotowners to put boats upon the lake, and put up boat houses and platforms, was not inconsistent with the right of the public to the use of the lake. A request to the citizens was made to these persons because they were managing and controlling, in the absence of any public authority, the use of the lake for lotowners, as well as the general public. Nor do I see how the fact that the company, by deed, dedicated a long triangular lot, in 1882, and another in 1885, both lying outside of Lake avenue, proves that the strip inside of that avenue was not previously dedicated. The only acts which asserted an exclusive right to any of the property within Lake avenue was the act of Mr. Lucas, in 1886, in negotiating for the sale of a portion of the peninsula, which portion seems to have been afterwards sold. But these acts were ten years after the map was filed, and after the dedication had become complete.

"But it is again said that, after the formation of the borough in 1892, the borough authorities in various ways admitted that the lake and surrounding park were private property. On April 3, 1892, and on August 15, 1892, the common council directed its clerk to notify the Spring Lake & Sea Girt Company of the dangerous condition of the

board walks around the lake, and directing the company to repair them. On January 28, 1895, the common council appointed the mayor a committee to wait on the owners of the beach and the lake and the sewer system within the borough of Spring Lake to ascertain whether they were willing to sell the said property, and, if so, upon what terms. Now, it is apparent that, if there had been a dedication of the land around the lake, that act was complete long before the organization of the borough. It arose by the filing of the map with the understanding that it would constitute a dedication; by repeated declarations that this space would remain open; that from 1875 it had remained open, the fringe of land being used as a park, where everyone sat or walked. It is apparent, therefore, that the resolutions of the common council can have no official significance whatever as to the rights of the public. The legislature had conferred no power upon the common council to discharge this property from the public easement. The power to vacate streets had not been put into action by the passage of an ordinance. The resolution of the common council amounted to nothing more than the expression of the individual members that the land company had or claimed some right in the lake or surrounding land, and that it had an admitted right in the sewer system. The common council had apparently taken no legal counsel in respect to the existence of any private right in the land company, and its action was of no importance in determining the existence or extent of such right. The testimony respecting the manner in which the property has been from time to time assessed had to me no significance whatever.

"The fact that upon the second map—that of 1876—two lots were plotted within Lake avenue, at the northwesterly end of the lake, in view of the evidence of how this came to be done, and of the action of the land company concerning it, makes in favor of, rather than against, the existence of an intention to dedicate. The lots were so plotted by the surveyor of his own volition, and his act was disapproved of by the company as soon as it came to its attention.

"It is finally objected that, if dedicated, there has never been an acceptance of the dedication of this property. Acceptance requires no formal act. The resolution of the mayor and common council was an assertion of a right of control over this property, equivalent to an acceptance, for the public, of the use tendered by the dedication. Besides, there had been a public user of the property for nearly twenty years. I am of the opinion that the land upon which the buildings were put is public ground, that the buildings are public nuisances, and that there should be a decree upon the cross bill for their abatement."

Messrs. Edwin Robert Walker and James Buchanan for appellant.

Messrs. Hawkins & Durand and Richard V. Lindabury for appellees.

Per Curiam:

Decree affirmed for the reasons given in the court of chancery.

For affirmance, *Magie, Ch. J., and De-pue, Van Syckel, Gammere, Ludlow, Nixon, Hendrickson, and Adams, JJ.*

For reversal, *Dixon, Garrison, Lip-pincott, and Bogert, JJ.*

KENTUCKY COURT OF APPEALS.

C. C. GODSHAW, Appt.,
v.

J. N. STRUCK & BROTHER et al.

(.....Ky.....)

A foreman in charge of the carpenter work on a building has no implied authority to engage medical attendance for one of his men who is injured while at work, by a brick falling from a scaffold, so as to render the common employer liable for the value of the services.

(October 31, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendants in an action brought

NOTE.—On the subject of the duty of a master to furnish medical aid to servant, there is a note in this series with the case of *Ohio & M. R. Co. v. Early* (Ind.) 28 L. R. A. 546; also the case of *Holmes v. McAllister* (Mich.) 48 L. R. A. 396.
51 L. R. A.

to recover the value of medical services rendered to defendants' employee. *Affirmed.*

The facts are stated in the opinion.

Messrs. Samuel A. Lederman and Kohn, Baird, & Spindle, for appellant:

A foreman of a corporation having charge of a gang of laborers employed in the construction of a building, when one of the laborers, in the performance of his duties, has been dangerously and seriously injured, requiring immediate medical attention to save life or limb, and he being the superior agent of the corporation on the ground at the time, has implied authority to procure a physician's services for his coemployee, and render the company liable for reasonable charges for such services. When an employee is disabled in the discharge of hazardous duties, it is a sufficient consideration to support a promise to pay for medical attention made by a foreman of a corporation so as to bind his employer.

Louisville, N. A. & O. R. Co. v. Smith, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775; *Terre Haute & I. R. Co. v. Brown*, 107 Ind.

336, 8 N. E. 218; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135; *Union P. R. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052.

This case should have been submitted to the jury under proper instructions for the jury to determine whether the foreman's contract of employment with appellant was ratified by the appellees.

Pacific R. Co. v. Thomas, 19 Kan. 256; *Toledo, W. & W. R. Co. v. Rodriguez*, 47 Ill. 188; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26; *Atlantic & P. R. Co. v. Reiser*, 18 Kan. 458.

Messrs. Byron Bacon and H. H. Nettelroth, for appellees:

Manufacturing and other corporations have never been held liable where the employment of a physician was made by an agent or employee who had no express authority to exercise such power on behalf of the corporation.

Chaplin v. Freeland, 7 Ind. App. 678, 34 N. E. 1007; *Swazey v. Union Mfg. Co.* 42 Conn. 556; *Mt. Wilson Gold & Silver Min. Co. v. Burbridge*, 11 Colo. App. 487, 53 Pac. 826; *Hodges v. Detroit Electric Light & P. Co.* 109 Mich. 547, 67 N. W. 564; *Brown v. Missouri, K. & T. R. Co.* 67 Mo. 122; *Union P. R. Co. v. Beatty*, 35 Kan. 265, 57 Am. Dec. 160, 10 Pac. 845; *Stephenson v. New York & H. R. Co.* 2 Duer, 341; *Tucker v. St. Louis, K. O. & N. R. Co.* 54 Mo. 177; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

An employer is under no legal obligation to secure medical attendance for an employee who is injured while working in the performance of his duty.

Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; *Davis v. Forbes*, 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

Burnam, J., delivered the opinion of the court:

This was an action by appellant against appellee to recover for his services as a physician rendered to a servant of appellee, who was injured while in their employ, at the instance of another of their employees. The facts, briefly stated, are as follows: The appellees, J. N. Struck & Bro., are a private corporation, doing business as carpenters and builders. The appellant, C. C. Godshaw, was at the time of the institution of this suit a practising physician. In August, 1894, the appellees were engaged in doing the woodwork, by contract with Finzer Bros., upon a building which was being erected for them under the supervision of an architect in the employ of the Finzers. A man named Raidt was the foreman of the carpenters in the employ of appellees in doing the woodwork on this building and his duties as foreman were to superintend the workmen, and see that the carpenters' work was done in accordance with the plans and specifications. He was not an officer or stockholder in the corporation, but was sim-

ply employed to boss appellee's part of the job in erecting the building. Jacob Hoertz, a brick contractor, was doing brickwork upon the same building upon the upper part of the wall, and a brick was knocked off of the scaffold, and fell to the first floor, striking a man named Martin Schnarvel, who was in the employ of appellee, on the top of the head, and inflicting a very dangerous and severe wound, which rendered him temporarily unconscious. Thereupon Raidt, appellee's foreman, directed another of appellee's employees to call in the nearest physician, who got appellant, and upon his arrival at the building Raidt directed him to take charge of the case, and give Schnarvel every attention, and that J. N. Struck & Bro. would pay for it. It also appears that Raidt called at the house of Schnarvel, and told his wife that appellant would be in charge of the case, and give her husband every attention that he required, and that J. N. Struck & Bro. would pay his bill. After this employment appellant took charge of the case, and treated Schnarvel for several months, and this action is to recover \$300, the alleged value of his services. No question is raised as to the seriousness of the injury to Schnarvel, or of the necessity of immediate medical attention.

It is contended for appellant that the act of Raidt, the foreman of appellee, in employing appellant, rendered them liable to pay the account sued on, as he acted in an emergency which required immediate medical skill to save the life of one of appellee's employees. There is no testimony that Raidt had authority from appellees to employ appellant on behalf of the company or of J. N. Struck, or that he was authorized to represent either of them in any capacity, except as foreman of the gang of laborers employed in doing the woodwork on the Finzer building. There is a marked distinction between the power and authority of a general and special agent to bind his principal. A general agent is usually authorized to do all acts connected with the business or employment in which he is engaged, while a special agent is only authorized to do specific acts in pursuance of particular instructions, or with restrictions necessarily implied from the act to be done, but, in either case, if the agent exceeds the authority conferred, his acts will not bind the principal. Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are regarded as dealing with the power before them, and they must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power. See *Am. & Eng. Enc. Law*, 986, and authorities there cited.

Appellant admits this general rule of law, but insists that it does not apply in cases of emergency, which require the immediate procuring of medical skill to save human life or prevent great bodily injury, and, to support this contention, refers us to a number of cases decided by courts of

other states, which relate to the employment of a surgeon by some officer of a railroad to administer to an injured employee or passenger in certain cases, by reason of special circumstances, namely: In the case of *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775, a brakeman in the employ of the railroad company was seriously injured while engaged in the discharge of his duties, and the conductor employed a surgeon to take charge of and treat the unfortunate. The court held that, in a case of an emergency of this kind, the conductor, although an agent inferior to the general superintendent, had the power to employ surgical aid, basing its decision upon various cases of the kind in other states. In the case of *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, a brakeman was injured while in the discharge of his duties, and the plaintiff was requested to take charge of the case by the conductor. The court in passing upon his claim, used the following language: "In ordinary cases, the conductor or other subordinate agent has no authority to employ surgical assistance for a servant of the corporation who receives an injury or becomes ill. We do not doubt that the general rule is that a conductor has no authority to make contracts with surgeons, and, if this principle governs all cases, the discussion is at an end; but we do not think that it does rule every case, for there may be cases so strongly marked as to constitute a class within themselves, and be governed by a different rule. . . . An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present and the emergency is urgent, he must act for the corporation, and, if he acts at all, his acts are of just as much force as that of the highest officer of the corporation. Our attention has been called to other cases in which the same principle contended for has been applied in the case of railroads, but the distinction between the liability of a railroad corporation and other manufacturing and private corporations for services of the character sued for here and the reasons therefor are very forcibly stated in *Chaplin v. Freeland*, 7 Ind. App. 678, 679, 34 N. E. 1007. In this case the court said: "Railroad companies occupy a peculiar position with reference to such matters. Exercising quasi public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their home, subjecting them to unusual hazards and dangers, the law has, by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees, when there is a pressing emergency calling for their immediate action. In such cases, even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer." It is also a matter of common

knowledge that railroad companies habitually and regularly employ surgeons and physicians in connection with the conduct of their roads. But we have been referred to no cases where it has been held to be within the duties of the manager of a factory for either an individual or corporation to employ physicians or surgeons for employees. We are not, therefore, prepared to hold as a matter of law that the employment of physicians or surgeons for injured employees comes within the scope of the duties of a general manager of an ordinary manufacturing business. It seems to us that the rule that appellant seeks to have applied to this case is confined exclusively to railroad companies, and, generally, in cases which involve some act of negligence on the part of the company which occasioned the injury.

Appellant has cited several cases where it was sought to hold manufacturing companies liable on the same principle, but in each of these cases the employment of the surgeon was made by the general business manager of the company or the general superintendent of the company, and we think that the present case cannot be brought within the rule laid down in any of these cases. In the first place, the services sued for were not confined to the immediate emergency, but lasted during a period of several months. Appellees in the meantime resided in the same city, and only a short distance from where appellant lived, and it would have been very easy for him to have inquired as to the alleged authority of their foreman, Raidt, to act for them. Usually an injured employee procures and pays for his own doctor, and if his employer can be made liable for his injuries he recovers this sum, with other damages. In this case no necessity is shown why appellee should have selected a physician to treat the injured man during the long period of his confinement, as it does not appear that he lacked friends or relatives who were both willing and able to do so for him.

It is also contended that, even if it be conceded that, under the testimony in this case, appellee's foreman did an unauthorized act which was not binding upon his employers, there is sufficient evidence in the record, tending to ratify the act of the foreman, to have entitled the appellant to have the question of ratification submitted to the jury. There is no testimony to show that appellee ever knew or heard of the alleged employment of appellant by Raidt, and it consequently follows that there can be no question of ratification of such act. But, even if it be conceded that they did know of such employment, we are of the opinion that the conversations between the witness Hoertz and Struck clearly rebut any idea of such ratification. We therefore conclude that appellees were primarily under no legal obligation to secure medical attention for Schnarvel, and that their foreman had no authority, express or implied, to make any contract in reference thereto which would be binding upon them, and that if he

made such a contract there was never any ratification thereof by appellees, so as to make them liable for the account sued on.

For reasons indicated, *the judgment is affirmed.*

Alf. W. DAVIS *et al.*, Appts.,
v.

J. H. HAMBRICK *et al.*

(.....Ky.....)

The decision of the state central committee of a political party, which by the rules of the party is invested with full control of the management of its affairs, in a contest as to which of two bodies of men constitute the executive committee of a certain county, is conclusive upon the courts, since the question is a political one, and the courts have no power to question the regularity of the proceedings or the justice of the decision.

(October 31, 1900.)

APPEAL by defendants from a judgment of the Circuit Court for Jefferson County in favor of plaintiffs in an action brought to establish the rights of plaintiffs as members of the Republican committee for the City of Louisville and County of Jefferson. *Reversed.*

The facts are stated in the opinion.

Messrs. Barker & Woods for appellants.

Mr. R. A. McDowell, for appellees:

A court of equity will take jurisdiction of such a suit as this, between factions of a voluntary organization, where property rights are involved, when the tribunals and arbitrators provided for in such cases, by the constitution and by-laws of the organization, have been exhausted or arbitrarily or unfairly administered.

Huston v. Reutlinger, 91 Ky. 333, 15 S. W. 867; *Hetterman Bros. v. Powers*, 19 Ky. L. Rep. 1087, 39 L. R. A. 211, 43 S. W. 180; *Supreme Lodge, O. of S. F. v. Raymond*, 57 Kan. 647, 49 L. R. A. 373, 47 Pac. 533; *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge, I. O. O. F.*, 54 Kan. 73, 26 L. R. A. 98, 37 Pac. 1003; *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L. R. A. 381, 46 N. E. 577; *Ostrom v. Greene*, 20 Misc. 177, 45 N. Y. Supp. 852.

Even if there be no question of property rights, the courts will interfere, at the instance of an aggrieved party, after the tribunals provided within the organization have been exhausted or arbitrarily or unfairly administered.

White v. Brounell, 2 Daly, 329; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665;

Poultney v. Backman, 31 Hun, 49; *Lafond v. Deems*, 81 N. Y. 507.

The appellants came into court and paid in the money, and turned over the books the possession of which was in dispute.

The court, thus having jurisdiction of the subject-matter of the controversy, undoubtedly had jurisdiction of the parties claiming it, and of all questions involved in a determination of the rightful owners of the same.

Landrum v. Farmer, 7 Bush, 47; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. Rep. 263.

On petition for rehearing.

Messrs. John Mason Brown and Arthur Peter, for appellees:

This action involves the title and ownership of the funds, archives, and personalty which belonged to the original county executive committee. This is the main issue. This fact alone gives the court jurisdiction.

A court of equity has power and authority to take cognizance of, and to enforce or protect, the rights of complainants, the members of voluntary and unincorporated associations, when their appeals to the supreme tribunals of their party organizations have been exhausted.

Ostrom v. Greene, 20 Misc. 177, 45 N. Y. Supp. 852.

Where a court of equity has custody of a fund or property, the title to which is in dispute, and to which there are several claimants, it has power and jurisdiction to do, and will do, all that is necessary to determine to whom the property belongs, and to finally settle all questions arising in the case between the several claimants.

Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. Rep. 263; *Landrum v. Farmer*, 7 Bush, 47; *Lynch v. Metropolitan Elev. E. Co.* 129 N. Y. 274, 15 L. R. A. 287, 29 N. E. 315; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75; *Griffin v. Fries*, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351, and note; *Lancy v. Randlett*, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169, and note; *McGowin v. Remington*, 12 Pa. 56, 51 Am. Dec. 584, and note; *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Killmer v. Wuchner*, 79 Iowa, 722, 8 L. R. A. 289, 45 N. W. 299.

A requirement of submission of controversies to organization tribunals does not, and cannot, abridge the rights of members to resort to the court when their claims have been submitted to, and finally rejected by, such officers or tribunals.

Supreme Lodge, O. of S. F. v. Raymond, 57 Kan. 647, 49 L. R. A. 373, 47 Pac. 533; *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge, I. O. O. F.* 54 Kan. 73, 26 L. R. A.

NORM.—On the subject of the power of courts as to political questions there is to be found in this series a note with the case of *Fletcher v. Tuttle* (Ill.) 25 L. R. A. 143; also the cases of *Green v. Mills* (C. C. App. 4th C.) 30 L. R. A. 90; *Denny v. State ex rel. Basler* (Ind.) 31 L. R. A. 726; *Phelps v. Piper* (Neb.) 83 L. R. A. 53; *Stephenson v. Election Comrs.* (Mich.) 42 51 L. R. A.

L. R. A. 214; *Phillips v. Gallagher* (Minn.) 42 L. R. A. 222; *Taylor v. Beckham* (Ky.) 49 L. R. A. 258; and *Moody v. Trimble* (Ky.) 50 L. R. A. 810.

For another case as to the powers of political committees in general, see *People ex rel. Coffey v. Democratic General Committee* (N. Y.) post, p. 674.

98, 37 Pac. 1003; *White v. Brownell*, 2 Daly, 329; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L. R. A. 381, 49 N. E. 577; *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; *Bacon, Ben. Soc.* § 450; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Poultney v. Bachman*, 31 Hun, 49; *Lafond v. Deems*, 81 N. Y. 507; *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867; *Wellenvoss v. Grand Lodge, K. of P.*, 20 Ky. L. Rep. 113, 40 L. R. A. 488, 45 S. W. 360; *Clark v. Wallace*, 20 Ky. L. Rep. 154, 45 S. W. 504.

The remedy by injunction is frequently invoked successfully, to protect property interests and personal rights pertaining to membership in voluntary, unincorporated associations.

1 Spelling, Extraordinary Relief, § 755, p. 603; *Rudolph v. Southern Beneficial League*, 23 Abb. N. C. 199, 7 N. Y. Supp. 135; 22 Am. & Eng. Enc. Law, p. 312, note 2; *Hirschl, Fraternities & Societies*, 47; *Pennfield v. Skinner*, 11 Vt. 296; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *Chamberlain v. Lincoln*, 129 Mass. 70; *Sperry's Appeal*, 116 Pa. 391, 9 Atl. 478; *Bauer v. Samson Lodge K. of P.* 102 Ind. 262, 1 N. E. 571; *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal. 313, 133 Pac. 217; *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867.

Burnam, J., delivered the opinion of the court:

This litigation is the result of dissension within the ranks of the Republican county and city executive committee of the city of Louisville, and the county of Jefferson. Plaintiffs instituted this action, under § 25 of the Code, on their own behalf, and for the benefit of all the members of said committee, whom they allege are so numerous as to render it impracticable to bring them before the court within a reasonable time. The defendants, Davis and others, are sued, under the same section of the Code, individually and as representing all of their committee, who are also alleged to be so numerous as to make it impracticable to bring them all before the court as defendants. Plaintiffs allege, in substance, that they are the regularly constituted Republican committee for the city of Louisville and Jefferson county; that J. H. Hambrick is the duly elected, qualified, and acting chairman thereof; and that as such they are entitled to the records, archives, and certain money belonging to them in their representative capacity, which the defendants are wrongfully withholding from them,—and pray for an order restraining the defendants, individually and as representing the other defendants, from using the money belonging to the city and county executive committee, and from in any way exercising the powers, duties, or functions of such committee, or from disposing of any money or property belonging to the committee, and ask that they be adjudged the owners and

entitled to the possession of all such archives, records, money, etc. The defendants deny in their answer that the plaintiff Hambrick is or ever was the duly elected or otherwise elected or acting chairman of the Republican county and city executive committee, or that Charles Blandford is or ever was the duly elected, qualified, or acting treasurer of said organization, or that either of them has any right to the custody of any records or property of the organization, or that they have any right, in any capacity whatever, to institute this action. They say that the defendant Davis is and claims to be the duly elected, qualified, and acting chairman of the committee, and that S. B. Richardson is the treasurer and Lewis Newman the secretary thereof, and deny any right or title in the plaintiffs to discharge the duties imposed by the rules of the Republican organization upon the chairman, secretary, and treasurer thereof; and they deny that they have wrongfully taken possession of the records, archives, or other property of the Republican county and city executive committee of Jefferson county and the city of Louisville, or that it is not the proper committee, of which they are the officers. They deny that Davis and his committee have retained wrongfully any funds belonging to the committee, and substantially deny all of the affirmative averments of the petition, and they allege affirmatively that under the rules for the government of the Republican party, as adopted by its state conventions, the affairs of said party are under the control and management of the committee known as the "Republican State Central Committee of Kentucky," and that subordinate to that committee the local committee was organized; that the regular election of members of said committee was held in June, 1896, for a term of four years, and that the members then chosen afterwards met, pursuant to the rules and constitution of the party, on the 30th day of June, 1896, and by acclamation elected the defendant A. W. Davis chairman of said committee, and on the same day elected Newman secretary thereof, for terms of four years; that neither of these officers had resigned or been removed, and that no member of the committee denied these facts until the 26th day of July, 1898; and that Hambrick is claiming the right to exercise the duties as chairman of the committee by the votes of less than one third of the members of the committee. They further allege that the state central committee is, by section 3 of the rules for the government of the Republican party, invested with full control of the management of the Republican party; that this committee is charged with the duty of organizing subordinate county and city committees as auxiliaries to the state central committee, and that these subordinate committees are subject to the control of the state central committee; that, in the exercise of the powers conferred by the party law, a meeting of the state central committee was held in Louisville, Kentucky, on September 26th, to hear and determine the question as to which

was the Republican county and city executive committee of said county and city, and that both Hambrick and Davis appeared before the committee in behalf of their respective bodies; and that after such hearing the state central committee unanimously adopted the following preamble and resolutions: "Whereas, it has been brought to the attention of this committee in various ways that there are dissensions in the Republican county executive committee of Jefferson county, and among the members composing the same, which dissensions have resulted in two bodies claiming to be such committee, one with Alf. W. Davis as chairman, who has been recognized by R. L. Gwathney, chairman of the Republican congressional committee for the fifth district, as chairman of the Republican county executive committee of said county, and from whose decision in such matters there has been no appeal taken to this body by anyone, and the other with J. H. Hambrick as chairman; and whereas, such dissensions and rival claims threaten to injure the interest of the Republican party in the county, if not definitely and authoritatively settled and determined by the committee, which, under the constitution and rules of the Republican party, has full jurisdiction and authority in the premises; and whereas, both said Davis and Hambrick, on behalf of their respective followers and bodies, have been duly cited to appear before this committee at its meeting held this September 6, 1898, and then and there to present their claims, which they have done, and this committee having heard all the evidence presented, including the records of the committee, which show that 118 members have recognized the committee of which Mr. Davis is the chairman, and that J. H. Hambrick and his counsel have admitted that not exceeding 56 members, at the utmost, have ever attended his committee, and having carefully considered the evidence and all the facts, and reached a judgment and conclusion upon the same: Therefore, resolved, that it is the unanimous judgment and determination of the Republican state central committee that the Republican county executive committee is that body which has long been in existence, and of which Alf. W. Davis is now, and has since June, 1896, been, the chairman, and that of which Lewis Newman is secretary; it being also the judgment and determination of said state central committee that said Davis has never been lawfully or otherwise removed from chairmanship of said committee. Resolved, further, that the body of which J. H. Hambrick claims to be chairman is not the Republican county executive committee of Jefferson county, and that its claims to be such are wholly unfounded and invalid. Resolved, further, that this committee is of the opinion that good order and party discipline require from the good Republicans who compose the so-called Hambrick committee that they should disband said body, and in that way decline to give aid or comfort to our political opponents. Resolved, 51 L. R. A.

further, that copies of these regulations be furnished to the said Alf. W. Davis, the said J. H. Hambrick, and the board of election commissioners of Jefferson county, the clerk of the Jefferson county circuit court, and to the newspapers." The defendants contend that this is the final decision of the matter in dispute, by the only body which had or has jurisdiction to settle it, and that the judicial tribunals of this state have no power to interfere with the judgment of the highest party tribunal in a matter involving party government.

The decisions of this court in the case of *Cain v. Page*, 19 Ky. L. Rep. 977, 42 S. W. 336, and in *Moody v. Trimble*, 22 Ky. L. Rep. 692, 50 L. R. A. 810, 58 S. W. 504, make it unnecessary for us to consider the disputed questions of fact which grew out of the alleged removal of A. W. Davis as chairman of the county and city executive committee of Jefferson county and the city of Louisville. The testimony on all these points is conflicting, but these facts stand out in bold relief: Less than one third of the committee have ever supported the right and claim of Hambrick to the chairmanship, while more than two thirds have steadily ignored and repudiated his pretensions, and recognized Davis as the duly-elected chairman of the committee; and the state central committee, the governing power in the management of the affairs of the Republican party of this state, after full and careful consideration of the merits of the controversy, have declared Davis and those represented by him to be the true and legal committee. The legislature has not provided any means for determining controversies of this character, and it may be seriously doubted whether it has the power to confer such authority upon the courts. Political parties are voluntary associations for political purposes. They are governed by their own usages, and establish their own rules. Members of such parties may form them, reorganize them, and dissolve them at their will. The voters constituting such party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom and liberty of the voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, rules, or doctrines of a political party, or to determine between conflicting claimants' rights growing out of its government. See *Phelps v. Piper*, 48 Neb. 724, 33 L. R. A. 55, 67 N. W. 755. The action of the state central committee must be treated as the final determination of all the rights of the parties growing out of this litigation, and the courts have no power to question the regularity of their proceedings or the justice of their conclusions. We are therefore of the opinion that the committee of which A. W. Davis claims to be the chairman was the legally constituted Republican county

and city executive committee of Jefferson county and the city of Louisville, and as such is entitled to the possession of all the funds, archives, and records which belong to the committee in its representative capacity.

For the reasons indicated, *the judgment*

of the Jefferson Circuit Court, appealed from, is reversed, and the cause remanded, with instructions to dismiss plaintiffs' petition, and for proceedings consistent with this opinion.

Rehearing denied.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York *vs rel.*
Michael J. COFFEY, *Appt.*,

v.

DEMOCRATIC GENERAL COMMITTEE
OF KINGS COUNTY, *Respt.*

(164 N. Y. 335.)

1. A county committee of a political party has no power to remove one of its members under Laws 1898, chap. 179, providing that there must be a county committee for such party, and that its members shall be elected for the term of one year at the primary election provided by statute.
2. Rules of a county committee of a political party authorizing the expulsion of a member cannot be operative after the enactment of Laws 1898, chap. 179, which provides for the election of the members of such committee for a term of one year, and authorizes the committee to make rules not contrary to, or in contravention of, the statutes, though it declares that rules previously adopted shall continue in force until new ones are adopted; since this provision is subject to the condition that the rules are in conformity with the statutes.

(Cullen, O'Brien, and Bartlett, JJ., dissent.)

(October 9, 1900.)

APPPEAL by relator from an order of the Appellate Division of the Supreme Court, Second Department, reversing an order of a Special Term for Kings County granting a peremptory writ of mandamus to compel the relator's restoration to membership in the defendant committee. *Reversed.*

The facts are stated in the opinions.

Messrs. Isaac M. Kapper and Luke D. Stapleton, for appellant:

When the relator was elected a member of the Democratic General Committee of Kings county in the manner prescribed by the primary election law, he was elected to an "office" created by law, and his associates, elected at the same time and in the same manner as himself, were powerless to expel him.

The primary election law has reversed the rule of the *McKane Case*, 123 N. Y. 609, 25 N. E. 1057, and revolutionized the whole system of political party management and control.

A public office has been defined as one in which the public has an interest, without regard to the question of the presence or absence of emoluments, oath of office, the permanent or transient character of the duties, or however narrow the territorial limits within which the functions of the office are to be exercised.

Throop, Pub. Off. § 8.

The public have an interest in the office to which they elected the relator.

The omission from the primary election law of a provision making the general committees the judges of the qualifications of members, or giving a right to oust or expel, is significant on the pretended right of expulsion.

People ex rel. Hatsel v. Hall, 80 N. Y. 117.

The statute, fairly read, withholds or denies the right of expulsion, and leaves the committee powerless to adopt or enforce any rule or regulation which will impair or impede membership in it save in the single case allowed by the statute, to wit, the nonpayment of dues; and then, in such a case, the rule may not provide for expulsion, but solely that noncompliance "therewith" may preclude a member from "participating in the meetings of the committee."

In any event, the answer of the respondent to the relator's petition for the writ, asserting political hostility on his part at the last general election held in Kings county, is insufficient in law, and entitles the relator to the relief sought.

People ex rel. McDonald v. Keeler, 99 N. Y. 403, 2 N. E. 615.

Messrs. Charles J. Patterson and Henry J. Furlong, for respondent:

If the rules and regulations contained no provision authorizing the expulsion of the relator for hostility, the general committee would still possess the inherent power and authority to expel the relator for cause.

Anson, *Law & Custom of Constitution*, p. 56; May, *Law & Usage of Parl. Pr.* p. 114; *Hiss v. Bartlett*, 3 Gray, 468, 63 Am. Dec. 768; Cooley, *Const. Lim.* pp. 159, 160; Story, *Const.* 5th ed. § 838; Paschal, *Anno. Const.* p. 87, § 49; 1 Dill. *Mun. Corp.* 4th ed. § 242, p. 329; *Rea v. Richardson*, 1 Burr. 517.

In private incorporated associations there is an implied power of expulsion where none is conferred by the charter or by-laws.

NOTE.—On the subject of political committees in general there are to be found in this series the following cases: *White v. Sanderson* (Minn.) 42 L. R. A. 231; *Hutchinson v. Brown* 51 L. R. A.

(Cal.) 42 L. R. A. 232; *Kearns v. Howley* (Pa.) 42 L. R. A. 235; *Stephenson v. Election Comra.* (Mich.) 42 L. R. A. 214; and *Davis v. Hambrick* (Ky.) ante, p. 671.

People ex rel. Pinckney v. New York Bd. of Fire Underwriters, 7 Hun, 248.

Before the primary statute, the general committee had absolute power to expel a member.

McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057.

The county general committee of a party, and the executive committee thereof, are vested with full power and authority under the law for the management of the affairs of that party, and their actions might reasonably be inferred to be such as were in conformity with ancient usage, which constituted the law of the party.

Sheehan v. McMahon, 28 Misc. 733, 59 N. Y. Supp. 969.

The claim that the relator was elected by the people, and therefore could not be deprived of his office by the general committee, is untenable.

Hiss v. Bartlett, 3 Gray, 468, 63 Am. Dec. 768.

As the general committee had power to expel the relator for cause, the propriety of their action in so doing will not be reviewed upon an application for a mandamus.

Abrams v. Hempstead Town Auditors, 45 Hun, 272; *People ex rel. Millard v. Chapin*, 104 N. Y. 96, 10 N. E. 141; *People ex rel. Equitable Life Assur. Soc. v. Chapin*, 103 N. Y. 635, 8 N. E. 368; *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *People ex rel. Deane v. Greene County Supers*, 14 Abb. N. C. 29; *People ex rel. Miller v. Hulse*, 38 Hun, 388; *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12.

Certiorari is the only proper method of reviewing a quasi judicial act.

People ex rel. Govers v. New Rochelle, 17 App. Div. 603, 45 N. Y. Supp. 836; *People ex rel. Humm v. Carrollton Town Auditors*, 43 App. Div. 22, 59 N. Y. Supp. 615; *People ex rel. Myers v. Barnes*, 114 N. Y. 325, 20 N. E. 609, 21 N. E. 739.

Mandamus is never proper to reverse a decision which is the result of the exercise of judgment upon evidence.

People ex rel. Harris v. Land Office Comrs 149 N. Y. 26, 43 N. E. 418; *People ex rel. Francis v. Troy*, 78 N. Y. 33, 34 Am. Rep. 500.

Mr. E. Countryman filed brief by leave of court:

The primary election law does not prescribe or require, as a hard and fast rule, that a member of either of the great political organizations shall support all of the candidates of his party at the general election.

Staying away from the polls on account of the badness of parties is an unworthy course; but going there and rebuking your party for its improper candidates is something honorable for every good citizen to do.

2 Woolsey, Political Science, 548, 557, 558, 567.

The general trend of the authorities is that the power of expulsion, even in cases of religious, benevolent, and social corpora-

tions, as well as in such a case as this, and for such a cause, does not exist.

Angell & A. Priv. Corp. 11th ed. § 410; 2 Cook, Corp. 4th ed. § 624, p. 1200.

The term of office of directors is usually fixed by the charter of the corporation, or by the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out, either by the stockholders, or the directors, or by a court.

2 Cook, Corp. 4th ed. § 711; *White v. Brounell*, 2 Daly, 329.

The right of membership in a mere voluntary association organized for any purpose whatever is regulated exclusively by its constitution and by-laws,—in other words, by the provisions of the private agreement between the members; and, of course, the power of expulsion may be given or withheld and enforced as therein provided.

McKane v. Adams, 123 N. Y. 609, 25 N. E. 1057; *O'Brien v. Grant*, 146 N. Y. 164, 28 L. R. A. 361, 40 N. E. 871; *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225.

The Democratic General Committee of the county of Kings is for certain limited purposes a representative body of a political subdivision of the state, and a quasi corporation, and the duly-elected members of the committee constitute the representative or corporate body, and are not mere officers of a corporation.

The general committee represents the body of Democratic electors in the several towns or wards of the county, and in this respect is similar to the common council of a municipality or a county board of supervisors.

The corporate functions of the committee are conferred upon it by the statute, and are not derived from the constituent body. In a word, the committee itself is the corporation, and its component members are for the time being the actual corporators, and not mere officers of the constituent body.

The membership of the committee is a franchise, and ejection or expulsion from the committee amounts to disfranchisement as a corporator, and not merely to a removal from office.

People ex rel. Elliott v. New York Cotton Exchange, 8 Hun, 216; *Evans v. Philadelphia Club*, 50 Pa. 107; *Com. v. St. Patrick Bener. Soc.* 2 Binney, 441, 4 Am. Dec. 453; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 251; *Beneficial Assn. of Brotherhood Unity*, 38 Pa. 299; *Butchers' Beneficial Assn. No. 1*, 38 Pa. 298; *Butchers' Beneficial Assn.* 35 Pa. 151; *Fuller v. Academics School*, 6 Conn. 532; *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187.

An officer of a corporation can only be removed from office for cause; and such cause must involve the malperformance or nonperformance of his official duties, or his commission of an infamous crime.

Grant, Corp. 250-252, *240, 241; *Angell & A. Priv. Corp.* 11th ed. § 432; *Willcock*, Mun. Corp. 245, 246; *State ex rel. Graham v. Milwaukee Chamber of Commerce*, 20 Wis. 64.

Parker, Ch. J., delivered the opinion of the court:

The fundamental question in this case is whether a member of the general committee of a county may be removed from office as a member of the committee. The answer to it depends upon the construction now to be given to the primary election law (2 Laws 1899, chap. 473) § 1 of which, in declaring the application of the act says: "It shall be controlling (1) on the methods of enrolling the voters; . . . (2) on primary elections; . . . (3) on party conventions; . . . (4) on the choice . . . of political committees, and on the conduct of political committees in and for any political subdivision of the state. . . ."

It will help us intelligently to consider the statute if we call to mind preceding legislation intended to protect the rights of minorities; the statute law looking to the purity of the ballot, and the organic law having for its purpose the encouragement of independent action in matters relating to municipal government. The help will come from our possession of the situation in which the legislators were when, in 1899, they passed the statute in question, which was in part composed of the general drift of public opinion, and the fault which that public opinion had found with the machinery for the election of public officials. The settled conviction that the safeguarding of our institutions requires the untrammelled exercise of the franchise by the citizens, and that the result be protected from fraud, has led to no inconsiderable amount of legislation during the present generation,—legislation aimed largely, although not entirely, at the frauds of majorities, who, at times, have manifested a disposition to retain their power, let the cost be what it might. The frauds that have perhaps occasioned the greatest amount of discussion resulted from colonization and repeating, for the correction of which several registry acts were passed. At the outset the legislation on that subject proceeded on the view that only in great cities were such frauds practised, but such view proved to be partial, and in 1890 a general registry law was passed applicable to all of the state except the cities of New York and Brooklyn. Laws 1890, chap. 321. In those cities registration had long been required. Laws 1880, chap. 142. An enlightened public sentiment was at the same time making war against the evils of bribery, and the outcome was a new departure in our method of voting, under the provisions of an act entitled "An Act to Promote the Independence of Voters at Public Elections, Enforce the Secrecy of the Ballot, and Provide for the Printing and Distribution of the Ballots at Public Expense." Laws 1890, chap. 232. This act inaugurated the voting booth; prohibited electioneering within 150 feet of the polling place; took the burden of printing and distributing ballots from the party organizations, and placed it upon the public generally; and throughout teemed with provisions guarding against the frauds upon the ballot that experience had

shown to be possible. Complaints had also been made that the practical effect of the power exercised by the organization was to render ineffective independent voting in purely municipal affairs, to the detriment of the best interests of the cities; and the recent constitutional convention (the work of which was subsequently ratified and adopted by the people) undertook to ameliorate the situation, to some extent, by providing that city officers should be elected at a different time than state officers, the election of the latter to take place in even, and the former in odd, numbered years; the reason assigned being that, unrestrained by national and state contests, the citizen would naturally be more independent, not only in voting, but in bringing about independent nominations, whenever the party to which he belonged should attempt to make nominations intended to subserve the selfish purposes of the leaders rather than to promote the public interests. Prior to 1882 there was no attempt to regulate by law the conduct of primaries, but chapter 154 of the Laws of that year, known as the "Chapin Act," declared certain acts committed at primaries crimes, such as the false personation of a voter, intentionally voting without right, prevention of others from voting, and fraudulent concealment or destruction of ballots. It also required that the presiding officers and inspectors at such an election should take the usual oath of inspectors at general elections, and provided for the challenge of voters, and the administration of an oath to a person so challenged. The act applied only to the city of Brooklyn, but in 1883 its operation was so extended as to include the entire state (Laws 1883, chap. 380); while four years later it was restricted to cities of 10,000 inhabitants or less (Laws 1887, chap. 265). The latter act, however, contained new provisions regulating the primary elections in all the cities of the state containing over 10,000 inhabitants. Among other things, it required the appointment of watchers, the examination of the ballot box before use, and that it should be so placed as to enable the voter and each watcher to see the ballot deposited, the keeping of a poll list of the voters, and the making and filing of returns in the county clerk's office. The qualifications a voter was required to possess under the Chapin act (§ 2) and under the act of 1887 (§ 14), in addition to his being an elector, were those "prescribed by the regulations of the association holding the primary or convention."

While those provisions reduced to a considerable extent the wrongs which had been committed against the voter who desired to participate in the selection of the candidates of his party, and made snap caucuses impossible, and the selection of delegates by brute force extremely difficult, still the right of the general committee to prescribe tests or qualifications for a voter was in some instances so employed as to exclude from participation in the primary many who were not in sympathy with the majority of the

committee in all respects, and who might be termed members of a minority faction in the party. The not unnatural desire of the several general committees to perpetuate their power and control led, in some instances, to the making of "regulations" under which members who were not congenial to the majority were disciplined upon charges of disloyalty, inefficiency, or mismanagement, and the places made vacant by their removal were oftentimes filled with men who, from choice or prudence, worked in harmony with the "majority" or the organization; for the latter term practically means the particular members of a party within a given territory who are, for the time being, in full control of its affairs. In *McKane v. Adams*, 123 N. Y. 609, 25 N. E. 1057, it appeared that the plaintiff was formerly a member of the Democratic association of his town, and a delegate upon the general committee of the county. Charges were preferred against the town association, and the trial resulted in its being disbanded. A reorganization of the town association was undertaken, and a primary election thereupon ordered by the general committee of the county organization, at which the defendant was elected a delegate to the county committee. The general committee refused to accept the returns of the primary election and to recognize him as a delegate. It was held that membership in such an association is a privilege which may be accorded or withheld. And, such being the status of a delegate to the general committee, that body could refuse to recognize the choice of a given constituency until such time as they should conclude to elect a delegate agreeable to the wishes of the majority, thus rendering futile all attempts at independent, otherwise termed "hostile," action.

These and other abuses, as they were called by the minority members of party associations, became so common that a demand was made for a primary election law sufficiently comprehensive in scope to assure to all citizens equal rights in the primary elections, conventions, and political committees of the party with which they were allied. This demand the legislature undertook to meet by the Laws of 1898; chap. 179, which was amended (but not in respects affecting this question) by the Laws of 1899, chap. 473. These acts recognize the equal importance of primary and general elections, and model the conduct of the former upon the general lines of conduct of the latter. They provide for the enrollment of the voter, and the only exaction permitted precedent to his right to enroll is that he shall express an intention to support generally at the next general state or national election the nominees of such party for state or national offices. Section 3, subd. 1. No inquiry as to the past political conduct is permitted, or promise as to future support of local candidates required. They provide for booths at public expense, in which the primary voter must in secret prepare his ballot; for ballots and their printing and subsequent folding, so that the inspectors shall

not be able to know for whom the ballot is cast; for the administration of an oath to a voter in case of a challenge; for challengers and watchers; for an annual primary day; and that the polls shall be held open for a fixed period of time. The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards.

Now, having in mind the purpose of this statute and the decision of this court in the *McKane Case*,—that membership in a county general committee is a privilege which may be accorded or withheld, not a right which can be gained independently and then enforced, inasmuch as the association is voluntary, being organized without a charter, and regulated as to its action by a constitution and by-laws,—let us further examine the statute, and see whether the legislature intended to and did take away from the general committee the power, for any cause whatsoever, to expel members elected thereto by the voters of a town or ward. In the first place, the voluntary character of the county general committee has been destroyed, for the statute expressly commands that "each party shall have a general committee for each county." There is but one way to gain membership, says the statute, and that is through the suffrages of the members of the party exercised "at the primary elections on the annual primary day" and at "public expense." Section 4, subsecs. 2, 3, and section 6.

"The expense of official primary elections, including the expense of preparing new enrollment books and the compensation herein provided to be paid to primary election inspectors, shall be paid by the same officers or boards, and in the same manner, as the expenses of general elections." Section 4, subd. 2.

"There shall be two polling places in each of such primary districts which shall be designated and provided at public expense by the officers or boards whose duty it is to provide polling places for days of general election, and which shall be, so far as they are available, the same places which were used for the last preceding general election." Section 4, subd. 3.

"The polling places, voting booths, guard rails, distance markers, ballot boxes, sample ballots and other supplies required for official primary elections shall be provided and paid for by the same officers, and in the same manner, as in the case of general elections, pursuant to §§ 10 and 18 of the election law." Section 6.

The term of "office" of a member of the general committee, for such the statute declares it to be, is for a period of one year, but is to commence at a time fixed by the rules and regulations of the party, except that it shall not be later than the 1st day of January succeeding their election. And the general committee is commanded to meet and organize "on the day fixed by the rules and regulations of the party." At that meeting a member elected at the preceding town or ward primary may appear to assume the duties of the office to which he has been elected, and the production of a certificate of election from the "custodian of primary records, or a duplicate thereof, shall be sufficient to entitle the person named therein to be admitted to the . . . committee to which he shall have been elected." Note, in passing, that there is no discretion vested in the committee, as the court said there was in the *McKane Case*. The statute that calls the general committee into existence makes the certificate of the "custodian of primary records" proof of his election and right to exercise the duties of a member of the committee. And § 1 provides that "the act shall be controlling . . . on the choice . . . of the members of political committees, and on the conduct of political committees in and for any political subdivision of the state." Does the recital of these provisions suggest that the legislature intended that the committee should be the judge of the election or other qualifications of its members, or that the primary voters should be the judge? What was the object of the legislation; to protect the majority of the committee from enforced association with a disagreeable or "hostile" member, or to protect the right of the voters to have their wishes in party matters presented by their chosen representatives? If the former, then legislation was not needed in that direction, for the general committees had a method of ridding themselves of offensive members that was in full operation, as the *McKane Case* witnesseth. If the latter was the object of the legislature, it is difficult to conceive how it could have taken more effective measures for its certain accomplishment. It provided that the statute should control, not only the choice, but also the conduct, of political committees. The choice of the member it vested absolutely in the voter at the primary, reserving no voice whatever in the matter to his associates in the committee. It provided many things for the conduct of the committee, but the right to expel a member was not one of them. Power was given to a committee to prevent a member who had failed to pay his annual dues "from participating in the meetings of such committee." Expulsion from, or forfeiture of, his office was not named as the penalty for nonpayment of dues, but only exclusion from participation in the meetings. And it is apparent from a reading of the provisions that the words were chosen with a view of enabling the member to resume attendance of the meetings upon payment of dues. But, if this

provision were capable of being treated as authorizing expulsion for nonpayment of dues, the maxim, *Expressio unius est exclusio alterius*, would be applicable, and call for a construction of the statute denying power to expel a member of the committee for any other reason.

But, to resume again the inquiry we were pursuing, whether it was possible for the legislature to have employed language more apt than it did to absolutely vest the power in the voters at the primary to select a representative in the general committee who should be responsible to them alone for the manner in which he should conduct himself, we observe, in addition to the provisions that the statute should control, not only the choice, but the conduct as well, of the committee, that the details of the plan by which the choice is to be made by the primary voter are fully carried out, and every one of them support in some measure the absolute supremacy of the majority at the primary. The annual enrollment; the statutory qualification of the voter; the private booth; the secret ballot; and all the expensive machinery of a general election, to be paid for out of the public treasury,—why was it all required if the legislature intended to permit the majority of the committee to deprive the primary voters of the right of choice on any ground whatsoever? But it did not so intend; and, in the light of the abuses that the legislature set out to remedy, upon any possible reading of this statute there seems no room whatever for the contention that the right of removal for any cause was continued in the statutory general committee that now takes the place of the voluntary committee of other days.

If I am right in the views expressed, no other question need be considered; for the statute manifests an intent not to allow the committee, on any pretext whatever, to remove the committeeman from office, and it is the duty of this court to give full force and effect to that legislative intent.

It has been suggested that it would be intolerable for the members of a general committee to associate with a member who is hostile to the ticket, and that it follows that the legislature must be presumed to have had such a situation in mind. I answer—without assenting for one moment that the legal conclusion follows from the proposition of fact standing alone—that it does not stand alone; that the legislature was confronted with what it regarded as an abuse of the rights of the citizens in party matters, which compelled it to decide which was the lesser of two evils,—to compel association occasionally with a member who is hostile to some portion of the party candidates or a majority of the committee, or to permit the general committee to deprive the primary voters of the choice of a representative. It decided that the wrongs that had been and were being done to the primary voters exceeded that which could result from occasional association with a hostile member. In other words, it was determined that the majority of the primary voters were entitled

to select any representative they might desire, who should be responsible to those electing him, and only to them, for his conduct in office. That determination should be given effect by the decision of this court agreeably to that well-understood canon of construction that commands the court in construing a statute to give effect to the intention of the legislature.

The suggestion that the provision of § 9, subd. 1, requiring the general committee to meet and organize, and authorizing the making of rules and regulations, but providing that, unless rules be so adopted, "the rules or regulations adopted by the last preceding county or general committee of said party in said county shall remain in full force and effect until repealed or amended in accordance with the provisions of this act," continues in force all the old rules and regulations, including those permitting the expulsion of members for the violation of rules, might furnish sufficient foundation for a controversy, notwithstanding the fact that such rules would be in open conflict with both the manifest purpose and clear reading of the statute, were it not that the opening provisions of subdivision 2 of the same section expressly so limit the effect of rules and regulations as that they shall not be inconsistent with the provisions of the statute. It reads as follows: "The rules and regulations of parties, and of the conventions and committees thereof, shall not be contrary to, or inconsistent with, the provisions of this act, or of any other law." If, therefore, the defendant were acting under the rules and regulations of its predecessor association (of which there is no hint in the record), so much thereof as provided for the trial and removal from office of a member of the committee has neither force nor effect, because contrary to and inconsistent with the provisions of this act. *The order of the Appellate Division should be reversed, and that of the special term affirmed, with costs.*

Haight, Vann, and Landon, JJ., concur.

Cullen, J., dissenting:

It is practically conceded by the prevailing opinion that if there was any power in the general committee to expel the relator for cause, then, on the affidavits submitted by the parties, the application for a peremptory writ of mandamus should have been denied, whatever might have been the relator's rights, had he asked for an alternative writ. The sole question, therefore, necessary to be discussed on this appeal, is whether there is power in the general committee of a political party to expel a member for misconduct in the member's duty to the committee, disloyalty, or other cause.

I agree with the opinion of the learned appellate division that there is in the general committee, for self-protection, an inherent power to expel a member acting in hostility to the objects and purposes for which the committee was organized. It is not necessary that the power should be granted by

the statute in terms; it will be presumed to exist unless the statute has denied it. The power of motion or removal of members is said by Chancellor Kent to be an ordinary incident of a corporation. 2 Kent, Com. 278. In *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187, it was said: "We entertain no doubt that the county societies may still exercise the common-law power of expulsion, notwithstanding the remedy provided by statute, which we regard as merely cumulative." In *People ex rel. Pinckney v. New York Bd. of Fire Underwriters*, 7 Hun, 248, it was said of the powers of the corporation then before the court: "It was merely an organization formed for promoting the proper transaction and management of the business of insurance, by its members, in a uniform manner. And its usefulness and success depended, in a very great measure, upon their faithful observance of its rules and regulations. That, under the charter, was an implied condition of membership, for the organization could be no otherwise maintained. And, for that reason, the corporation necessarily possessed the power of expulsion over members violating their obligations in that respect. It could not exist without it." This is not the rule as to stock corporations, but it applies to all corporations or voluntary associations where there exists a personal duty of the member to the corporation or association.

Why should not the same rule apply to the general committee of a political party? The members of that committee are certainly not public officers, for this reason, if for no other: Public officers must, under the Constitution, be either appointed or elected, and, if elected, then in the same manner as other elections by the people. Const. art. 10, § 2; *Re Gage*, 141 N. Y. 112, 25 L. R. A. 781, 35 N. E. 1094. They take no official oath. They cannot be indicted and removed for misconduct in office. It is difficult to imagine a case where the obligation of the member to the association is more purely ethical or more devoid of any legal attributes possible to be enforced by the courts. The political convictions of a member may change subsequent to his election, and he may conscientiously desire the defeat of the party to which he has belonged. He may think that in no way can he accomplish that result more effectually than by remaining as a leader to share in the counsels and control of the party. Is the committee to be relegated to the chance of the member's sense of delicacy dictating his resignation, as the sole means of severing its connection, with him? Is a county committee of the Prohibition party to be denied the right to exclude from its counsels a member, who, subsequent to his election, engages in the manufacture or sale of intoxicating liquors, or has so little regard for his political principles as not to remain sober for a week at a time? It is said that the power of the general committee to expel members is not to be presumed because if it exists it may be abused. This is true of the exercise of all power. The question whether the relator

was properly removed from his position does not arise on this record. If wrongfully removed, he may obtain redress in a proper proceeding and by proper averments in his petition.

The question discussed is all that is necessarily involved in this case, and I would rest here, were it not for the announcement in the prevailing opinion of certain propositions from which I feel bound to express my dissent. It is asserted that the organization and control of a political party are no longer matters of voluntary agreement among the members of that party, but that, under the statute relating to primary elections, every party must have a county committee, and that committee must be appointed and organized in the particular way prescribed by the statute. This doctrine is made the foundation for the argument that the legislature meant to deprive the general committee, or party organization, of all power, except such as the statute gives in express terms. From this doctrine I dissent *toto calo*. If the statute is to be so construed, in my judgment it is unconstitutional and void. The right of the electors to organize and associate themselves for the purpose of choosing public officers is as absolute and beyond legislative control as their right to associate for the purpose of business or social intercourse or recreation. The legislature may, doubtless, forbid fraud, corruption, intimidation or other crimes in political organizations the same as in business associations, but beyond this it cannot go. Much is said of the evils that have grown up in the management of political parties, and the dictation that has been exercised by political leaders, and their invasion of the rights of the members of a party, and it is asserted that the statute intended to secure to all citizens equal rights in the management of the parties to which they may be allied. But an alliance cannot be made by one person alone. It requires the action of several whose rights are equal. No one can ally himself with others solely by his volition. Therefore I do not see that an elector has any greater rights to join a party, unless on the conditions that the party prescribes, than he has to insist upon entering a partnership, on contributing his quota of capital, against the wish of the parties then conducting the business. In *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, it was held that a statute prohibiting any gift on the sale of any article of food, or any other article, as an inducement to purchase, was unconstitutional and void, in that it infringed upon the liberty of the dealer to pursue a lawful calling in the manner he chose to adopt. The liberty of the electors in the exercise of the right vested in them by the Constitution to choose public officers on whatever principle, or dictated by whatever motive, they see fit, unless those motives contravene common morality, and are therefore criminal, cannot be denied. It seems to me as absolute as the right to pursue any trade or calling, and therefore their right to associate and organize for that purpose is 51 L. R. A.

equally great. The statute of primary elections grants the right to join in the management of a party to any person on a declaration of his intention to support generally the candidates of that party, but a political organization may be unwilling to grant membership on these terms. It may make past conduct, and not future promise, the condition of membership. If the legislature can prescribe this test as a condition of membership in a party, I do not see why it may not require as a condition of voting at a Democratic primary a declaration of belief in the free coinage of silver at the ratio of 16 to 1, or of membership in the Republican party a denial of the application of the Constitution of the United States to the territories and dependencies of the country. Whether these are the fundamental doctrines of these parties, I do not attempt to say. If they are, it is for the parties themselves to so declare, not for the legislature. The rules and principles on which political parties are to be conducted must necessarily lie largely beyond the domain of legislative interference, because they relate to the action of the people, the ultimate source of sovereignty in what is unquestionably their prerogative,—the election of public officers. It may be that what is apparently the present practice of the voters, the subordination of the choice of municipal and local officers to the partisan tests of national political parties, is an evil, and leads to bad government. It may also be that the blind obedience of the electors in voting for the nominee of some political leader is a great evil, and leads to corruption. As a public officer, I have no opinion to express on these questions, though as a citizen I have a very positive judgment thereon. It may be that the voters think it is necessary to choose local officers on party lines for the purpose of maintaining their party organization, and ultimately succeeding in the control of the government, state or Federal, on larger issues, which they deem more important than local contests, and they may vote for nominees selected by political leaders because of implicit faith in the wisdom and integrity of those leaders. Of course, it is equally possible that they are guided by no such reasons; but all this is something with which the legislature has no right to interfere, because in these matters the people are supreme. The legislature may doubtless, to a certain extent, affect the subject by providing for the conduct of elections in such manner as to render independent voting easy; but this is the extent of its power. The evil in all these things comes from the voluntary acts of the voters themselves, and can be corrected only by arousing the consciences of the electors to their responsibilities and duties. A rule which would permit interference with the liberty of an elector in his political action cannot be upheld, no matter how meritorious its object may be in a particular case.

I think the statute of primary elections can be sustained, however, where political parties voluntarily take advantage of it; that is to say, political parties may have

their organizations and primaries outside of the statute if they choose, but, if they adopt the statutory primaries held at public expense, they become subject to statutory rules. This admission does not render the views expressed as to the power of the legislature to control political organizations irrelevant to the discussion of this case; for, if the subjection of the political parties to the provisions of the statute is voluntary, we may assume that the legislature did not intend to deprive party organizations of powers that they formerly had, and seem almost necessary to their practical administration,—powers which they would not be likely to surrender, even for the advantage of holding their primaries at public expense. In analogy to the case of a corporation, the ground for the expulsion of a member must be a cause arising since his election, at which time first comes into being the duty of the member to the committee. *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187; *Fawcett v. Charles*, 13 Wend. 477.

The order appealed from should be affirmed, with costs.

O'Brien, J., concurs.

Bartlett, J., concurs in result reached by Cullen, J.

Frederick FOX, *Respt.*,

v.

MOHAWK & HUDSON RIVER HUMANE SOCIETY, *Appt.*

(.....N. Y.....)

1. There is only a qualified property in dogs, and in fact there may be said to be no property in them as against the police power of the state, though as against a wrongdoer the law regards them as property.
2. The summary destruction or appropriation of a dog by a humane society, without notice to the owner, when he has failed to procure a license for the dog as required by Laws 1896, chap. 448, does not constitute a taking of his property without due process of law, though such a confiscation of domestic animals, such as horses and oxen, would be in violation of the constitutional provisions on that subject.
3. The authority given to a humane society by Laws 1896, chap. 448, to destroy or appropriate unlicensed dogs, is not an unconstitutional delegation of governmental power to a private corporation, since unlicensed dogs have long been regarded as subject to destruction by any person.
4. The grant of license fees paid for dogs, to a humane society, by Laws 1896, chap. 448, providing that such fees may be used by the society towards defraying the cost of carrying out the provisions of the statute and maintaining a shelter for lost, strayed, or homeless animals, "and for its own purposes," is an appropriation of public

moneys for private use in violation of Const. art. 8.

5. The privilege of a humane society to keep dogs without paying any license fee, which is conferred by Laws 1896, chap. 448, while every other citizen is obliged to pay such fee, is the grant of an exclusive privilege and immunity forbidden by Const. art. 8, § 18.

(February 5, 1901.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a judgment of a Trial Term for Albany County in defendant's favor in an action brought to restrain defendant from killing, disposing of, or interfering with plaintiff's dogs. *Affirmed.*

The facts are stated in the opinion.

Mr. G. B. Wellington, with *Messrs. Hun & Johnston*, for appellant.

Chapter 448 of the Laws of 1896 is a valid exercise of the "police power" of the state.

The clause in the Constitution as to "due process of law" confines the legitimate exercise of governmental powers within limits established by law for the protection of certain rights of the individual as a member of society.

It is impossible in any case to determine the nature or extent of an individual's rights without considering at the same time the rights of the community. Where the rights of a single individual conflict with the rights of a community the latter must control. It may be true that "due process of law" may in a particular case be completely fulfilled, although an individual's property is destroyed without judicial proceedings and without notice.

"Due process of law" means no more in a given case than that the abstract rights of the individual shall be respected in so far as they may be respected without defeating the object to be attained, to wit, the public good.

It is admitted that the legislature may enact that no one may keep a dog without a license to do so. If the legislature has power to require a license, it has the power to make such a law effective.

The statute gives to all citizens who would own dogs notice that, unless a reasonable license fee be paid, judgment of confiscation will go against them. One object of the law is thus to ascertain the ownership of dogs. The only practicable penalty is to treat the unlicensed dog as a public nuisance.

The "law of the land" in England did not provide in every case for formal judicial proceedings even when the subject-matter was not a nuisance.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Stuart v. Palmer*, 74 N. Y. 193, 30 Am. Rep. 289.

Homeless dogs may be declared to be nuisances by the legislature, and appropriate summary methods may be provided to exterminate them.

NOTE.—As to property rights in dogs, see *Graham v. Smith* (Ga.) 40 L. R. A. 503, and *note*; also *Hodges v. Causey* (Miss.) 48 L. R. A. 95.

People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Hart v. Albany*, 9 Wend. 590, 24 Am. Dec. 165; *New York Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833.

The existence, from a very early date, of statutory provisions in reference to the payment of taxes or license fees upon dogs, and for the killing of unlicensed dogs without notice, is a controlling argument in favor of the validity of such statutes.

There is nothing in the Constitution which forbids the legislature from conferring public functions upon a corporation.

People ex rel. State Bd. of Charities v. New York Soc. for Prevention of Cruelty to Children, 161 N. Y. 233, 55 N. E. 1063.

There are local officers who are neither county officers nor municipal officers.

Dempsey v. New York O. & H. R. R. Co. 146 N. Y. 290, 40 N. E. 867; *Liquor Tax Law* 1896, chap. 112, §§ 9, 10; *Astor v. New York*, 62 N. Y. 567; *Re Whiting*, 2 Barb. 513; *People ex rel. Saratoga Springs Bd. of Edu. v. Bennett*, 54 Barb. 480; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *Sturgis v. Spofford*, 45 N. Y. 446; *New York Fire Department v. Atlas S. S. Co.* 106 N. Y. 566, 13 N. E. 329; *People ex rel. McMullen v. Shepard*, 36 N. Y. 285.

The act in question is not invalid under U. S. Const. 5th Amend.

Sentell v. New Orleans & O. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693.

Similar statutes have been declared to be valid in other states.

Tower v. Tower, 18 Pick. 262; *Blair v. Forchand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Mowery v. Salisbury*, 82 N. C. 175; *Faribault v. Wilson*, 34 Minn. 254, 25 N. W. 449; *Morey v. Brown*, 42 N. H. 373; *Carter v. Dow*, 16 Wis. 298; *Gray v. Kimball*, 42 Me. 290; *Oranston v. Augusta*, 61 Ga. 572; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *Mitchell v. Williams*, 27 Ind. 62; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152; *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Tiedeman*, Pol. Power, 141 (a); *Cooley*, Const. Lim. 6th ed. p. 740 and note; *Julienne v. Jackson*, 69 Miss. 34, 10 So. 43; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310; *Haller v. Sheridan*, 27 Ind. 494; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, 30 Pac. 760; *Carthage v. Rhodes*, 101 Mo. 175, 9 L. R. A. 352, 14 S. W. 181; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *Hagerstown v. Witmer*, 86 Md. 293, 39 L. R. A. 649, 37 Atl. 965; *Hamby v. Samson*, 105 Iowa, 112, 40 L. R. A. 508, 74 N. W. 918, 67 Am. St. Rep. 298, note.

Messrs. David B. Hill and John L. Cadwalader, with *Mr. J. Mayhew Wainwright*, by leave of court submitted arguments on behalf of societies similar to appellant:

The provision for the destruction of unlicensed dogs does not violate any clause of the Constitution.

The right of the summary abatement of § 1 L. R. A.

nuisances, without personal notice to the owner, was an established principle of the common law, and was not abrogated by the Constitution.

Lawton v. Steele, 119 N. Y. 235, 7 L. R. A. 134, 23 N. E. 878; *Hart v. Albany*, 9 Wend. 589, 24 Am. Dec. 165; *Rockwell v. Nearing*, 35 N. Y. 308; *Sentell v. New Orleans & O. R. Co.* 166 U. S. 704, 41 L. ed. 1172, 17 Sup. Ct. Rep. 693; *Happy v. Mosher*, 48 N. Y. 313.

A municipal corporation may, without incurring liability, destroy, if necessary, the building of a citizen, to prevent the spread of a conflagration; and yet, technically speaking, there has been no "process of law."

Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46.

Such right is based upon the theory that in such cases a public danger exists,—like a public nuisance,—which must be averted or abated for the public good.

People ex rel. Brisbane v. Buffalo, 76 N. Y. 558, 32 Am. Rep. 337; *Struve v. Droge*, 62 How. Pr. 233; *Russell v. New York*, 2 Denio, 461; *Taylor v. Plymouth*, 8 Met. 462.

The legislature, in the exercise of the police power of the state, may determine what acts or what uses of property constitute public nuisances, and may provide for the abatement of such nuisances and the summary destruction of the property.

Lawton v. Steele, 119 N. Y. 233, 7 L. R. A. 134, 23 N. E. 878; *People v. Gillson*, 109 N. Y. 401, 17 N. E. 343; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636.

A man who does not properly care for a dog does not deserve its ownership, and the dog becomes a nuisance.

The right to destroy unlicensed dogs without notice to the owner and without judicial proceeding, in aid of the public health and safety, proceeds upon the same ground as statutes authorizing boards of health in cities to direct alterations and improvements in buildings to conserve the public health, which may be done without notice to or hearing by the owner.

New York Health Department v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710, 39 N. E. 833; *People ex rel. Copcutt v. Yonkers Bd. of Health*, 140 N. Y. 1, 23 L. R. A. 481, 35 N. E. 320.

The statute preventing the carrying on of the business of barbering on Sunday was sustained as a valid exercise of the police power in aid of the public health.

People v. Havnor, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541.

While dogs are property, they are only such in a qualified sense.

Dunlap v. Snyder, 17 Barb. 561.

"Due process" does not absolutely require personal notice to an owner.

Happy v. Mosher, 48 N. Y. 313.

The act of 1896 is not unconstitutional simply because it vests in the defendant society the execution of certain police powers of the state.

There is nothing in the Constitution which prevents the legislature from conferring

public functions, not only upon a municipal corporation, but upon any other corporation.

Quasi-public corporations are corporations technically private, but yet of a quasi-public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as the exercise of the right of eminent domain.

Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

The books are full of cases recognizing as quasi-public corporations those which are technically private, but which exercise certain "governmental powers" and perform various public functions.

Railroad Comrs. v. Portland & O. C. R. Co. 43 Me. 269, 18 Am. Rep. 211; *Foster v. Fowler*, 60 Pa. 27; *Fourth School-Dist. v. Wood*, 13 Mass. 197; *Grant v. Fancher*, 5 Cow. 309; *Point Chautauqua Association*, Laws 1885, chap. 196; *Sylvan Beach*, Laws 1896, chap. 812; *Round Lake Camp Meeting Asso. Laws* 1889, chap. 260; *Seneca Nation of Indians v. John*, 27 Abb. N. C. 253, 16 N. Y. Supp. 40.

Mr. J. S. Frost, with *Mr. L. C. Warner*, for respondent:

The act in question is in violation of article 5 and article 14, § 1, of the Amendments to the Constitution of the United States, and of article 1, § 6, of the Constitution of the state of New York, as it deprives persons of their property without due process of law and without just compensation.

Dogs are property within the meaning of the Constitution of the state of New York.

Mullaly v. People, 86 N. Y. 365; *People ex rel. Shand v. Tighe*, 9 Misc. 607, 30 N. Y. Supp. 368; *Rockwell v. Nearing*, 35 N. Y. 305; *King v. Hayes*, 80 Me. 206, 13 Atl. 882; *Shaw v. Kennedy*, 4 N. C. (Term Rep.) 158; *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Washington v. Meigs*, 1 MacArth. 53; *State v. Yates*, 10 Ohio Dec. Reprint ed. 182; *Archer v. Baertschi*, 8 Ohio C. C. 12; *Fagin v. Ohio Humane Soc.* 9 Ohio Dec. 341; *Lynn v. State*, 33 Tex. Crim. Rep. 153, 25 S. W. 779.

The law is unconstitutional for the reason that it authorizes the exercise of a power of taxation not recognized by the Constitution.

If the moneys derived from the act are essential to provide means to secure the public from dangers of lost and homeless dogs, as claimed by the defendant, then all property should be charged with its proportionate burden. One class of property may not be singly charged therewith.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

The private property of a citizen cannot, by the exercise of the legislative power in any form, be taken from him and given to another or to a corporation. Such act would be judicially depriving him of his property without due process of law.

Turner v. Althaus, 6 Neb. 54; *Philadelphia Asso. for Relief of Disabled Firemen v. Wood*, 39 Pa. 75.

61 L. R. A.

A license fee is a tax when revenue is the mere purpose for which it is imposed.

Desty, Taxn. 305.

The imposition of a tax forbidden by the Constitution cannot be supported as an exercise of the police power of the state.

San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113, 15 Pac. 380.

A license is a right granted by some competent authority to do an act which without such authority would be illegal. A tax is a rate or sum of money assessed upon the personal property, etc., of the citizen.

Home Ins. Co. v. Augusta, 50 Ga. 530; *Cooley*, Taxn. 573; *People ex rel. Binsfeld v. Murray*, 149 N. Y. 377, 32 L. R. A. 344, 44 N. E. 146; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Home Ins. Co. v. Augusta*, 93 U. S. 122, 23 L. ed. 825.

The taxing power cannot be invoked in aid of an enterprise strictly private (*Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 663, 22 L. ed. 461), even though it would tend to increase the business prosperity of the municipality.

Weisner v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; *Spencer v. Joint School Dist. No. 6*, 15 Kan. 202, 22 Am. Rep. 268.

To take from one citizen to bestow upon another citizen or corporation for private uses or enterprises is not legislation, and is beyond the power of the legislature.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 663, 22 L. ed. 461; *People ex rel. McLean v. Flagg*, 46 N. Y. 401.

This act cannot be upheld under the "police power" of the state.

People v. Smith, 108 Mich. 527, 32 L. R. A. 853, 86 N. W. 382; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 490; *Austin v. Murray*, 16 Pick. 121; *Brill v. Ohio Humane Soc.* 4 Ohio C. C. 358.

The grant of a license is the exercise of sovereign power, and may not be delegated to private corporations.

The act is in the nature of a gratuity, rather than within the police power.

People v. Gillson, 109 N. Y. 389, 17 N. E. 343; *Bush v. Orange County Supers.* 10 App. Div. 542, 42 N. Y. Supp. 417.

Cullen, J., delivered the opinion of the court:

This action was brought to restrain the defendant from killing, disposing of, or interfering with, the plaintiff's dogs; he having refused to pay the license fee prescribed by chapter 448, Laws 1896, entitled "An Act for The Prevention of Cruelty to Animals and Empowering Certain Societies for the Prevention of Cruelty to Animals to Do Certain Things." The defendant was formed by the consolidation of a society for the prevention of cruelty to children with one for the prevention of cruelty to animals, and was vested with all the powers of each association. Chapter 292, Laws 1894. The defendant in its answer pleaded its corporate organization and its power and authority under the statute of 1896, and upon the

trial admitted its intent to seize the plaintiff's dogs for nonpayment of license fees. The sole question involved in the case is the constitutionality of the provisions of this statute. No objection has been made to the mode of procedure adopted, nor to the plaintiff's right to maintain the action, and we shall raise none. The court at special term held the statute valid, and rendered judgment for the defendant. The appellate division reversed the judgment below and granted a new trial, and from the order of reversal the defendant has appealed to this court.

The statute of 1896 provides that every person who owns or harbors dogs within the limits of any city having a specified population, in which there exists or may thereafter exist an incorporated society for the prevention of cruelty to animals, shall procure a yearly license for each animal, and pay the sum of \$1 therefor to such society. Dogs not licensed according to the provisions of the act shall be seized, and, if not redeemed within forty-eight hours, destroyed, or otherwise disposed of, at the discretion of the society. The license fees are to be used by the society towards defraying the cost of carrying out the provisions of the statute and maintaining a shelter for lost, strayed, or homeless animals, "and for its own purposes." The learned appellate division held this legislation void on two grounds: First, that the direction for the summary destruction or appropriation of the dog without notice to the owner was taking the property of such owner without due process of law; second, that the act assumed to vest in the defendant, a private corporation, the execution of certain police powers of the state, and, in effect, to constitute it a public officer.

We are of opinion that the decision below cannot be upheld on either of these grounds. Under any circumstances, there is but a qualified property in dogs, cats, and similar animals; and in fact there may be said to be no property in them as against the police power of the state. In *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, the Supreme Court of the United States upheld the constitutionality of a statute of the state of Louisiana which provided that no dog should be entitled to the protection of the law unless it should have been placed on the assessment rolls, and that the owner should not recover for injuries done to the dog, in any civil action, beyond the value fixed by him on the assessment roll, which statute was challenged as depriving the owner of property without due process of law, in contravention of the 14th Amendment of the Federal Constitution. In the opinion there delivered will be found a review of the common law on the subject of dogs, and of the legislation of the various states and the decision of the state courts on the same subject. Such legislation and decisions are in substantial harmony. In *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82, a statute authorizing the summary destruction of

dogs not licensed and collared according to the provisions of the statute was held valid and constitutional. It was there said: "Dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals." In *Morewood v. Wakefield*, 133 Mass. 240, a statute which authorized any person to kill a dog which had no collar on, even though licensed, was upheld. The decisions in *Morey v. Brown*, 42 N. H. 373; *Tenney v. Lenz*, 16 Wis. 566; *Mitchell v. Williams*, 27 Ind. 62; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, 30 Pac. 760,—are to the same effect. Nor is the rule in this state different. In *Mullaly v. People*, 86 N. Y. 365, it was held that dogs are the subject of larceny; the decision proceeding on the ground that the Revised Statutes had changed the common-law rule to the contrary, and recognized dogs as property by providing for their taxation. But the proposition that there is property in a dog as against a wrongdoer is very different from the proposition that an owner has the same right of property in a dog, as against the police power of the state, which he has in useful domestic animals. The same title of the Revised Statutes that directed the taxation of dogs (title 17, chap. 20, p. 1) authorized any person to kill a dog so taxed unless the tax was paid within five days after demand (§ 6), or any dog which he might see chasing, worrying, or wounding any sheep (§ 15). This last provision was but a re-enactment of previous legislation. 1 Rev. Laws 1813, p. 169, §§ 1, 7. Summary confiscation of this character, without judicial process, would, in the case of domestic animals such as horses, oxen, and the like, even though those animals were trespassing, be unconstitutional (*Rockwell v. Nearing*, 35 N. Y. 302); but the legislation regarding dogs, though it has stood on the statute books for nearly a century, has never been questioned.

Nor, if the statute is not condemned for other reasons, do we think it presents a case of the delegation of governmental power to a private corporation. As unlicensed dogs have been so long subject to destruction by every person, the authority given to the officers or agents of the defendant to kill such dogs is neither greater nor less than that conferred on other citizens.

We think, however, that the statute is unconstitutional so far as it requires the owner of a dog to pay a license fee to the defendant for its own use. In *People ex rel. Einsfeld v. Murray*, 149 N. Y. 374, 32 L. R. A. 344, 44 N. E. 146, the question was as to the validity of the liquor tax law, which was assailed as directing an appropriation of public money for local purposes, and as not having been passed by a two-thirds vote of the legislature, as required by § 20, art. 3, of the Constitution of the state. The statute was upheld on the ground that the term "public money" was used in this section of the Constitution in the narrow, restricted sense of meaning money of the state at large, in

contradistinction from moneys raised for local governmental purposes. Judge Andrews, in delivering the opinion in that case, wrote of license fees: "In a strict and accurate sense, they were public moneys. No exaction can be lawfully made of a citizen, by way of tax, impost, or excise, except under the authority of the legislature; and the product of such imposition is public money." The correctness of this doctrine is too clear to be questioned. The appropriation of public money for other than strictly governmental purposes, and its expenditure through other than official channels, have been most carefully limited by article 8 of the Constitution. By § 9 it is prescribed: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper." By § 10: "No county, city, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation. . . . This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law." Section 14 provides: "Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages" for these purposes "may be authorized, but shall not be required, by the legislature." By this comprehensive enumeration of money of the state, of a county, city, town, and village, it is plain that the Constitution meant to include all public moneys which are raised in any manner throughout the state as an exaction from the citizen by the taxing or licensing power of government. Pecuniary penalties for offenses are not imposed under either the taxing or licensing power of the state, and probably would not fall within the constitutional restrictions as to public money. So little vested right of property is there in a penalty that in a civil case it may be taken away by the repeal of the statute at any time before judgment (*Cooley, Const. Lim.* p. 383; *People ex rel. Fleming v. Livingston*, 6 Wend. 526), and in criminal cases also by pardon. Authority to apply public moneys for educational purposes is given in other sections of the Constitution. If the appropriation to the defendant of the license fees prescribed by this statute is a gift of money to or in aid of an association, corporation, or private undertaking, then it is in conflict with the constitutional provision cited. It

51 L. R. A.

is not necessary to determine whether these license fees are to be regarded as the money of the city or the money of the state. If money of the city, only permissive legislation empowering its appropriation is authorized by the Constitution. If it is the money of the state, it does not come within the exception to the constitutional inhibition, to wit, "provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents."

It is contended, however, that the defendant, though a corporation organized by the voluntary acts of individuals, is a "subordinate governmental agency," and that an appropriation of money to its use is but an appropriation of money for the support of the government, and not within the constitutional restrictions. If it were necessary for the disposition of this case, agreeing with the view of the learned appellate division, I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty, and property of the citizens, except that of eminent domain, to be exercised for a public purpose, and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me. Of course, the state or any of its subdivisions may employ individuals or corporations to do work or render service for it, but the distinction between a public officer and a public employee or contractor is plain and well recognized. *People ex rel. Percival v. Cram*, 164 N. Y. 167, 58 N. E. 112; *Mechem, Pub. Off.* § 2. I do not base my judgment exclusively on the view that a corporation cannot take an oath of office, for the acts of the corporation must be done by agents, who are natural persons. In many cases the legislature has created corporations from boards of public officers. My chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens), that the agents or officers of the corporation are appointed such by the corporators, and that, if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens, and possibly persons not citizens, while under the Constitution all public officers must be elected or appointed by other public authorities, and thus trace their title to power and authority either immediately or mediately back to the people. See *Anes v. Port Huron Log Driving & Boom Co.* 11 Mich. 439, 83 Am. Dec. 731; *State ex rel. Atty. Gen. v. Kennon*, 7 Ohio St. 547; *State ex rel. Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

But, if we assume that the legislature can create, and has created, this defendant "a subordinate governmental agency" to assist in the enforcement of the criminal laws relative to cruelty to animals, still, that as-

sumption will not establish the proposition that the devotion of these license fees is to a governmental purpose. It cannot be said to be compensation for services done in the destruction of the dogs, for the amount of money received is in inverse proportion to the services rendered. If licenses were taken out for all the dogs, there would be no dogs to be killed, and the defendant would receive the money without service. While, if none of the dogs was licensed, all would be subject to destruction, and the defendant would obtain nothing for its services. But the defendant is not required to kill unlicensed dogs. It may dispose of them as it sees fit, and therefore retain them. It is empowered by the statute to apply the license moneys to maintaining a shelter for lost, strayed, or homeless animals, which would include the very dogs seized for nonpayment of the license. I cannot see why, under this statute, the defendant may not maintain a kennel of the largest description in which to retain dogs for its pleasure, or from which to sell dogs for its profit. It seems to me idle to argue that such a work is governmental, or that a corporation engaged in discharging it is *pro tanto* "a subordinate governmental agency." It is contended that the statute was enacted to exterminate homeless, wandering, or diseased dogs, which may be a source of great danger to life and health. If the statute prescribed action appropriate to effect such result, the work directed to be done in pursuance of it might be well termed governmental, and a very different question presented. The legislation before us we think destitute of any such feature. It is but an exaction of money or property from one citizen, and its appropriation to another for its private use. Such is not a valid exercise of taxing power. *Cooley*, Taxn. 572; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 556; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455. We are of opinion, therefore, that the statute, so far as it compels the owners of dogs to pay license fees to the defendant for the purposes prescribed in the statute, is an unauthorized appropriation of public moneys, and is in conflict with the Constitution.

We are of further opinion that the statute, so far as it empowers the defendant to appropriate, harbor, and keep dogs without paying any license fee, while every other citizen is obliged to pay such license fee, is the grant of an exclusive privilege and immunity forbidden by § 18, art. 3, of the Constitution. The law for the incorporation of societies of the character of this defendant permits the incorporation of but one society in a county. Therefore the defendant is the only person, natural or artificial, who can keep dogs without paying a license. Doubtless the legislature might discriminate between different breeds of dogs, and provide that certain breeds should not be harbored within the state, while others it could suffer to be kept. It might subject the keeping of dogs to restrictions which, by reason of their conditions, might, in practice, discriminate as to the right to keep dogs. If this classi-

fication was fairly adapted to the destruction of vicious dog or dogs of a vicious breed, or to keeping dogs under such conditions as to prevent their endangering the persons or health of the members of the community, it would be a valid exercise of the police power, and justifiable. But under the law before us no distinction is made between the breeds or individual characters of dogs, nor as to the manner in which dogs may be restrained and kept. The defendant can keep any dog it sees fit, and is not required to pay anything for the privilege. No one else in the community can keep a dog without paying \$1 a year for the privilege, to say nothing of the fact that he is compelled to pay that dollar to the defendant. We think this an exclusive privilege condemned by the Constitution.

The views we have expressed are not inconsistent with the recent decision in this court in *People ex rel. State Bd. of Charities v. New York Soc. for Prevention of Cruelty to Children*, 161 N. Y. 233, 55 N. E. 1063. In that case the only question before the court was whether the defendant was an institution of "charitable, eleemosynary, correctional, or reformatory" character, within the nomenclature of § 11, art. 8 of the Constitution, and therefore subject to the visitation of the state board of charities,—a question not at all involved in this case. Nor is the result reached in conflict with the decision in *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217, in which the validity of an appropriation of a percentage of the premiums received by foreign fire insurance companies to the relief of exempt firemen was upheld. The decision in that case proceeded on the ground that the volunteer fire department for more than 100 years had been a recognized agency of the municipal government, and that an appropriation of money to the benevolent fund of the firemen was but a recognition of the obligation due from the state to the members of the department for their services. Judge Finch there said: "The precise relation of these firemen to the municipality and the state it is not easy to describe. They were not civil or public officers, within the constitutional meaning (*People v. Pinckney*, 32 N. Y. 392), and yet must be regarded as the agents of the municipal corporation. Their duties were public duties. The service they rendered was a public service. Their appointment came from the common council, and was evidenced by the certificate of the city officers. They were liable to removal by the authority which appointed them, and were intrusted with the care and management of the apparatus owned by the city. They were, at least, a public body, and perhaps are best described as a subordinate governmental agency." It must be admitted that the status of these firemen was somewhat anomalous, and the description formulated by Judge Finch, "subordinate governmental agency," was doubtless the best characterization of it. But the case must not be considered as authority for the doctrine that the administra-

tion of government generally can be confided to "subordinate governmental agencies" in the shape of corporations or associations. One vital distinction between the fire department and the defendant is this: As to the former, membership in the department, as well as its discipline and management, was at all times subject to the control and regulation of the common council of the city, while membership in the defendant may be accorded or withheld at its pleasure, and the management of the corporation and the selection of its officers are wholly vested in the corporators.

The order granting a new trial should be affirmed, and judgment absolute rendered for plaintiff on the stipulation, with costs.

Parker, Ch. J., and O'Brien, Haight, and Werner, JJ., concur. Gray, J., concurs on second ground stated in opinion. Landon, J., not sitting.

William D. STROBEL *et al.*, *Appts.*,

v.

KERR SALT COMPANY, *Respt.*

(164 N. Y. 808.)

1. The use of water from a stream to operate salt works by putting it into a bed of salt and, when saturated, taking it out in the form of brine, evaporating it, and permitting a portion of it, after it is again condensed into water, to return to the stream, is a wrongful use which a lower riparian owner can restrain, when it results, not only in the permanent diversion of a large quantity of water from the stream, but also renders the rest so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted by it.
2. A material injury which necessarily results to a lower riparian owner from the conduct of the business of an upper riparian proprietor will be restrained by a court of equity on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits.
3. The fact that other manufacturers are doing the same thing as one against whom an injunction is sought to prevent his diverting or polluting the waters of a stream will not prevent relief, but may require it.
4. Riparian proprietors, each owning a distinct piece of land situated upon a part of the stream separate from that abutted upon by the land of every other owner, have a common grievance which entitles them to sue jointly for the prevention of the diversion and pollution of the waters of the stream.

(October 2, 1900.)

A PPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme

NOTE.—As to how far stream may be polluted for mining purposes, see *Drake v. Lady Enaley Coal, I. & R. Co.* (Ala.) 24 L. R. A. 64, and *note*.

As to liability for pollution of water generally, see earlier cases in this series as follows: 51 L. R. A.

Court, Fourth Department, affirming a judgment of a Wyoming County Equity Term in favor of defendant in an action brought to enjoin the diversion and pollution of the water of a stream flowing through plaintiffs' property. *Reversed*.

Statement by Vann, J.:

This action was commenced in 1892 by fourteen plaintiffs, who own various mills on Oatka creek, a natural stream running through the counties of Wyoming, Genesee, and Monroe, against the defendant, a domestic corporation engaged in the manufacture of salt at a point on said creek above the mills of the plaintiffs, to restrain it from diverting or polluting the waters thereof. The action is for an injunction only, as the plaintiffs in their complaint expressly reserve "to themselves and each of them their several damages, . . . which they will seek to recover in several actions at law in due time to be prosecuted for that purpose." In its answer the defendant denied that it had diverted or polluted the water of the stream, except that, in carrying on the business of manufacturing salt upon its own premises, it had made a reasonable use of a small portion of said water, and alleged that such use was necessary and lawful. Upon the trial, in 1893, it appeared that Oatka creek formerly contained pure water, which was valuable for various purposes, and especially for use in manufacturing. The plaintiffs and their predecessors in title have owned mills and manufactories situated upon said stream from 1½ to 30 miles below the salt works of the defendant, and have operated them by the water thereof for many years, one at least since 1825. While they still depend mainly upon water power to run their machinery, some of them are now using steam to a certain extent. There is less water in the stream at present than there was a few years ago, and the plaintiffs attribute the deficiency mainly to the diversion of water by the salt works of the defendant and others, recently erected, while the defendant insists that it is owing to the clearing away of forests and the drainage of swamps. The evidence does not show any material change in the forests of the valley during the past ten or fifteen years, but it appears that streams in western New York have generally lessened in size during the past twenty-five or thirty years. Since 1886 the defendant has carried on the business of manufacturing salt at a point upon said stream above the mills of the plaintiffs. The watershed above its works comprises about 14 square miles, and that below about 140. Its plant consists of 250 acres of land lying upon the creek, with extensive buildings, machinery, and appliances for the manufacture of salt. It has sunk seven wells upon its premises, each

Barton v. Union Cattle Co. (Neb.) 7 L. R. A. 457, and *note*; *Columbus & H. Coal & I. Co. v. Tucker* (Ohio) 12 L. R. A. 577, and *note*; *Heilrich v. Catonsville Water Co.* (Md.) 13 L. R. A. 117, and *note*.

about 2,000 feet deep, at the bottom of which rock salt is found in two beds, which vary in depth from 30 to 60 feet. The salt is not mined, but water is pumped from a reservoir fed by a race from Oatka creek, forced down one pipe to the bed of salt, where it speedily becomes saturated, and thence, in the form of brine, is forced by hydraulic pressure up another pipe into storage tanks upon the surface of the ground. It is then drawn by gravity through a system of pipes into shallow pans and grainers, which are widely spread over the land of the defendant, where it is evaporated by exposure to the air and by means of steam and artificial heat. The function of the water is to bring the salt to the surface in solution, where it is first purified by the use of lime, and then evaporated, leaving a residuum of salt suitable for domestic purposes. All the water that is forced down into the earth and up again must be turned into vapor before the solid salt can be extracted therefrom. The water taken by the defendant for this purpose, and for use in its boilers to run the necessary machinery, is about 20,000 cubic feet, or 150,000 gallons, a day, which is more than 104 gallons per minute, and is about 4 per cent of the flow of the stream in low water at the mills of the plaintiffs nearest the defendant's works. The part totally consumed in the boilers is very slight, as the steam is condensed into water by artificial means, and used over again. The leakage from the salt after it is removed from the evaporating pans falls upon the surface of the ground, and scales, which are a combination of lime and salt formed during the process of manufacture, are thrown from the grainers and pans upon the land of the defendant, all of which is within the drainage area of the Oatka. Much of this refuse, mixed with ashes was used to fill up low places about the buildings so as to protect them in high water. The stream is small, but no complaint is made of any deficiency in the supply of water except during the dry season of the year, when the plaintiffs have less than they need to operate their mills and less than they had before the erection of the defendant's works. The waters of the creek have become so salt as at times to be unfit for watering cattle as well as for many other uses, both domestic and mechanical. The effect has been to destroy the most of the fish and certain kinds of vegetation growing in the stream or upon the margin. There are twelve other salt works, somewhat widely separated, situated upon said creek below those of the defendant, which are operated in the same way, and contribute their quota of diminution and pollution. The drainage from several villages also affects the purity of the water, especially when the stream is low. Salt is the leading industry of the Oatka valley, and only one company actually mines by means of shafts sunk to the beds of salt. The salt so mined is dark, impure, and unfit for ordinary uses, unless it is dissolved, purified, and the water evaporated. The amount

51 L. R. A.

made daily by the defendant is about 860 barrels of pure white merchantable salt, but the full capacity of its works is nearly 1,200 barrels. It furnishes employment to more than 100 men and women. The capacity of the other salt manufactories, not including the one which mines its salt in bulk, is about 9,800 barrels daily. It requires 13.35 cubic feet of brine, of the usual strength, or more than 100 gallons, to make a barrel of salt. The effect of taking 150,000 gallons of water from the stream without restoring any part of it, or making any allowance for evaporation, would deprive the plaintiffs of 3.8 horse power during an entire day of twenty-four hours, or more than 9 horse power for a working day of ten hours, assuming that the water when not in use is saved by means of dams. If the production by the other works involves a proportionate use of the water, the number of horse power taken away would be increased accordingly. Salt water rusts machinery, deranges the operation of boilers, and requires the frequent replacement of pipes, cocks, etc., although it is used generally in steam vessels on the high seas.

Upon the trial which took place about seven years after the defendant had established its plant, the conflict in the testimony was mainly confined to the degree of diminution and pollution. The amount of diminution depends largely upon the alleged return of the water to the stream after it had been converted into vapor and allowed to escape in the air. The amount of pollution depends largely upon when the samples of water, which were analyzed by chemists, were taken from the stream, as those taken in high water contained a small amount of salt when compared with those taken during low water. The trial court found, among other facts, that "the configuration of the ground on either side of the stream is such that the water or vapor escaping from said boilers or grainers, as it condenses into water naturally returns to the same stream; . . . that, in the process of manufacturing salt, some water containing salt in solution has flowed by such natural drainage from said works into said stream; that since the beginning of this action the defendant has constructed a trench between its works and the said stream, so located and constructed as to carry any water containing salt in solution that might escape by drainage from defendant's works into its said salt wells; that it has not been shown that defendant diverts the water of the stream, or that it makes any other use of it, except in the mining and manufacture of salt on its own lands, as hereinbefore set forth, or that it has caused or permitted the escape of foreign substances into said stream, except by the natural drainage from its own lands as aforesaid. The use of the waters of said creek, made as aforesaid by the defendant, is a proper and necessary use of the same upon its said premises in the transaction of its said business, and is a reasonable use thereof, such as it

was lawfully entitled to make, and not prejudicial to the rights of the plaintiffs." It was found, as a conclusion of law, that the plaintiffs were not entitled to any part of the relief demanded in their complaint, which was dismissed upon the merits, with costs. Upon appeal to the appellate division, the judgment entered accordingly was affirmed without an opinion, except that one of the justices who dissented wrote elaborately in favor of reversal. Seven only of the plaintiffs have appealed to this court.

Mr. Henry Selden Bacon, for appellants:

The acts admitted by the defendant amount in law to a diversion, in the technical sense, and the question of reasonable use does not arise.

Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; *Garwood v. New York C. & H. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452.

Whether the acts complained of amount to a diversion or not, the use made is in law not reasonable.

Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373.

The final doctrine of the Pennsylvania court has been carefully limited to cases where the injury to plaintiff is a consequence which must unavoidably result from the beneficial use of the defendant's property.

Robb v. Carnegie Bros. 145 Pa. 338, 14 L. R. A. 329, 22 Atl. 649.

The present Pennsylvania rule has been disapproved in several jurisdictions.

Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *Young v. Bankier Distillery Co.* [1893] A. C. 691.

The true meaning of the plea of necessity is pointed out in *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828, which expressly follows *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723, and *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331, and holds that where a defendant runs a sawmill, sawdust from which gets into the stream, he may use the stream in a proper and reasonable manner, but must respect and regard the rights of riparian owners below, and is limited, in discharging sawdust and refuse into the stream, to what is "absolutely and indispensably necessary for the beneficial use of the water," and that it is not a question of convenience or economy.

Wheatley v. Chrisman, 24 Pa. 298, 64 Am. Dec. 657; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630.

The suggestion that other salt mines have also corrupted and diverted the water, and therefore the defendant cannot be held liable, is met in—

Crossley v. Lightowler, L. R. 2 Ch. 482, L. R. 3 Eq. 270; *Sherman v. Fall River Iron Works Co.* 5 Allen, 213; *Hill v. Smith*, 32 Cal. 166; *Baltimore v. Warren Mfg. Co.* 59 51 L. R. A.

Md. 96; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 772.

The final injunction rests upon absolute right, which a court of equity can never lawfully refuse simply because the plaintiff's harm is slight, and the defendant's loss would be great.

High, Inj. § 16; Kerr, Inj. 4-7; Angell, Watercourses, § 449; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Davis v. Lambertson*, 56 Barb. 480; *Garwood v. New York C. & H. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 451; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286.

The "custom" of salt manufacturers to pollute the stream can have no effect to protect one of them in such injury to his neighbors.

Smith v. Wright, 1 Cal. Cas. 43, 2 Am. Dec. 162; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630.

See, in further support of the propositions contended for above,—

Crossley v. Lightowler, L. R. 2 Ch. 478, L. R. 3 Eq. 279; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 451, L. R. 7 H. L. 697; *Atty. Gen. v. Leeds*, L. R. 5 Ch. Div. 583; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Townsend v. Bell*, 62 Hun, 306, 17 N. Y. Supp. 210; *Smith v. Cranford*, 84 Hun, 318, 32 N. Y. Supp. 375, Aff'd in 155 N. Y. 640, 49 N. E. 1104; *Indianapolis Water Co. v. American Strawboard Co.* 53 Fed. Rep. 970, 57 Fed. Rep. 1000; *Smith v. Brooklyn*, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757.

Mr. Norris Morey, with **Mr. Frank W. Brown**, for respondent:

Property in a watercourse consists in a right to its use; the right to the use of the water is not a mere easement or appurtenance, but is inseparably annexed to the soil itself.

Angell, Watercourses, Perkins' ed. § 116; Gould, Waters, 2d ed. § 204.

Whether a particular act done upon, or particular use of, one's own premises constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances.

The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his

ownership, over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 276, 24 L. R. A. 105, 35 N. E. 592; *French v. Via*, 143 N. Y. 90, 37 N. E. 612; *Negus v. Becker*, 143 N. Y. 303, 25 L. R. A. 667, 38 N. E. 290.

The working of quarries or mines is one of the natural uses of land, and in this respect is on the same footing as farming or "other industries connected with the use of land."

McCormick v. Horan, 81 N. Y. 90, 37 Am. Rep. 479; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 11 Ch. Div. 782; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350.

The right of drainage into and by means of the natural watercourses, of the lands adjacent, is a natural right which appertains to all riparian lands.

McCormick v. Horan, 81 N. Y. 89, 37 Am. Rep. 479; *Waffle v. New York O. R. Co.* 58 Barb. 413; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 145, 57 Am. Rep. 445, 6 Atl. 453; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 6 Ch. Div. 773, L. R. 11 Ch. Div. 782.

Every owner of land upon a running stream has a right, incident to his ownership of land, to make a reasonable use of the water of such a stream, upon and in connection with his land. In determining whether the use made of the water is a reasonable use, the public interest is kept in view, and the various uses to which the water of the stream is properly subservient, or may be made subservient, under all the circumstances of the particular case, are to be considered.

Cooley, Torts, pp. 582-584; *Prentice v. Geiger*, 74 N. Y. 341; *Gould v. Boston Duck Co.* 13 Gray, 443; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Townsend v. Bell*, 70 Hun, 557, 24 N. Y. Supp. 193; *Thomas v. Brackney*, 17 Barb. 654; *Angell, Watercourses*, Perkins' ed. §§ 117-119, 140d; *Gould, Waters*, §§ 208, 217, 220; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Holten v. Winnipiseogee Lake Cotton & Woollen Mfg. Co.* 53 N. H. 552; *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576; *Hetrich v. Deachler*, 6 Pa. 32; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Robb v. Carnegie Bros.* 145 Pa. 338, 14 L. R. A. 329, 22 Atl. 649.

A proprietor higher up on the stream may, upon the weight of authority, use all of the water if reasonably necessary for his own domestic and household purposes, and for the watering of his own stock.

Gould, Waters, § 205.

Use of water by converting it into vapor in a reasonable way is permissible upon the same ground as is its use for any other manufacturing purpose.

Bias v. Kennedy, 43 Ill. 67; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

In its application to the rights of different

riparian owners upon the same stream, the maxim, *Aqua currit, et debet currere, ut currere solebat*, is treated as a flexible maxim, and not as an absolute rule of law.

Bullard v. Saratoga Victory Mfg. Co. 77 N. Y. 527; *Palmer v. Mulligan*, 3 Cai. Cas. 308, 2 Am. Dec. 270; *Gould v. Boston Duck Co.* 13 Gray, 442; *Prentice v. Geiger*, 74 N. Y. 341; *Gould, Waters*, 2d ed. § 220; *Merrifield v. Worcester*, 110 Mass. 221, 14 Am. Rep. 592; *Hayes v. Waldron*, 44 N. H. 585, 84 Am. Dec. 105; *Townsend v. Bell*, 70 Hun, 557, 24 N. Y. Supp. 193; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

In determining upon the reasonableness of the use, it is necessary to take into account, not only the general customs of the country, but also any local customs along the stream; and such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes.

Cooley, Torts, 2d ed. p. 584; *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576; *Hetrich v. Deachler*, 6 Pa. 32; *Tyler v. Wilkinson*, 4 Mass. 397, Fed. Cas. No. 14, 312; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Merrifield v. Worcester*, 110 Mass. 219, 14 Am. Rep. 592.

This is the case of a riparian owner making use of the waters of the stream upon his own riparian property in mining salt and preparing it for market.

Gould, Waters, § 213; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Garwood v. New York O. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.

The question as to whether the use made by a riparian owner of the waters of the stream upon his own riparian lands has been a reasonable use is a question of fact.

Prentice v. Geiger, 74 N. Y. 341; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Gould, Waters*, § 220; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Hayes v. Waldron*, 44 N. H. 585, 84 Am. Dec. 105; *Merrifield v. Worcester*, 110 Mass. 221, 14 Am. Rep. 592; *Thomas v. Brackney*, 17 Barb. 654; *Townsend v. Bell*, 70 Hun, 557, 24 N. Y. Supp. 193; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Cooley, Torts*, pp. 582 et seq.

What constitutes reasonable use depends upon the circumstances of each particular case.

Cooley, Torts, pp. 583 et seq.; *Timm v. Bear*, 29 Wis. 254; *Gould v. Boston Duck Co.* 13 Gray, 443; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Prentice v. Geiger*, 74 N. Y. 341; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

This action to obtain an adjudication that the use made by defendant of its riparian

property is an unreasonable use, and to obtain a permanent injunction against such use, cannot be maintained either on behalf of the fourteen original plaintiffs or on behalf of the seven appellants.

Demarest v. Hardham, 34 N. J. Eq. 469; *Hudson v. Maddison*, 12 Sim. 416; *Gray v. Rothschild*, 112 N. Y. 668, 19 N. E. 847.

In this action against the defendant alone, with the proof undisputed that its works are operated independent of all other persons who either make use of the water or contaminate it, a recovery could only be had for unlawful acts found to have been actually committed by the defendant, and for results common to all appellants, traced by the evidence and findings to the defendant.

Chipman v. Palmer, 77 N. Y. 56, 33 Am. Rep. 566; *Crossley v. Lightowler*, L. R. 2 Ch. 478, L. R. 3 Eq. 279.

The only relief asked for by the plaintiffs was a permanent injunction; any claim to recover damages was disclaimed in the complaint, and no proof of damages was made.

Under such circumstances a court of equity was not bound to issue the injunction, and had the right, in its discretion, to refuse a permanent injunction, no pressing necessity or imminent danger calling therefor.

New York Health Department v. Purdon, 99 N. Y. 237, 52 Am. Rep. 22, 1 N. E. 687; *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524; *High, Inj.* § 808; *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 474, 51 N. E. 402; *Watson v. New Milford Water Co.* 71 Conn. 450, 42 Atl. 265.

On petition for rehearing.

The real distinction is between the taking of the water by an upper riparian proprietor for use upon his riparian lands, and the "diverting" of the water not for use upon his riparian lands.

Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; *Gould, Waters*, § 213; *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

There are a waste and consumption of water in nearly every use of it by a riparian owner, as in its consumption for drinking by man and animals, and in its evaporation in culinary purposes, for factory uses, in producing steam power, and in being spread out in ponds when dammed up for purposes of producing water power. This loss by evaporation is one of the most constant facts recognized as essential to the "reasonable use" of the water by riparian owners.

Palmer v. Mulligan, 3 Cai. Cas. 308, 2 Am. Dec. 270; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Seeley v. Brush*, 35 Conn. 419; *Bliss v. Kennedy*, 43 Ill. 73.

Any use which is reasonable by a riparian owner upon riparian lands is lawful.

Cooley, Torts, p. 582.

The court erred in assuming that the fact that the plaintiffs had first erected their mills, and had first begun to appropriate

the water, had some bearing upon the rights of the respective parties in this case.

Gould, Waters, 2d ed. 226; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Smith v. Brooklyn*, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787.

Vann, J., delivered the opinion of the court:

As the findings of the trial court are general and somewhat indefinite, construction is necessary by reading them in the light both of the uncontradicted evidence and of the evidence most favorable to the defendant. When, for instance, the learned trial judge found no diversion of the water and no use of it except in making salt upon the defendant's own lands, he did not find that there was no diversion or pollution, and, if he had, it would have been an error of law, because opposed to the uncontradicted evidence, and open to review by us because the affirmance was not unanimous. So, when he found that the use of the water by the defendant was proper, necessary and reasonable, and such as it was lawfully entitled to make, and not prejudicial to the rights of the plaintiffs, it was to some extent a conclusion of law, and, in so far as it was a finding of fact, so general as to require construction through the aid of other facts, either found or uncontradicted. The same is true of the finding that the defendant has not unlawfully diverted or polluted the waters of said stream to the injury or prejudice of the plaintiffs; for as there was manifestly some diversion and some pollution, with some injury and some prejudice, the finding is either against the uncontradicted evidence, or simply reflects the opinion of the trial judge that the degree of diminution, pollution, and injury was not so substantial as to require action by a court of equity. While the trial judge found that, owing to the hills bounding the valley, the vapor caused by evaporating salt on so large a scale, "as it condenses into water, naturally returns to said stream," he did not and could not find that it all so returned, or state the proportion that escaped. It was impossible for any witness to testify what part of the vapor rising in a narrow valley about two miles wide from summit to summit, with comparatively low hills on either side, was carried away and dissipated by the wind, and what part returned to the earth, within the limits of the valley, in the form of mist or rain. The witnesses could not tell from observation, nor state as a fact, where such an invisible, elastic, and elusive substance went. There was no evidence of an increase in the rain or moisture. In cold weather, when the water is high, condensation would be rapid, but in warm weather, when the water is scarce, condensation would be slow. Some of the settling tanks are on the hillside, half a mile from

the stream. The measurements made below the works included the return by condensation, and there was no evidence to justify the conclusion that all the water diverted reached the stream again. *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408, 412, 40 N. E. 8. The counsel for the defendant states in his points that "it is a very moderate estimate to say that at least two thirds of the escaping steam, on the average, must be condensed and returned to the water supply of Oatka creek."

The theory upon which the trial judge proceeded to judgment is illustrated in his opinion, where he says: "The question is whether it is a reasonable use of the stream to allow the water impregnated with salt to take its natural course into the stream, impairing its use for drinking purposes, or otherwise affecting its use by the lower proprietors, to their injury." Discussing the question he further said: "Since the salt is a component part of the soil itself, and the owner has a legal right to excavate it and place it upon the surface, it would be an unwarrantable stretch of the powers of a court of equity to compel its removal, merely upon the ground that the surface water, becoming impregnated with the salt, and taking its natural course into a stream, renders its waters unsuitable for drinking purposes or causes injury to the boilers and machinery of a mill situated far down on the banks of the stream. . . . The defendant, as a riparian owner, has a right to the natural and necessary drainage of any salt water which may escape from the salt works into the stream. The water used was returned to the stream in as clear and pure a condition as the nature of the operations upon the lands would permit. The only obligation resting upon the defendant is to exercise ordinary care so as not to inflict unnecessary injury to the lower proprietors." Referring to the case of *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117, which followed the *Sanderson Case*, hereinafter alluded to, he quoted with apparent approval the following therefrom: "Where therefore a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation. It is, then, a case in which the interest and convenience of the individual must give way to the general good." Thus, the trial judge was of the opinion that the plaintiffs, although they and their predecessors had used the waters of the stream in their mills and on their farms for half a century, could not prevent the defendant, which long afterwards, and with knowledge of the facts, established its plant, from devoting the stream to a new and unusual use, diverting the water, and turning "a fresh-water stream

into a salt-water stream." This would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital. The use made by the defendant of the water of the stream is new and peculiar, for it involves its utter destruction as water. Until it is turned into vapor it refuses to give up its salt, so that it must cease to be water or fail to accomplish the defendant's purpose. That purpose is to utilize only by destroying, not in a scientific sense of course, but in a practical sense. The loss is not incidental, by diminution through the process of using the water, as in most cases presented to the courts, but is absolute, by means of dissipation through the atmosphere. The diversion is as complete as if the water had been pumped over the hills bordering the Oatka valley and turned into another creek; for diversion, as applied to watercourses, means taking water from a stream, and not returning it so that the lower riparian owner can use it. *Parker v. Griswold*, 17 Conn. 288, 289, 42 Am. Dec. 739. By taking nearly 150 gallons every minute during a working day of ten hours, the defendant diverted that quantity of water from its natural course. The evidence, practically undisputed, shows that the water of the stream, which was fresh before the erection of the defendant's works, is now salt, especially in a dry time. The witnesses who tested it agree that it "tastes salt," and the effect of salt in the water was obvious to the senses in various ways, as by small stalactites of salt formed at leaky spots in the pipes of machinery, the formation of visible crystals on stones in the stream, the rusting of machinery, the foaming of water in the boilers, and the destruction of vegetation. The owners of portable steam engines, who formerly used the water in their boilers, abandoned it and resorted to rain or well water. Wells near the stream were affected to some extent. In some places the salt killed vegetation, including willow trees. It destroyed fish in large numbers. Cattle and horses refused to drink the water, although some drank it when they had nothing else to drink. One of the plaintiffs boiled three quarts of water taken from the race leading to his mill, and obtained nearly a tablespoonful of salt. Another could grind only about half as much grain as he had previously ground at the same season of the year.

All this evidence, and other of like character, stands substantially uncontradicted, as it is not a contradiction for a witness to say that he did not observe these effects, when he did not examine in order to see what the facts were. The only dispute was in relation to the degree of pollution, and the defendant's evidence is substantially adopted for the purpose of this review. One of its experts, who for twenty years was the state chemist at the Onondaga Salt Springs, testified that in a sample taken in December, 1892, above the works, he found in a gallon of water .086 grains of salt, while a specimen taken right below the works contained 305.01 grains. A specimen taken

at the mill of the plaintiff Munger, which is a mile and one half below the defendant's works, and is above all the other salt plants, afforded 99.08 grains; one from the mill of the plaintiff Martin, about 2 miles below, 75.69; another from Brown's pond, still further down the stream, 82.14. These samples were taken by the chemist himself, and, except that last mentioned, were unaffected by any other source of pollution than the defendant's works. Thirty-three other specimens, obtained in April, 1893, still further down the stream, after many small rivulets, as well as the drainage from other salt works, had emptied in, but not taken by the chemist himself, showed much less salt to the gallon, and averaged between 30 and 40 grains, only two of them exceeding 50. An analysis made by the plaintiffs' chemist of 44 specimens taken by a hydraulic engineer in September, October, and November, 1892, at points from one-half to one mile apart, all along the stream below defendant's works, showed a much larger proportion of salt, averaging, even after rejecting 11 of the highest, which went up into the thousands, from 100 to 300 grains to the gallon. The samples of the plaintiffs were taken from the stream after the commencement of the action and before the trial, while the defendant's were taken shortly before or during the trial, and after the changes had been made in order to prevent the salt water from reaching the creek. While all water contains some salt, that which contains less than 50 grains to the gallon is, according to the testimony of defendant's experts, suitable for use in steam boilers. Brine of full strength contains 18,072 grains to the gallon.

The testimony as to the amount of diminution is less definite and satisfactory than that relating to pollution, owing to the difficulty of measuring water flowing in a stream. It is undisputed, however, that the water diverted, as measured by defendant's expert, by "four independent but simultaneous methods," including "weir measurement," which included all water returned to the stream, if used by the plaintiffs to the best possible advantage, would be equal to nine horse power daily. One year it amounted to 4 per cent of the flow at plaintiff Munger's mill during the whole month of July. The uncontradicted evidence and the evidence most favorable to the defendant shows such a degree of pollution and such an amount of diminution as to make it certain, in our judgment, that the trial judge, in his findings, meant that neither was in excess of what the defendant had a lawful right to put in or take out of the stream, in conducting a lawful business upon its own premises. This theory is confirmed by his opinion, as he relies largely upon a case in Pennsylvania which held that one operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water that percolates into his mine into a stream which forms the natural drainage basin in which the mine is situate, although the quantity of water

may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453. That case had a varied history, and it was not until it came before the court for the fourth time that, influenced by the necessities of a great industry, the rule was laid down as stated. The case was first considered in 1878, when the claim of the lower riparian owner was sustained upon the principle of *Sic utere tuo ut alienum non laedas*. In reply to the argument of counsel that "the law must be adjusted to our great industrial interests," the court said [86 Pa. 408, 27 Am. Rep. 717]: "In the argument here the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised in ejecting the water from their mine should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the state the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope, and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. . . . The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole countryside would be depopulated." In 1880 the case was reviewed a second time, and it was again urged that the rights of the riparian owners should yield to the immense public interest involved. The court, however, reaffirmed its former decision, and, among other things, said: "The mining operations of the defendant do not involve the public welfare, but are conducted purely for the purposes of private gain. Incidentally all lawful industries result in the general good. They are, however, not the less instituted and conducted for private gain, and are used and enjoyed as private rights over which the public has no control. It follows that none of them, however important, can justly claim the right to take and use the property of the citizen without compensation." *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. 302, 307, 39 Am. Rep. 785. In

1883 the court heard the case for the third time, with the same result; but on the last review, in 1886, by a vote of four to three, it reversed its previous decisions, and held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must *ex necessitate* give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." The extensive coal mines of the state of Pennsylvania were regarded as of sufficient importance to warrant the court in departing from the law as previously laid down by itself in the same case, as well as from the rule which prevails in England and in this country, except in some of the states where mining is extensively carried on, and there is no way to get rid of the water in the mines except by pumping it into the streams. *Clifton Iron Co. v. Dye*, 87 Ala. 470, 6 So. 192. Courts of the highest standing have refused to follow the *Sanderson Case*. *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *Young v. Bankier Distillery Co.* [1893] A. C. 691. And its doctrine was finally limited by the court which announced it. *Robb v. Carnegie Bros.* 145 Pa. 358, 14 L. R. A. 329, 22 Atl. 649. The court below, however, manifestly followed the Pennsylvania rule, without limitation. *Mann v. Retsof Min. Co.* 49 App. Div. 454, 459, 63 N. Y. Supp. 752. We have never adopted that rule in this state, and no public necessity exists therefore, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interest of some business required to develop the resources of the state, and in which much capital had embarked, giving employment to a great number of people.

There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollu-

tion. This is the common right of all, which must not be interfered with by any. The use by each must therefore be consistent with the rights of the others, and the maxim of *Sic utere tuo* observed by all. The rule of the ancient common law is still in force: *Aqua currit, et debet currere, ut currere solebat*. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation, when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use, in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Smith v. Brooklyn*, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 649; *Crossley v. Lightowler*, L. R. 3 Eq. 279, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co. L. R. 5 Ch. Div. 769*; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Hodgkinson v. Ennor*, 4 Best & S. 229; 3 Kent, Com. 439; Gould, Waters, § 219; Higgins, Watercourses, 132; Washb. Easem. 4th ed. 215; 1 Wood, Nuisances, §§ 364, 427.

The question of reasonable use is generally a question of fact, but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use, is a question of law. When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt, at times, that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such

use, as a matter of law, is unreasonable and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected, and the method adopted by an upper riparian owner in the conduct of his business, is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain, on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by the convenience or necessity of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." *Wheatley v. Christian*, 24 Pa. 298, 64 Am. Dec. 657. While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor; and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use. The fact that other salt manufacturers are doing the same thing as the defendant, instead of preventing relief, may require it. "Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and, if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy." *Hill v. Smith*, 32 Cal. 166; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Sherman v. Fall River Ironworks Co.* 5 Allen, 213, 79 Am. Dec. 799; *Baltimore v. Warren Mfg. Co.* 59 Md. 96; *Crossley v. Lightowler*, L. R. 3 Eq. 279, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769, 772. In *Garwood v. New York O. & H. R. R. Co.* 116 N. Y. 649, 22 N. E. 396, the diversion, as shown by the record on file in this court, was less than that testified to by the defendant's witnesses in the case before us. Even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction. *Ames* 51 L. R. A.

terdam Knitting Co. v. Dean, 162 N. Y. 278, 280, 56 N. E. 757.

The objection that the plaintiff's have no cause of action common to all, and hence that they cannot sue jointly, is unsound. While each owns a distinct piece of land, situated upon a part of the stream separate from that abutted upon by the land of every other owner, they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest, and warrants a common remedy. *Emery v. Erskine*, 66 Barb. 9, 14; *Reid v. Gifford*, Hopk. Ch. 416, 477; *Murray v. Hay*, 1 Barb. Ch. 59, 62, 43 Am. Dec. 773; *Blunt v. Hay*, 4 Sandf. Ch. 362.

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can; for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

The judgment of the courts below should be reversed, and a new trial granted, with costs to abide the event.

Parker, Ch. J., and O'Brien, Bartlett, Landon, Cullen, and Werner, JJ., concur.

Rehearing denied.

Benjamin F. FORBELL, Respt.,
v.

City of NEW YORK, Respt.,

(164 N. Y. 522.)

The draining of land of a private proprietor by city pumping works which exhaust from all the region thereabout the natural supply of underground or subsurface water, and thus prevent the raising upon it of crops to which the land was and is pecu-

NOTE.—The effect on percolating waters, of a public improvement which cuts them off, is considered in a note to *Southern P. R. Co. v. Du-four* (Cal.) 19 L. R. A. 92.

The right to pump water from a stream for purposes of irrigation is also determined by an earlier case in this series. *Charnock v. Higuerra* (Cal.) 32 L. R. A. 190.

There is also in 45 L. R. A. 664, the case of *Smith v. Brooklyn* (N. Y.) determining the rights in case of the draining of underground sources of a surface stream by pumping water city reservoir.

larly adapted, or destroy such crops after they are grown or partly grown, renders the city liable to him for the damages which he sustains, and entitles him to an injunction against a continuance of the wrong.

(November 20, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in favor of plaintiff in an action brought to enjoin the diversion of subsurface water and to recover damages for injuries caused by past diversion. *Affirmed.*

Statement by Landon, J.:

The judgment grants a perpetual injunction restraining the city of New York from operating its engines, driven wells, and pumping stations known as the "Spring Creek Pumping Station," in the borough of Queens, city of New York, on the conduit line near the Kings county boundary line, and awards past damages to the plaintiff in the sum of \$6,000, together with the costs of the action. The plaintiff was a lessee of certain farming lands situated near Spring creek, within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses. The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of this action, in 1898.

Mr. William J. Carr, with Mr. John Whalen, for appellant:

Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him to do so.

Popplewell v. Hodkinson, L. R. 4 Exch. 248.

The owner of land may dig ditches or sink wells, or in any other manner exercise his dominion over his own land, without being liable at law for the interception or diversion of any underground percolating waters consequent upon such use of his own property.

Ellis v. Duncan, 21 Barb. 230; *Goodale v. Tuttle*, 20 N. Y. 459; *Pisley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179; *Covert v. Brooklyn*, 6 App. Div. 73, 39 N. Y. Supp. 744; *Aceton v. Blundell*, 12 Mees. & W. 324; *Racstron v. Taylor*, 33 Eng. L. & Eq. Rep. 428; *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. Rep. 553; *Chasemore v. Richards*, 7 H. L. Cas. 349; *New River Co. v. Johnson*, 2 El. & El. 436; *Bradford v. Pickles* [1895] A. C. 587; *Ballacorkish Silver, Lead & Copper* 51 L. R. A.

Min. Co. v. Harrison, L. R. 5 P. C. 49; *Popplewell v. Hodkinson*, L. R. 4 Exch. 248; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Greenleaf v. Francis*, 18 Pick. 117; *Davis v. Spaulding*, 157 Mass. 431, 19 L. R. A. 102, 32 N. E. 650; *Frazier v. Brown*, 12 Ohio St. 294; *Haldeman v. Bruckhard*, 45 Pa. 514, 84 Am. Dec. 511; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Ocean Grove Camp Meeting Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447, 3 Atl. 168; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 445, 9 Am. Rep. 276.

If a landowner digs on his own land a deep trench, in order to cut off, maliciously, the supply of underground waters percolating to his neighbor's spring, no action can lie against him.

Phelps v. Nowlen, 72 N. Y. 40, 28 Am. Rep. 93; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294.

If a railroad company should, on its own land, make excavations for the purpose of constructing its roadbed, and in so doing dry up a well on adjoining land, through its interception of percolating waters, no action would lie.

New Albany & S. R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60; *United States v. Alexander*, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529.

A municipal corporation using its own land for the purpose of obtaining a water supply for its inhabitants possesses all the rights over its own property as to underground percolating waters which are incident to the rights of an individual owner over his own soil.

Chasemore v. Richards, 7 H. L. Cas. 349; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Bradford v. Pickles* [1895] A. C. 587; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272, 21 N. E. 761; *Merrick Water Co. v. Brooklyn*, 160 N. Y. 657, 55 N. E. 1097; *People's Gas Co. v. Tynor*, 131 Ind. 277, 16 L. R. A. 443, 31 N. E. 59.

Mr. Charles Coleman Miller, for respondent:

The underground percolating waters in plaintiff's land belong to him, and the abstraction of them by defendant is unlawful.

Pisley v. Clark, 35 N. Y. 531, 91 Am. Dec. 72; *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141; Gould, Waters, 2d ed. § 280; Angell, Watercourses, § 109.

Such underground waters are as much the property of the owners of the land as the ores, rocks, etc., beneath the surface.

27 Am. & Eng. Enc. Law, p. 427.

Defendant is a trespasser.

Actual entry upon the land is not essential if damage be done to the land.

Precitt v. Clayton, 5 T. B. Mon. 4.

The fact that defendant had authority of law for the erection of its plant did not vest it with authority to trespass on plaintiff's rights.

Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; *Covert v. Brooklyn*, 13 App. Div. 188, 43 N. Y. Supp. 310.

The rule of no liability for the "interception" of underground waters has no application.

The action should be sustained on its merits.

Plaintiff has the sole right to the possession and enjoyment of his property and the product thereof. He can use it as he sees fit.

Storm v. New York Elev. R. Co. 82 Hun, 11, 31 N. Y. Supp. 13; *Shepard v. Metropolitan Elev. R. Co.* 48 App. Div. 452, 62 N. Y. Supp. 977.

No stranger can dictate to him how he shall use it or what he shall plant in it. No stranger can enter upon it and destroy his crops.

It is for plaintiff to say how much his land shall be drained. If he prefers an abundance of water, that is his business.

Since the doctrine was enunciated that "because the existence, origin, movement, and course of such waters and the causes which govern their movements are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty," no relief can be afforded, there has been a great advance in knowledge regarding underground waters.

Collins v. Chartiers Valley Gas Co. 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012.

A riparian owner, as against lower owners, cannot sell the waters of a stream; and the supplying of water to cities and public institutions is not the exercise of a riparian right.

28 Am. & Eng. Enc. Law, p. 955; Gould, *Waters*, 2d ed. § 280.

Landon, J., delivered the opinion of the court:

The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its 2 acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown. The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the subsurface waters are unobservable from the surface, they are unknown, 51 L. R. A.

and thus so far speculative and conjectural as to be incapable of proof of judicial ascertainment. Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters. That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have, in the just administration of the law, a remedy. In *Smith v. Brooklyn*, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787, a case in which the defendant, by the use of the same act and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond. It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362; *Phelps v. Nowlen*, 72 N. Y. 40, 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179. The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees. & W. 324, and *Greenleaf v. Francis*, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil, so long as it remains there, is—unlike water flowing in a surface stream—a part of the soil itself (*Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519); that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight, and their exact operation and courses are conjectural, and not susceptible of actual observation and proof; and, finally, that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from 5 to 11 square miles, would enable it to capture the greater part of it. In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely tapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters, in which liability has been denied, was well pointed out by the learned judge who wrote for the appellate division in *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

Parker, Ch. J., and Bartlett, Haight, Martin, and Vann, JJ., concur. O'Brien, J., not voting.

NEBRASKA SUPREME COURT.

CONNECTICUT FIRE INSURANCE COMPANY, *Plff. in Err.*,

v.

JEARY.

(.....Neb.....)

*1. Forfeitures are looked upon by the courts with ill favor, and will be enforced only when the strict letter of the contract re-

*Headnotes by HOLCOMB, J.

NOTE.—Conditions in fire policy as to keeping, producing, and preserving books and papers.

I. Keeping books and vouchers.

- a. Validity of clause.
- b. Condition precedent and warranty.
- c. Compliance with policy.
- d. Waiver.

II. Production of books and papers.

- a. Validity of clause.
- b. Condition precedent.

quires it, and this rule applies with full force to policies of insurance.

2. Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interest, the language in which the contract is couched.

3. Where it is conditioned in a policy of insurance "that the assured shall take an inventory of stock hereby covered at least once a year, and shall keep books of

II.—continued.

c. Compliance with policy by insured.

1. Substantial and reasonable compliance.
2. Procuring vouchers from third parties.
3. Time, place, and manner of examination.
4. Demand.
5. Destruction or loss of books and vouchers.

account correctly detailing the purchases and sales of said stock, and shall keep all inventories and books securely locked in a fireproof safe or other place secure from fire in said store during the hours that said store is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy,"—*held*, that such provisions should be construed conjointly, and that, to work a forfeiture of the policy, there must be a failure to perform all the conditions named, and not any particular one of them.

(June 7, 1900.)

ERROR to the District Court for Cass County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed*.

The facts are stated in the opinion.

II.—continued.

d. *Waiver*.

1. *Generally*.

2. *Failure to act, or delay*.

III. *Keeping books and vouchers in a safe, or safe place.*

a. *Validity of clause.*

b. *Condition precedent and warranty.*

c. *Compliance.*

d. *Waiver.*

IV. *Summary.*

I. *Keeping books and vouchers.*

a. *Validity of clause.*

The provision in a policy usually called the "iron-safe clause" generally requires the insured to keep books of account showing the record of business and an inventory; to produce his books and inventory; to present himself for examination when required by the company; and to preserve his books, vouchers, and inventory in a fire-proof safe, or in some secure place outside of the building.

In *CONNECTICUT FIRE INS. CO. v. JEARY*, it was held that these several provisions should be construed conjointly, and that to work a forfeiture of the policy there must be a failure to perform all the conditions named, and not any particular one of them, and that there being no breach of the inventory clause the policy would not be forfeited. This seems to be a new construction of this clause, and is based on the theory that the provisions in the policy are prepared with ingenuity for the purpose of avoiding the policy on technical grounds, and therefore it should be strictly and technically construed. These provisions in that case were connected by the conjunctive "and." The case goes further, and intimates, as is held in the Kentucky cases, that the fire-proof-safe clause is only for the preservation of evidence, and is without consideration, but holds that it is not necessary for the determination of the question at issue, to pass on that question.

A clause as to keeping a set of books showing a complete record is a useful and valid condition. *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 84 S. W. 83; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539. In the latter case it was said: "This condition is both useful and valid. Its object is apparent. It was to enable the insurance company to ascertain the extent of any loss occasioned by fire during the life of the policy, and to test the accuracy of the statement or inventory furnished by the assured for that purpose. By such a set

Messrs. Charles F. Offutt and W. W. Moraman for plaintiff in error.

Messrs. Beeson & Root and Edwin Jeary for defendant in error.

Holcomb, J., delivered the opinion of the court:

The plaintiff in error (defendant below) resists payment of loss under a policy of insurance issued by it covering a stock of merchandise which was destroyed by fire during the term for which the policy was written. As presented to this court, the only question involved is the liability of the insurance company under the provisions or covenants commonly known as the "iron-safe clause," which are found in a "rider" attached to the insurance policy at the time it was written and delivered to the assured. The provisions referred to are as follows: "It is ex-

of books the amount and value of the goods acquired while the policy was in force could be ascertained; and, in the event any doubt as to the correctness of the books in this respect should arise, the insurance company might be enabled to ascertain from the persons shown by the books to have sold the goods the sales actually made; and the amount disposed of and on hand would be made to appear. They were necessary to protect the insurer against the errors and dishonesty of the assured. Without them it would be left without adequate means to protect itself against false statements and inventories furnished by the assured in case of loss."

And a clause requiring an itemized inventory to be made once a year was held to be part of the policy. *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720.

But a provision requiring loss to be sustained by books of account was held to be no implied warranty to keep books of account. *Wightman v. Western M. & F. Ins. Co.* 8 Rob. (La.) 442.

This clause is generally placed in a policy in connection with a clause in regard to production of books and papers, which is also held valid. (See II.) This clause is frequently found in connection with the iron-safe clause providing for keeping books in a safe. There is some conflict of authority as to that part being enforceable. (See III.)

b. *Condition precedent and warranty.*

The clause as to keeping a set of books and inventory is generally held to be a warranty. *Standard F. Ins. Co. v. Willock* (Tex. Civ. App.) 29 S. W. 218; *American F. Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 884; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720; *Farmers' F. Ins. Co. v. Bates*, 60 Ill. App. 39; *Western Assur. Co. v. Altheimer*, 58 Ark. 565, 25 S. W. 1067.

And in some cases it is held to be a condition precedent. *Currow v. Phoenix Ins. Co.* 46 S. C. 79, 24 S. E. 74; *Western Assur. Co. v. Altheimer*, 58 Ark. 565, 25 S. W. 1067; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539; *German Ins. Co. v. Bates*, 67 Ill. App. 870.

In *Farmers' F. Ins. Co. v. Bates*, 60 Ill. App. 39, a stipulation that the insured shall take an inventory at least once a year, and shall keep books of account correctly detailing purchases and sales of their stock, and that the failure to observe such conditions shall work a forfeiture of all claims under the policy, was held to be an express promissory warranty that would render a policy void if its requirements were not observed.

But in *McNutt v. Virginia F. & M. Ins. Co.*

pressly warranted that the assured shall take an inventory of stock hereby covered at least once a year, and shall keep books of account correctly detailing the purchases and sales of said stock, and shall keep all inventories and books securely locked in a fireproof safe or other place secure from fire in said store during the hours that said store is closed for business. Failure to observe the above conditions shall work a forfeiture of all claims under this policy." It appears that a fire occurred in less than one year, and that no inventory had been taken; that books of account, although kept, were not preserved as provided by the clause quoted, and were destroyed in the same fire which burned the insured stock of goods.

It will readily be noted that the defense interposed is of the most technical character, and, it may be said, has but little, if

any, real and substantial merit. The failure of assured to take and preserve an inventory, and keep books of account, as provided, in a fireproof safe or other secure place, which is relied upon to operate as a release of the company under its policy of indemnity, in nowise changes the character of the risk assumed, or increases its hazard to the smallest extent. Compliance with the provisions quoted could serve no other purpose than as affording a particular means of establishing the amount of loss or damage in the event a loss should occur. It was an attempt to preserve or perpetuate evidence by which the liability of the indemnitor was to be fixed should a fire occur during the life of the policy of insurance. All that can be said in its favor is that the parties undertook by this particular method to ascertain and determine the extent of the loss, if one should

(Tenn. Ch. App.) 45 S. W. 61, it was held that a clause in regard to keeping a set of books which shall clearly and plainly present a complete record of business transacted, and take an itemized inventory, was a condition subsequent, and was to be construed strictly against the right of forfeiture. In this case the court said: "Did the insured understand that he was guaranteeing that every entry made on the books should, of itself, without any explanation, be absolutely and scientifically correct and understood by anyone? . . . It is a matter of universal information, of which we may take judicial knowledge, that, as a rule, books are not kept, in the country stores in this state, up to any such state of excellence. . . . As was said by Judge McCormick, common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts, and the courts should, and do, and will apply to these the doctrines that obtain in adjudging forfeitures, because they can be nothing more. They are conditions subsequent on which a forfeiture is sought."

And a provision requiring loss to be proved by books of account is no implied warranty to keep books of account. *Wightman v. Western M. & F. Ins. Co.* 8 Rob. (La.) 442.

See, further, V. b.

e. Compliance with policy.

As was shown above (I. a) the case of *CONNECTICUT F. Ins. Co. v. JEARY* held that the various provisions of an iron-safes clause should be construed conjointly, and that to work a forfeiture there must be a failure to perform all the conditions named, and not any particular one.

The same was held in *Connecticut F. Ins. Co. v. Waugh* (Neb.) 88 N. W. 1118.

The clause in regard to keeping a set of books that will show a complete record of the business is generally construed to mean such a set of books as a person of ordinary intelligence will understand. The books do not have to be kept on any particular system.

A substantial compliance with the provisions of a policy in regard to keeping books of account is sufficient. *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. W. 580; *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. 104; *McNutt v. Virginia F. & M. Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61. In the latter case it was held that a clause in regard to keeping books was not an undertaking to keep and produce books of absolutely scientific correctness, but that a substantial compliance with the same 51 L. R. A.

is sufficient, although there may be quite a number of errors in country bookkeeping.

And under a clause requiring a complete set of books to be kept it cannot be claimed that the books must be kept on any particular system. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. 104.

It is not indispensable that a set of books should embrace what is usually termed a cash book, or that the books should be kept on any particular system. *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006. In this case the stipulation was to keep a set of books showing a complete record of business transacted, including all purchases and sales both for cash and credit.

And, where the books of the insured are kept so that there is no difficulty in ascertaining the amount of the loss it will be a compliance with the clause in regard to keeping books. *Phoenix Ins. Co. v. Padgett* (Tex. Civ. App.) 42 S. W. 800. In this case it was insisted that the books must clearly show everything necessary to be ascertained after the fire. But it was held that it was only necessary for the books to show a complete record of the business transacted, including all purchases and sales and shipments, both for cash and on credit, from the date of the inventory; and that, in determining the amount of goods on hand, the inventory, as well as the books, might be looked to in ascertaining the amount of the loss.

The clause as to keeping a set of books showing a complete record of business transacted is complied with, where, in a cash business, small balances are treated as cash, and regarded as such. *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129.

The record of the business should be kept in such a manner that a person of ordinary intelligence, accustomed to and acquainted with bookkeeping, can understand it. *Ibid.*; *Burnett v. American Cent. Ins. Co.* 68 Mo. App. 343.

In these cases the policies required the assured to keep a set of books showing a complete record of business transacted.

And the provision is complied with where expert bookkeepers prove that the set of books show a complete record such as good bookkeepers keep, and such as generally obtains among similar merchants. *Western Assur. Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067.

The failure to enter on the books exchanges of goods for produce until the produce was sold, when the proceeds went to swell the cash account, was held to be immaterial, unsubstantial, and harmless, under a policy requiring the

occur. It is not even suggested in this case that the actual loss sustained was less than the amount named in the policy. In fact, it appears that the loss far exceeded the sum for which the property was insured.

It may well be doubted whether a stipulation of this kind is not an independent contract, entirely without consideration, and that its terms cannot be invoked to defeat a recovery for loss under the contract of indemnity. We are, however, not disposed to enter into a discussion of the subject, and do not undertake to decide the question.

It is not claimed that there has been a failure to comply with any condition mentioned, except with regard to the manner of preserving the books of account. The defense being purely technical, a strict construction of the terms of the warranty is not only proper, but all that the defendant is

entitled to ask in the adjudication of its liability upon the contract which it is sought to have forfeited. If the defendant is entitled to a forfeiture of the policy at all, it is because it is so denominated in the contract, and a strict enforcement of its terms gives to it the release contended for. It is a matter of everyday knowledge that these forfeiture clauses are prepared with much care, skill, and ingenuity, and are frequently resorted to more for the purpose of avoiding, on technical grounds, contracts of indemnity entered into in the best of faith by the assured, and for which he is willing and does pay an ample consideration for the protection sought, rather than of subserving any useful purpose in determining the substantial rights of the parties as affected by the essential elements of the risk assumed and the indemnity granted. It is with no heai-

insured to keep books of account of his business. *Meyer Bros. v. Insurance Co. of N. A.* 78 Mo. App. 166.

In *Standard F. Ins. Co. v. Willock* (Tex. Civ. App.) 29 S. W. 218, it was held that the books were kept sufficiently to comply with the clause providing for keeping a set of books.

A clause requiring the insured to keep a set of books showing the record of his business, including all purchases and sales, and to preserve the same together with an inventory, is complied with if an inventory taken at the time of the insurance is preserved, together with a set of books showing all purchases and sales beginning at that date, although such books contained the mere footings of accounts from prior books which were destroyed by the fire. *Liverpool & L. & G. Ins. Co. v. Sheffy*, 71 Miss. 919, 18 S. W. 307.

And where it was a question of fact whether the insured complied with the stipulation requiring him to "keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," it was held error to grant a nonsuit. *Morris v. Imperial Ins. Co.* 103 Ga. 567, 29 S. E. 927.

But the provision in regard to keeping a set of books showing a complete record of business transacted, and keeping such books in a fire-proof safe, is not complied with by keeping the last inventory and the record of cash sales from that date until the fire occurred. *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 589.

And such a provision was not complied with where no account of sales for cash was kept, although the money received from sales for cash was used to pay for goods purchased, and the accounts kept with wholesale dealers from whom such purchases were made would show the amount so paid. *German Ins. Co. v. Bates*, 67 Ill. App. 370.

The failure to keep a set of books showing a record of all business transacted, including purchases and sales for cash and on credit, as required by the usual iron-safe clause, will bar a recovery. *Curnow v. Phoenix Ins. Co.* 48 S. C. 79, 24 S. E. 74; *Pelican Ins. Co. v. Wilkerson*, 58 Ark. 353, 13 S. W. 1103. In the latter case it was impossible from the books to obtain any correct idea of the amount of the goods on hand and destroyed by the fire, as the items were not given by the books. The books were not destroyed.

In *Western Assur. Co. v. Althelmer*, 58 Ark. 545, 25 S. W. 1067, the case of *Pelican Ins. Co. v. Wilkerson*, 58 Ark. 353, 13 S. W. 1103, was distinguished, as there was no proof in that 51 L. R. A.

case, by expert bookkeepers, showing that the system of bookkeeping there adopted as to the cash sales, etc., was a complete record, and no proof of the custom of merchants as to the method of keeping books.

Whether such books were kept was properly submitted to the jury, under a policy requiring the insured to keep a set of books showing a complete record of the business transacted by him, including sales for cash and on credit. *Burnett v. American Cent. Ins. Co.* 63 Mo. App. 843. In this case the insured kept books and accounts, including a day book, in which were made entries of his business, and a cash account with a bank showing his daily sales, and his books showed the amount of sales from the date of the application and the date of the fire.

The failure to take an inventory of stock within one year, as required by the iron-safe clause, is held to be no default, where one year had not expired after the policy was written. *CONNECTICUT F. Ins. Co. v. JEARY*; *Continental Ins. Co. v. Waugh* (Neb.) 83 N. W. 81; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720; *McCollum v. Niagara F. Ins. Co.* 61 Mo. App. 352; *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 338, 50 N. E. 772.

A warranty slip attached to the policy, covenanting to take a complete inventory within thirty days of this policy, if one has not been taken within twelve months, and to keep a set of books, and to keep such books and inventory in a fire-proof safe, did not apply where no inventory was taken within twelve months prior to the fire, and the fire occurred within thirty days after insurance. *Continental Ins. Co. v. Waugh* (Neb.) 83 N. W. 81.

A clause requiring the insured to keep a set of books together with the last inventory of said business, and to keep such books and inventory in a fire-proof safe or in some secure place, and to produce such books and inventory, and, in the event of failure to produce the same, the policy shall be null and void, does not refer to the original inventory; and a policy was held to be not invalid as to goods recently bought in bulk in a grocery business, although no inventory had ever been taken, and although it might be invalid as to a prior stock of dry goods. *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932.

An inventory made before the fire in connection with the evidence of the parties who made it, and giving a list of goods totally destroyed, was held admissible in evidence as tending to show the amount of value of the goods destroyed. *West Branch Lumberman's Exchange*

tancy that the courts declare such forfeiture clauses are to be looked upon with ill favor, and to be enforced only when the strict letter of the contract requires it. In *Springfield, F. & M. Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171, this court has held that forfeitures are not favored, and should not be enforced, unless the courts are compelled to do so, and that such rule applies to insurance policies. In that case the court cites with approval *Dickenson v. State*, 20 Neb. 81, 29 N. W. 184; *Estabrook v. Hughes*, 8 Neb. 496; and *Hibbeler v. Gutheart*, 12 Neb. 531, 12 N. W. 5. In *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300, it is said: "Forfeitures are not favored, and in contracts of insurance a construction resulting in loss of indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the

parties." See also *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 774, and authorities therein cited. In *Bailey v. Homestead Ins. Co.* 16 Hun, 503, where it is held that a clause against the property being encumbered does not invalidate the insurance by an encumbrance on a part of the property only, says the judge writing the opinion: "The defense suggested is founded on the merest technicality. The provision is inserted in a few brief words at the close of a long paragraph relating mostly to matters entirely foreign to the particular provision relied on, and not calculated to attract the attention of the insured, but to operate as a trap to enable the company to receive its premium, but, in case of loss, to insure a strong probability in many cases of being able to interpose a technical defense, which operates as a surprise upon the party who has relied upon his

v. American Cent. Ins. Co. 183 Pa. 366, 88 Atl. 1081.

An inventory from the fly leaf of a ledger is competent, where it had been made from an abstract of previous inventories which were destroyed by the fire, in connection with evidence that the books were correct, and that the inventories in the day books were the original entries of purchases and sales. *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

And where an inventory was begun the first week in January, and not completed by the end of the month when the fire occurred, and no prices or values were attached until after the fire, such inventory was held admissible in evidence as contemporaneous entries at the time stock was taken and merely for the purpose of identification, so as to enable the witness to testify to the contents of the entries, although sales had been made during the entire month. *Wallach v. Commercial F. Ins. Co.* 12 Daly, 387.

But an inventory and books of account were not admissible in evidence under an iron-safe clause where it was not shown that they were correctly kept. *American F. Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384.

And where the inventory produced was six months old, and carelessly made, and change of stock was made on various slips of paper, it was held that the jury were not bound to take such documents as fixing the amount of loss as absolutely correct. *Schlesinger v. Springfield F. & M. Ins. Co.* 26 Jones & S. 112, 9 N. Y. Supp. 727.

d. Waiver.

An insurance agent authorized to issue, countersign, and deliver policies, and receive the premiums, may strike out part of the iron-safe clause in regard to keeping a set of books, when objection is made to such provision, and such act of the agent will be binding on the company. *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, 34 S. W. 478. In this case the provision of the policy required the insured "to keep a set of books showing a complete record of business transacted, including all purchases [and sales both for cash and on credit] together with a last inventory of said business, and further covenants and agrees to keep such books and inventory securely [locked in a fire-proof safe] at night. . . ." The words in brackets were erased with a pen by the agent.

And where an agent of the company was authorized to complete the contract of insurance, and filled in the application as to the date of the last inventory, which was incorrect, and on the insured starting to obtain the accurate date

from the inventory in the safe told him it was immaterial as he had seen the inventory, the company was estopped from claiming that the date of the inventory was misstated in the application. *Riasler v. American Cent. Ins. Co.* 150 Mo. 366, 51 S. W. 755.

And where the adjuster made no claim that the policy was forfeited by reason of the failure to keep and produce a set of books kept in accordance with the original terms of the policy, but, with full knowledge of the manner in which they had been kept, required proof of their loss, and afterwards supplemental proof causing expense in preparation, it was held to be a waiver of the bookkeeping condition. *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, 34 S. W. 478.

II. Production of books and papers.

a. Validity of clause.

The condition providing for the inspection of books, furnishing of vouchers or certified copies, and personal examination of the assured, is upheld by the authorities as a reasonable condition. *Fleisch v. Insurance Co. of N. A.* 58 Mo. App. 596; *O'Brien v. Commercial F. Ins. Co.* 63 N. Y. 108; *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, Reversing 58 Ill. App. 161; *Phillips v. Protection Ins. Co.* 14 Mo. 220; *Langan v. Royal Ins. Co.* 162 Pa. 357, 20 Atl. 710; *Mispehorn v. Farmers' F. Ins. Co.* 53 Md. 473, 50 Md. 180. In the latter case it was held: "This construction is not only reasonable, but it would seem to be the only one of which the condition is susceptible. A condition substantially in the same terms as the present has received a similar construction to that here adopted, by the court of appeals of New York, in the recent case of *O'Brien v. Commercial F. Ins. Co.* 63 N. Y. 108. In that case, in speaking of the condition and what it required, the court said: 'The intent and meaning of the clause is neither ambiguous nor obscure, and, upon the most favorable interpretation for the insured, exacts from him, upon the requisition of the insurers, duplicates of his invoices of purchase, certified by the merchants from whom the purchases were made. The condition is reasonable and not difficult of performance, and the defendant has a right to insist upon a compliance.'"

b. Condition precedent.

The provision in insurance policies generally requires that the insured shall produce for examination all books of account, invoices, and

policy as intended to be a fair contract of indemnity. Under the circumstances of this case, therefore, the insurance company has no right to complain if its technical defense is met by a technical answer." Other authorities might be cited in further support of the above rule, but it seems unnecessary.

With reference to the covenants relied on in the case at bar to relieve the defendant, it may be said, in brief, that it is provided that the assured shall take an inventory within one year, keep books of account of purchases and sales, and that the books and inventory shall be kept in a fireproof safe or other safe place secure from fire in said store during the hours the business is closed, and that, if these conditions are not complied with, the policy shall be forfeited. The question, then, is, What action or actions of the assured, or his failure to act, will work a forfeiture of

the policy of insurance, under the strict terms of the clause quoted? Will a failure to comply with any one condition or all of them together be necessary in order to work a forfeiture? If an inventory is required to be taken, when must it be done to comply with the contract? If the books of account and the inventory which is to be taken at least once a year are to be kept in a fireproof safe or other safe place, when is the limit of time after which the nonobservance of one or both will work a forfeiture of the policy? Will the failure to preserve books of account in a fireproof safe or other place secure from fire in the store building alone defeat recovery, or is a failure to comply with all the conditions necessary? Doubtless, these provisions are intended to provide some means for preserving that which would be evidence of the value of the goods lost or damaged by

vouchers, or certified copies if the originals be lost, and that a failure to comply shall render the policy null and void. This provision is generally held to be a condition precedent, and must necessarily be complied with in order to recover on the policy, or impossibility of compliance must be shown by the insured. *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. Rep. 347; *Seibel v. Lebanon Mut. Ins. Co.* 16 Lanc. L. Rev. 356, 29 Ins. L. J. 838; *Cinqu Mars v. Equitable Ins. Co.* 15 U. C. Q. B. 143; *Fleisch v. Insurance Co. of N. A.* 58 Mo. App. 596; *O'Brien v. Commercial F. Ins. Co.* 68 N. Y. 108, *Reversing 6 Jones & S. 517*; *Farmers' F. Ins. Co. v. Mispelhorn*, 50 Md. 180; *Langan v. Royal Ins. Co.* 162 Pa. 357, 29 Atl. 710; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932; *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, *Reversing 58 Ill. App. 161*.

But in *Germania Ins. Co. v. Bromwell*, 62 Ark. 48, 84 S. W. 83, it was held to be no excuse for failing to comply with the clause in regard to keeping books of account, that before the policy was issued the agent told the insured that it was unnecessary to keep such books.

And an insurance company may protect itself after loss by requiring the assured to covenant in writing that any investigation relative to the claim shall not waive any condition of the policy. *Sun Mut. Ins. Co. v. Dndley*, 65 Ark. 240, 45 S. W. 539.

And under a policy requiring the insured to deliver "in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or their agents may reasonably require; and until such declaration or affirmation, account and evidence be produced, the amount of such loss or any part thereof shall not be payable or recoverable,"—a compliance is a condition precedent. *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. Rep. 347.

The failure to comply with a provision that the insured shall "produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if the originals be lost, at such reasonable place as may be designated by this company," was held to prevent a recovery where the insured refused to forward to the home office, a distance of 25 miles, for examination, a number of certified copies of lost bills, invoices, and vouchers on the written request of the insurer. *Seibel v. Lebanon Mut. Ins. Co.* 16 Lanc. L. Rev. 356, 29 Ins. L. J. 838. 51 L. R. A.

The company may insist on compliance with the terms of a policy requiring the production of books of account and vouchers, and submission to an examination under oath; and if the refusal is without excuse it will avoid the policy in accordance with its provisions. *Phillips v. Protection Ins. Co.* 14 Mo. 220.

A recovery cannot be had under a policy providing that, "if required, the insured shall produce books of account and other proper vouchers, and exhibit the same for examination, . . . and shall also furnish original or properly certified duplicate invoices," if the insured wilfully and with intent to defraud refuses to produce vouchers. *Lion F. Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. 45.

Under a provision in a policy that the insured shall, if required, produce copies of all bills and invoices, the originals of which have been lost, the insured will be required to procure the same from the merchants who furnished the goods, where there is no showing made that compliance will be impossible. *O'Brien v. Commercial F. Ins. Co.* 68 N. Y. 108, *Reversing 6 Jones & S. 517*; *Farmers' F. Ins. Co. v. Mispelhorn*, 50 Md. 180; *Langan v. Royal Ins. Co.* 162 Pa. 357, 29 Atl. 710.

In *Farmers' F. Ins. Co. v. Mispelhorn*, 50 Md. 180, the court said: "It was no excuse for his failure to produce such duplicates that they were not in his possession or at his command at the time of the demand made; if they could have been had by application to those who could have furnished them he was bound to procure and exhibit them as required."

But in *Wightman v. Western M. & F. Ins. Co.* 8 Rob. (La.) 442, it was held that a policy requiring that, in case of loss, the claim shall be sustained "if required by their books of accounts and other vouchers," created no implied warranty on the part of the insured to keep books of account. In this case the court said: "Warranties and special conditions in policies of insurance, as a general rule, must be strictly complied with; and we do not feel authorized to extend them by implication, as cases may often arise in which it would be difficult, if not impossible, to comply with them."

c. Compliance with policy by insured.

1. Substantial and reasonable compliance.

It is a sufficient compliance with the policy if the insured furnishes such inventory and vouchers as the conditions of the policy require. *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567; *McKee v. Susquehanna Mut. F. Ins. Co.* 135 Pa. 544, 19 Atl.

fire, if one should occur. At the time the policy was issued, it is presumed that the insurance company was acquainted with the property insured and the character of the same, and wrote the insurance with reference thereto. The stock of goods in the course of business would change by purchases and sales, and, the more definitely to determine the effect of these constantly occurring changes, the company has regarded it to its interest to fix a time—a period—within which an inventory must be taken, which, with the books of account, shall show the stock on hand at the time of its taking, and the purchases and sales subsequent thereto, and which inventory and books shall be preserved in the manner specified. It would serve no good purpose to take an inventory in a day or a week, or even within a month and a year was named as the limit of time to

perform this act. The time, therefore for taking an inventory of the stock of goods insured did not expire until a year after the policy was written, and, as the loss occurred in less time, no default in this condition, or any condition dependent thereon, is shown or can rightfully be claimed.

The books of account were kept as provided for in the warranty. They were not, however, preserved as therein required, and the vital question that presents itself is whether the failure to comply with this one of the different conditions imposed will defeat a recovery. It is conceded by both parties that the representations made were not concerning matters then in existence, but were of a promissory character only, and to be carried out some time in the future. We have assumed that these conditions were valid and enforceable, and a substantial compliance

1067; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932.

In *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955, where the clause did not call for a detailed inventory, an inventory giving separate items showing the value of goods was held to be all that could be required.

And a clause requiring the last inventory to be preserved was held not to refer to an original inventory made before the purchase of the stock by the insured. *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932.

And a reasonable compliance with the terms of the policy is sufficient. *Goldsmith v. Gore Dist. Mut. F. Ins. Co.* 27 U. C. C. P. 435; *People's F. Ins. Co. v. Pulver*, 127 Ill. 246, 20 N. E. 18; *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129.

And it was sufficient for the insured to furnish such particulars and documents as it was reasonably in his power to do? *Goldsmith v. Gore Dist. Mut. Fire Ins. Co.* 27 U. C. C. P. 435. In this case the court said: "We think the conditions set out in the fourth plea must be construed on some common-sense principle, and not, as we understand the argument, that the giving of invoices, producing books, etc., are essential in every case, whether such things in fact exist or are in the power of the assured to give."

An inventory furnished as complete as possible, but not in strict compliance with the requirements of the policy requiring an inventory "showing the quantity, quality, and cost of each article claimed to be destroyed," made in apparent good faith, was held sufficient. *People's F. Ins. Co. v. Pulver*, 127 Ill. 246, 20 N. E. 18.

The insured is not required to furnish a correct inventory or itemized list where the policy is upon a stock of merchandise shifting daily. *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832.

An accidental omission to produce all the books before the adjuster will not avoid the policy if the books are produced in court. The insured is entitled to a reasonable opportunity to produce his books. If the adjuster declines to make further examination of the books on the ground of fraud the failure to produce other books will not avoid the policy where they are produced on the trial. *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 45 S. W. 129.

The failure to produce books of account on demand will not prevent a recovery if the policy does not have any provision making it void, or denying to the insured the right of recovery, §1 L. R. A.

solely upon the ground that he refuses to produce books of account, vouchers, etc., when demanded by the insurer. *Lion F. Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. 45.

Whether it is possible or impossible for the insured to produce the bills or duplicates is a question of fact to be determined by the jury, under a policy requiring that the insured shall furnish bills of purchase of the goods destroyed, or duplicates. *Coleman v. New York Bowery F. Ins. Co.* 177 Pa. 239, 35 Atl. 729.

But a showing of books and vouchers must be made according to the provisions of the policy, unless a valid excuse is given. An attempted compliance that is not substantially in accord with the terms of the contract will be held insufficient. *Carter v. Niagara Dist. Mut. Ins. Co.* 19 U. C. C. P. 143; *Mulvey v. Gore Dist. Mut. F. Assur. Co.* 25 U. C. Q. B. 424; *Stickney v. Niagara Dist. Mut. Ins. Co.* 23 U. C. C. P. 372; *Western Assur. Co. v. McGlathery*, 115 Ala. 218, 22 So. 104; *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, *Reversing* 58 Ill. App. 161; *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. Rep. 847.

The failure to comply with a condition in a policy that the insured shall, within a month after the loss, deliver in as particular an account thereof as the nature of the case will admit of, and make proof of the same by production of his books of account and other proper vouchers, will prevent a recovery. *Greaves v. Niagara Dist. Mut. F. Ins. Co.* 25 U. C. Q. B. 127; *Carter v. Niagara Dist. Mut. F. Ins. Co.* 19 U. C. C. P. 143; *Cinqu Mars v. Equitable Ins. Co.* 15 U. C. C. P. 143. In the latter case the company had required certain invoices which the plaintiff refused to produce, although it was in his power to do so.

And under a condition requiring the assured to give notice, and within thirty days after the loss to deliver a particular account of such loss signed by his hand and verified by his oath, and also, if required, by his books of account and other proper vouchers, where some accounts were attached of goods sold to him, showing only charges of goods, it was not a compliance with the condition. *Mulvey v. Gore Dist. Mut. F. Assur. Co.* 25 U. C. Q. B. 424. In this case the court said: "We agree the condition is not to be too strictly construed, but the plaintiff was bound to afford to the defendants some statement or information from which they could reasonably satisfy themselves that he had sustained loss or damage entitling him to the indemnity he claimed."

Under a policy requiring the insured to give a detailed account of loss verified by oath and

therewith essential to the right of recovery in case of loss of the property insured. In construing these and similar clauses in insurance policies, there is much diversity of opinion among the different courts which have passed upon the subject. Counsel for appellant has called our attention to a number of cases which hold, broadly and generally, that such stipulations are valid, and that a full and complete compliance with their terms on the part of the assured is necessary and required before a recovery can be had. These decisions are based upon what is said to be the general and underlying principle of the right of the parties to enter into such a contract as they may desire, and the duty of the courts to enforce the contract as made. There is no attempt to construe the language used other than in a liberal and general way, and, as it occurs to us, in some cases more

favorable to the insurer than the assured. In Kentucky such stipulations are held to be independent of the contract of insurance, and therefore void for want of consideration. See *Phoenix Ins. Co. v. Angel*, 18 Ky. L. Rep. 1034, 38 S. W. 1067, and *Mechanics' & T. Ins. Co. v. Floyd*, 20 Ky. L. Rep. 1538, 49 S. W. 543. Courts of other states have construed similar provisions as interdependent, holding that the one requiring books of account to be kept and preserved took effect concurrently with that requiring an inventory, and that no default in any of the conditions could exist until the expiration of the time allowed for taking the inventory. *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 774; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720. We are of the opinion, however, that in this case more cogent reasons exist for holding that

by their books of account and other proper vouchers a general statement was held insufficient, although the books and vouchers were produced. *Stickney v. Niagara Dist. Mut. Ins. Co.* 23 U. C. C. P. 372.

And where the breach of the iron-safe clause was alleged in the answer to be that the plaintiff did not keep a set of books as therein provided, a reply stating that the plaintiff "had substantially kept a set of books from which the defendant could have ascertained the loss, and . . . that the plaintiff offered to produce books and evidence to meet defendant's demand for books claimed by defendant to be necessary," was held insufficient, as it did not show what books plaintiff offered to produce. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. 104.

It is no excuse for the failure to produce books or invoices for examination, as required by an iron-safe clause providing for forfeiture, that the insured kept no books of account. *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, Reversing 58 Ill. App. 161.

And where there is no waiver, an estimate of the extent of loss without any particulars was held not to be a compliance with a provision requiring a particular account of the loss by affidavit and by books of account, and was not relieved by the fact that the insurer had had possession of the books containing the inventory and invoices to which reference was made. *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. Rep. 847.

The terms of the policy in regard to the production of books and vouchers must be complied with by the insured to the best of his ability. *Jube v. Brooklyn F. Ins. Co.* 28 Barb. 412; *Stockton Combined Harvester & Agri. Works v. Glen's Falls Ins. Co.* 98 Cal. 557, 33 Pac. 633; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821; *Greaves v. Niagara Dist. Mut. F. Ins. Co.* 25 U. C. Q. B. 127; *Banting v. Niagara Dist. Mut. F. Assur. Co.* 25 U. C. Q. B. 431; *Ward v. National F. Ins. Co.* 10 Wash. 361, 38 Pac. 1127; *Mispelhorn v. Farmers' F. Ins. Co.* 53 Md. 473.

The failure to comply with a condition, that the assured should produce, if required, his books of account and other vouchers in support of his claim, and permit extracts and copies to be made, and that until such proofs were produced, or, if they were refused when demanded, the loss should not be payable, will prevent a recovery. *Jube v. Brooklyn F. Ins. Co.* 28 Barb. 412. In this case the court said: "He was required by the defendants, as he testifies, to produce his bills of purchases; he says he told

them it was impossible to do so, that he had only found a few bills; that he had since found others, but only a part, but did not produce any to the defendants; that they asked him to furnish further statements, and the bills of purchases, or duplicates of them, but under the advice of counsel he declined. It is apparent from this testimony that Carpenter had some of these vouchers or bills at the time of the demand for them, and could have complied with it, to that extent."

An award was set aside where the insured acted on the same, supposing they had all the information that could be obtained, and the principal bookkeeper in charge of the books did not disclose for inspection, as requested, books showing inventories of the amount of material and machines destroyed by fire, and estimates of the cost which were prepared by order of the board of directors, although the director making the settlement had no personal knowledge of the existence of such books. The policy provided that in case of loss the plaintiff would if required produce and exhibit for examination by defendant his books of account and other vouchers. *Stockton Combined Harvester & Agri. Works v. Glen's Falls Ins. Co.* 98 Cal. 557, 33 Pac. 633.

An iron-safe clause, covenanting and warranting to take an itemized inventory once a year or the policy shall be void, and in the event of the failure to produce inventories for inspection the policy shall be null and void and bar a recovery, is not complied with by a collection of invoices covering every article embraced in a stock of merchandise on a given day. *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821. In this case the court said: "It may be that a collection of invoices, accompanied with a written statement signed by the insured that the invoices embraced every article in the store and the actual value of each, would be a substantial compliance with the stipulation in the policy, but be this as it may, we are clear that the invoices alone are not sufficient."

And where the policy required a particular account of the loss verified by oath, and also, if required, by books of account and other proper vouchers, and the assured was able to furnish a particular account, but failed to do so, it was held to be no compliance with the condition. *Banting v. Niagara Dist. Mut. F. Assur. Co.* 25 U. C. Q. B. 431. In this case the court said "that there were means of affording a more particular account of the character of the goods, as well as of verifying it by obtaining duplicates of invoices to the extent of apparently one half of the stock on hand or purchased."

there was no breach in the conditions of the warranty sufficient to forfeit the policy at the time the loss occurred, and that the defendant's contention to the contrary must fail for the reasons hereafter assigned.

It will be noted that these provisions, constituting, as we have seen, a promissory warranty, are joined together by the conjunctive "and," followed by the penalty of forfeiture, to the effect that "failure to observe the above conditions shall work a forfeiture of all claims under this policy." The insurance company had the power to separate the conditions imposed, making each independent of the other, the clause being of its own creation; but it has not chosen to do so. By its own language, it has made a series of acts to be construed together, and a failure to perform, not one, but all, the conditions, is required to work a forfeiture of the poli-

cy. This being the case, it is not the duty of the court to give to the language used a more favorable construction to the company than the fair import of the words will warrant. The reverse of the proposition is true, and it behooves us to construe the terms imposed most strongly against the company. It is their language. It has been carefully prepared and well worded in the company's interest. They impose the conditions upon the assured, and a proper conception of the rights of both parties to the contract requires the adoption of such a rule of construction.

Having in view, however, the situation of the parties and the purposes sought to be accomplished by the contract of insurance, can it be said from the language used that it was the intention of the parties that the policy should be forfeited by the mere failure to

And under a condition of a policy requiring the insured to produce all books of account, bills, invoices, and other vouchers, or certified copies thereof if the originals be lost, the assured must comply substantially with such condition or he cannot recover, and the inability to produce all will not excuse failure to produce such as he may have. *Ward v. National F. Ins. Co.* 10 Wash. 361, 38 Pac. 1127.

In the absence of trustworthy books, it was held that insurance companies could show that other merchants in the same line of business for six years prior to the fire did not have on hand at any one time stock amounting to more than one fifth of their annual aggregate sales. *Home Ins. Co. v. Weide*, 11 Wall. 438, 20 L. ed. 197.

2. Procuring vouchers from third parties.

The insured was held not bound to procure and furnish to the insurance company bills of parcels of materials recently purchased, and also the pass books of their journeymen in which were entered the boots and shoes or other manufactured articles made and delivered by them to the insured, where all the books of account and invoices of goods had been destroyed by the fire. The policy required the insured, if demanded by the company, to verify their loss by their books of account and other proper vouchers. *Mechanic's F. Ins. Co. v. Nichols*, 16 N. J. L. 410.

And the refusal of the insured to sign an instrument in writing after the loss, requesting persons from whom he had purchased goods to furnish the amounts of the invoices, will not prevent a recovery, where he furnishes the names of merchants from whom he purchased. *Franklin Ins. Co. v. Culver*, 6 Ind. 137. This policy provided that whenever required in writing, the insured shall produce an exhibit of their books of accounts and vouchers to the insurers, in support of their claim, and permit extracts and copies thereof to be made. All the bills were destroyed by the fire, and no copies were preserved.

And under a policy requiring the insured to furnish the company bills of purchase or duplicates thereof, the company may show by the books of another house that plaintiff could have obtained duplicates of such bills if he had applied for them. *Mispelhorn v. Farmers' F. Ins. Co.* 53 Md. 473. In this case it was also held that what would be a reasonable time within which the company should make known its dissatisfaction with the terms, and demand the bills of purchase or duplicates, is a question of law for the court, and not for the jury. 51 L. R. A.

3. Time, place, and manner of examination.

The insured may refuse to be examined with his books if his attorney is excluded. *Thomas v. Burlington Ins. Co.* 47 Mo. App. 169.

The demand for the production of books must name a reasonable place. *Murphy v. Northern British & Mercantile Co.* 61 Mo. App. 323; *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98.

The place for such examination must be a reasonable place, and ordinarily will not be considered as embracing any other place than at or near the scene of the loss. *Murphy v. Northern British & Mercantile Co.* 61 Mo. App. 323.

And the insured cannot be compelled to appear with his books and accounts at the office of the insurance company in another state. *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98. In this case the court said that a clause in the policy that "required such an act as a condition precedent to a right of recovery would be against public policy and void, and, when the contract is silent in that regard, no higher right would exist by reason of a notice and demand for compliance therewith."

The demand for the production of the books at the place of the fire is a proper demand, and cannot be avoided by an offer to produce the books at a place in a distant state, although the insured may reside at the latter place. *Fleisch v. Insurance Co. of N. A.* 58 Mo. App. 596.

The question of reasonable time is one for the jury.

The compliance with a provision requiring the production of books of account and other vouchers, and to submit to an examination under oath, is a question for the jury, where the insured is served with notice as he is departing from the city with a sick child and family, in order to avoid the epidemic of cholera, on the 19th of June, and did not return until the 12th day of September. *Phillips v. Protection Ins. Co.* 14 Mo. 220.

In the absence of proof when the insured was to produce duplicate bills of purchase, and of proof whether there was neglect or refusal of the insured to comply, the neglect to produce duplicates of invoices, the originals of which were alleged to be destroyed, did not bar a recovery under a clause: "Shall also produce their books of account and other vouchers of all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination by anyone named by the company." *Republic F. Ins. Co. v. Weide*, 14 Wall. 375, 20 L. ed. 894.

comply with the one only of the conditions of the warranty? We think not. We are not disposed to impute to the company a desire to avoid responsibility under a fair contract, by it voluntarily entered into, upon a pretext so slight and with so little substantial reason therefor. It ought not to be presumed that a forfeiture of the entire policy, leaving to the assured no protection against contingencies from which consequences grave and serious in their character might flow, was contemplated by either party, except for weighty and important considerations. By a fair and reasonable construction of the contract of the parties to this action, a forfeiture was provided for, not for a failure to comply with one of the several conditions mentioned, but for all of them taken together. Had it been desired to have any other construction placed on its provisions, it

would have been no difficult matter to so word the conditions of the warranty as to make a failure to comply with any one or more of them grounds for the forfeiture of the entire policy. This has not been done, and we are not disposed to give a broader or more liberal construction than the language used requires. The views herein expressed seem to be consonant with both reason and authority. We are not entirely without light upon the subject as to the views of other courts upon what we regard as kindred questions. In a very recent case in the supreme court of Iowa [*Born v. Home Ins. Co.* 110 Iowa, 379, 81 N. W. 676], in construing a clause in a policy of insurance against encumbrances upon the property insured, it is stated in the syllabus: "A policy insuring both real and personal property provided that, 'if the property should thereafter be-

4. Demand.

The demand for the production of books must conform to the requirements of the policy.

The insured is not obliged to produce and exhibit books of account until so required in writing under a clause providing that whenever required in writing the insured shall produce and exhibit their books of account and other vouchers. *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315.

And where the plaintiffs neglected and refused to deliver an account with invoices and books of account as provided in the policy, it was held that they were bound by the condition in the policy if a proper and bona fide demand had been made; but such not being the case it was not a sufficient defense. *Cameron v. Times & B. F. Ins. Co.* 7 U. C. C. P. 234.

5. Destruction or loss of books and vouchers.

Destruction of books without fault will excuse noncompliance. *Bumstead v. Dividend Mut. Ins. Co.* 12 N. Y. 81; *Liverpool & L. & G. Ins. Co. v. Kearney*, 36 C. C. A. 265, 94 Fed. Rep. 314; *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103; *Sneed v. British-American Assur. Co.* 73 Miss. 279, 18 So. 928; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Jones v. Mechanics' F. Ins. Co.* 36 N. J. L. 35, 13 Am. Rep. 405; *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 645.

If the books and papers are all consumed by fire, a verified showing that the property destroyed was of the value named is a sufficient compliance. *Bumstead v. Dividend Mut. Ins. Co.* 12 N. Y. 81. In this case the policy provided that the insured shall in case of loss deliver to the insurer a particular account of the loss or damage verified by his oath, and, if required, by his books and vouchers, together with an inventory of the property destroyed giving the amount of the damage to each item verified by oath. This only requires such a full and accurate inventory and statement as the party is able to furnish.

In *Jube v. Brooklyn F. Ins. Co.* 28 Barb. 412, 11 C. 1, the case of *Bumstead v. Dividend Mut. Ins. Co.* 12 N. Y. 81, was distinguished, as in that case the insured was excused from the non-production of papers and vouchers on the ground that they had been consumed by the fire, and that the insurers had waived the non-production.

The provision to keep a set of books, and to keep such books and inventory in a fire-proof safe, or in some secure place, and in case of loss the assured agrees and covenants to produce

such books and inventory, and, in the event of failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained for any such loss, must be reasonably, and not literally, construed. *Liverpool & L. & G. Ins. Co. v. Kearney*, 36 C. C. A. 265, 94 Fed. Rep. 314. The construction in this case was that the insured must produce his books and inventory after a fire if it is within his power to do so, and as throwing upon the insured the responsibility for the loss of his books and inability to produce them in all of those cases where their loss is due to a wrongful or fraudulent act on his part or to his culpable negligence. Having the right to keep the books either in the safe or in a secure place, the removal from the safe during a conflagration to a more secure place, and losing the inventory, will not of themselves bar a recovery.

And where an inventory is produced to the agent of the company authorized to adjust the loss, and the inventory is lost without fraud or negligence on the part of the insured, he may establish by other legal testimony the amount of his loss. *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103.

A fire-proof clause requiring the books to be kept and produced will not avoid a policy where such books are placed in a safe of the usual kind classified as fire-proof, and are destroyed. *Sneed v. British-American Assur. Co.* 73 Miss. 279, 18 So. 928.

The failure to submit his books, invoices, and vouchers for examination, and also furnish duplicate invoices for the same purpose, required by the policy, is excused where the books and original invoices were destroyed by fire, and the insured used reasonable efforts to produce duplicates of the original invoices but failed to obtain them. *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411. It was further held that the failure to communicate his inability to produce these invoices would not prevent a recovery.

In speaking of the sufficiency of the proof of loss it was said in *Jones v. Mechanics' F. Ins. Co.* 36 N. J. L. 35, 13 Am. Rep. 405, that, in cases where the fire has not only consumed the goods insured, but all the books and vouchers from which an account could be made, the insured has not been held to do what was vain and impossible, but only to such performance as the nature of the case would admit. *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 645; *Mason v. Harvey*, 8 Exch. 819, 22 L. J. Exch. N. S. 834; *Roper v. London*, 1 El. & El. 825, 28 L. J. Q. B. N. S. 260, 5 Jur. N. S. 491.

come mortgaged or encumbered,' the policy should be void, and also declared that it should be forfeited if other insurance was taken out 'on any of said property.' Held, that since the provision for forfeiture for mortgaging did not provide a forfeiture for mortgaging 'any' of the property, but treated 'the property' as a whole, the policy would not be forfeited for a mortgage given on a part of the property only." Says Judge Given in the opinion of the court: "It is a familiar rule that forfeitures are not favored, that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to clearly show that he is entitled to it. The language of the policy is, 'or, if the property shall hereafter become mortgaged or encumbered,' the policy becomes null and void. It is the property, not a part of it; not the

real, nor the personal, but the whole, property, the mortgaging of which renders the policy void." To the same effect is *Bailey v. Homestead Ins. Co.* 16 Hun, 503, heretofore quoted. In our own state this court, in construing like clauses as to encumbrances, has not adopted the same line of reasoning as the courts whose opinions have last been referred to. It is here held that, where different classes of property are insured for specific sums, although the premium is paid in one sum in gross, the policy as to the different classes of property is separable and divisible, and a mortgaging of one class of property in violation of the terms of the policy will not prevent a recovery as to all other classes upon which no encumbrance existed. The rule was announced in the case of *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L. R. A. 524, 43 N. W. 340, and has since been

Under a policy providing that as soon as possible after the loss the insured shall deliver as particular an account of their loss as the nature of the case will admit, and make such proof by their books of account and other vouchers as shall be reasonably required, where all the papers furnishing details were consumed with the goods, a statement of the gross amount lost, with the circumstances of the loss, was held sufficient. *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 645.

The burden of proof as to loss of books is on the insured.

Under a policy requiring the insured to furnish to the company the bills of purchase or duplicates, the burden of proof is on plaintiff to show that it was not possible for him to comply with the terms of this condition by the use of all reasonable means within his power. *Mispehorn v. Farmers' F. Ins. Co.* 53 Md. 473.

Such books as are not destroyed may establish value of inventory. *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. 33; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197, 55 Pac. 481; *Republic F. Ins. Co. v. Weide*, 14 Wall. 375, 20 L. ed. 894.

And under a policy providing that after a fire the insured shall separate the damaged and undamaged personal property, and make a complete inventory of the same, stating quantity and cost of each article and the amount claimed, and where almost all the books were burned except the day book, the purchase book, and the book showing the amount paid out for manufacturing, it was held that the insured could show from these books the value of goods on hand. *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. 33.

And where a loss occurred in 1894, and all the data which had existed and which would show the value of the goods destroyed were burned except an inventory made in 1887 and the plaintiff's accounts of purchases and sales of goods subsequent thereto, and these were the best evidence in existence aside from personal recollection, it was held that this inventory could be used. *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197, 55 Pac. 481.

Footings of prices and value entered on the fly leaf of a new ledger, transferred from the fly leaf of an exhausted ledger, correctly entered therein, the inventory books and the exhausted ledger having been destroyed, are competent evidence substantiated by witnesses to show the value of the loss. *Republic F. Ins. Co. v. Weide*, 14 Wall. 375, 20 L. ed. 894. The court said: "In this case the inventory book and the fly leaf of the exhausted ledger had both been

burned. There was no better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy."

d. *Waiver.*

1. Generally.

A waiver of production of books and papers may be made by an adjuster.

So, where an adjuster had been fully informed that the scratch book and ledger had been destroyed, and the insured executed a writing requesting the adjuster to examine the property, and agreeing that such examination "shall not act or be taken as any waiver, direct or implied, of any defense the companies may have or claim by reason of the breach of warranty, as contained in the iron-safe clause, made a part of the policies, we having lost our detailed inventory and only having a memorandum of the amount,"—this was held to be a waiver on the part of the insurance company to the effect of saying: "We do not object to paying the loss on the goods on any grounds except the failure to produce a detailed inventory." *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955. In this case the court said that a detailed inventory was not called for in the policy.

And where the adjuster waived the production of more definite information, and asked for a proposition for a compromise, it was held to be a waiver of the defense of nonliability for failure to produce invoices under a policy providing that the insured as often as required shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if the originals be lost. *Storm v. Phenix Ins. Co.* 40 N. Y. S. R. 40, 15 N. Y. Supp. 281.

And a demand by the adjuster and president of a company for certified copies of bills purchased was held to be a waiver of formal proof of loss. *Lake v. Farmers' Ins. Co.* 110 Iowa, 473, 81 N. W. 710.

And where notice to the plaintiff to appear and submit to a personal examination, with her books, was given to her husband, and as her agent he appeared, it was held to be a waiver of a personal examination of the plaintiff. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. 104.

Examination of books may be a waiver of an examination of person and books.

So, where the insurance company's agent took

followed. In that case the insurance was upon certain buildings on a farm, and also covered a lot of personal property described in the policy. The policy provided that "any other insurance or any encumbrance upon any of the property hereby insured existing at the date of this policy, not made known in the application, or if any subsequent encumbrance is imposed, . . . this policy shall be void." A mortgage was placed upon the real estate on which the insured buildings were located in violation of the terms of the encumbrance clause, and it was held that the policy of insurance was separable and divisible, and that an encumbrance upon the real estate, while preventing a recovery for the loss sustained by the burning of the buildings, would not preclude a recovery for the loss of the personal property insured. While the rule announced in our court is ap-

parently in conflict with the views of the other courts on the same subject herein referred to, the divergence of opinion is not as marked as first appearances would indicate. Each has a different basic point for the course of reason adopted. In this court the policy as to different classes of property insured for specific sums is held to be divisible, and a separate contract as to each class of property insured, in so far as the clause against insurance shall apply, while the other cases undertake to analyze and define the meaning, force, and effect of the words employed in the provisions against encumbrance. While neither are controlling of the provisions under consideration, they are useful in so far as they may aid us in a correct solution of the questions herein involved.

Recurring to the language of the warranty

part in the adjustment of the loss, and examined the books and determined the amount of loss and damage, and practically agreed upon a discount, it was held to be a waiver of a provision authorizing the company to examine plaintiff and books. *Robertson v. New Hampshire Ins. Co.* 42 N. Y. S. R. 452, 16 N. Y. Supp. 842.

Proof required by adjuster of loss of books was held to be a waiver of forfeiture for not producing a set of books. *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, 34 S. W. 470.

In *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567, the court said: "It is clear that a notice and inventory, such as are required by the policy, had been made, or, at all events, waived, by the conduct of the special agent."

But where the insurance company pleaded nonperformance of a condition requiring the delivery of a particular account of the plaintiff's loss verified by his oath or affirmation, or by his books of account, within thirty days after the loss, it was held that the plaintiff could not rely upon a parol waiver of this condition by the managing director and secretary, as it would be setting up a substituted parol contract in answer to a sealed policy. *Scott v. Niagara Dist. Mut. Ins. Co.* 25 U. C. Q. B. 119.

A compliance with a request to be shown the books, and with a request to produce the property not damaged, and an offer to pay a part of the claim, was held not to be a waiver of a valid defense to the claim upon the policy where the contract provided for the taking of such steps. *McCormick v. Orient Ins. Co.* 86 Cal. 260, 24 Pac. 1003. The clause of this policy is not set out in the case.

The insured, relying upon a waiver of a condition in the policy requiring the production of books and vouchers, must plead such waiver. *Mulvey v. Gore Dist. Mut. F. Ins. Co.* 25 U. C. Q. B. 424.

2. Failure to act, or delay.

Delay by the insurance company in making demand, or in taking action, or in objecting to the books and vouchers presented, may be a waiver. *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60; *People's F. Ins. Co. v. Pulver*, 127 Ill. 249, 20 N. E. 18; *Jones v. Howard Ins. Co.* 117 N. Y. 103, 22 N. E. 578; *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Rissler v. American Cent. Ins. Co.* 150 Mo. 366, 51 S. W. 755.

And the company will be held to have waived the production of books of account and other vouchers, as provided for in the policy, where

demand is not made until after thirty-eight days from receiving proof of loss, without objection in the interim. *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60.

And delay in pointing out objections to an inventory furnished was held to be a waiver. *People's F. Ins. Co. v. Pulver*, 127 Ill. 249, 20 N. E. 18.

And under a policy providing that the insured in case of loss shall furnish original or certified copies of bills or invoices when required, where no such requirement was made until long after proofs of loss had been rejected, and about four months after the fire, and the insured had presented himself at the office of the company with all the bills and invoices he could obtain to submit to their examination, but this was refused by the company, it was held that a demand by the company thereafter came too late. *Jones v. Howard Ins. Co.* 117 N. Y. 103, 22 N. E. 578.

An insurance company having the right by the express terms of the policy, where the originals had been lost, to call for the production of copies of bills, invoices, etc., before a person to be named by it, and failing to name such person, will be held to have waived the right. *Home Ins. Co. v. Cohen*, 20 Gratt. 312.

And under a policy requiring the insured to keep a set of books to be produced when required, it was held that the assured could establish the amount of his loss by his clerks, where no notice was given by the company requiring the production of books and papers, and no request was made for an opportunity to examine them. *Rissler v. American Cent. Ins. Co.* 150 Mo. 366, 51 S. W. 755.

Waiver of production of books and vouchers must be pleaded. *Mulvey v. Gore Dist. Mut. F. Ins. Co.* 25 U. C. Q. B. 424.

III. Keeping books and vouchers in a safe, or safe place.

a. Validity of clause.

The provision requiring the keeping of books of account and vouchers in a fire-proof safe or safe place is held by some courts to be a reasonable and valid provision. *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507; *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11.

A provision in a policy to keep a set of books showing a complete record, and to take an itemized inventory once a year, and to keep such books and inventory at night in a fire-proof safe, and to produce such books in case of loss, and, in the event of failure, the policy to be null

in the case at bar, it is provided that, if the conditions are not performed, the policy shall be forfeited. There are two separate and distinct acts to be done,—one is to keep books of account, and the other is to take an inventory at a certain time. To accomplish the object sought, it also provided that the books while being kept, and the inventory when taken, are to be kept in a fireproof safe or other place secure from fire in the store building containing the property insured. These different steps to be taken are all more or less important, if valuable at all. The inventory, it would seem, is regarded as important as any other act required; and, until there has been a default or breach in that condition, who is at liberty to say, under the wording of the penalty, that a forfeiture of all rights under the policy was the deliberate contract of the parties to be enforced by the courts upon application therefor? The answer is rendered less difficult when there is kept in view the rules for the proper construction of provisions of this character, as heretofore announced in this opinion. It is

not said by the words used, or the fair import of the same, that if one condition is not complied with a forfeiture will ensue, but the plural is used, and clearly refers to all the conditions preceding, and not to any particular one of them.

From the foregoing observations, the conclusion is reached that a ground for forfeiture of the policy as contended for does not exist, and that the company is liable to the assured under its contract of indemnity. Our attention has been invited by counsel for assured to the proposition that a waiver of the clauses for forfeiture, if existing, has been established, and also to certain parts of the testimony as preserved in the bill of exceptions in support of the contention thus made. In view of the conclusions reached, we have thought it unprofitable to consider this feature of the case, and consequently have not taken the necessary time to investigate the proposition.

The judgment of the lower court is right, and is affirmed.

and void; and no suit at law shall be maintained for any loss,—is a reasonable provision; and the failure to observe it, with intent to defraud, will forfeit a contract of insurance. *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574.

But this was denied by other courts, and in *CONNECTICUT F. INS. CO. v. JEARY* it was said: "It may well be doubted whether a stipulation of this kind is not an independent contract, entirely without consideration, and that its terms cannot be invoked to defeat a recovery for loss under the contract of indemnity."

In *Phoenix Ins. Co. v. Angel*, 18 Ky. L. Rep. 1034, 38 S. W. 1067, it was held that the failure to keep the inventory and books in a fire-proof safe, as required by a fire-proof-safe clause, will not defeat a recovery, as such a provision is without consideration, and is only for better preservation of evidence. In this case the court said: "It is, however, admitted that the inventory and books were not kept in a fire-proof safe, nor in any fire-proof place or apartment, but it is claimed that the agent at the time knew that the assured had no fire-proof safe, nor anything of the kind, and waived that part of the policy; and, if that be true, then the failure of the assured in that regard cannot defeat a recovery in this case. But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most would only tend to the better preservation of the evidence to show the amount of the loss sustained in case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party."

In *Mechanics' & T. Ins. Co. v. Floyd*, 20 Ky. L. Rep. 1538, 49 S. W. 543, where the defense was a breach of condition of a fire-safe clause, and that the books were not produced, the case of *Phoenix Ins. Co. v. Angel*, 18 Ky. L. Rep. 1034, 38 S. W. 1067, holding that a failure to comply with this provision would not work a forfeiture as it was without consideration, was followed.

Evidence that the insured did not promise to keep his books in an iron safe, or remove them from the store at night, is not admissible where the defense is that this was required by the policy and the application, and the pleadings do not deny such condition, or allege fraud, accident, mistake, or ignorance.

Liverpool & L. & G. Ins. Co. v. Morris, 79 Ga. 686, 5 S. E. 125. In this case the books were left exposed, and were destroyed.

Where it was a matter of dispute as to whether the iron-safe clause was properly in the policy, or had been inserted by the fraud of the company's agent, it was held error to leave it to the jury to pass upon its materiality in case they should find it was a part of the policy. *Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180.

The iron-safe clause in regard to preserving the books in an iron safe, inserted in the application without knowledge of the insured and in fraud of his rights, will not relieve the company where no safe is used and the books are destroyed. *Liverpool & L. & G. Ins. Co. v. Morris*, 84 Ga. 759, 11 S. E. 895.

And that the insured to whom a policy containing an iron-safe clause is issued had no iron safe does not constitute such a fraudulent concealment as will avoid the policy, where no inquiries were made with regard to whether he had such safe. *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S. W. 837.

b. Condition precedent and warranty.

A provision in a fire-insurance policy requiring the books of account and inventory to be kept in a fire-proof safe, or in a safe place, is generally held to be a warranty, and a compliance therewith is held to be a necessary condition precedent to a recovery. *Losano v. Palestine Ins. Co.* 24 C. C. A. 85, 41 U. S. App. 694, 78 Fed. Rep. 278; *City Drug Store v. Scottish Union & Nat. Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Allred v. Hartford F. Ins. Co.* (Tex. Civ. App.) 37 S. W. 95; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 227, 28 S. W. 1027; *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321; *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 84 S. W. 670; *Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Goldman v. North British Mercantile Ins. Co.* 48 La. Ann. 223, 19 So. 132; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Murphy v. Royal Ins. Co.* 52 La. Ann. 775, 27 So. 143; *Landman v. Hartford Ins. Co.* (La.) 19 Ins. L. J. 572, Affirming 18 Ins. L. J. 813; *Virginia F.*

& M. Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191.

And the same was said to be the rule in *Brown v. State Ins. Co.* 74 Iowa, 428, 38 N. W. 125.

And in the following cases, this provision was on a slip attached to the policy: *Lozano v. Palatine Ins. Co.* 24 C. C. A. 85, 41 U. S. App. 694, 78 Fed. Rep. 278; *City Drug Store v. Scottish Union & Nat. Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Allred v. Hartford F. Ins. Co.* (Tex. Civ. App.) 37 S. W. 95; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 227, 28 S. W. 1027; *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321; *American F. Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554; *Goldman v. North British Mercantile Ins. Co.* 48 La. Ann. 223, 19 So. 132; *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11; *Landman v. Hartford Ins. Co.* (Ia.) 19 Ins. L. J. 572, *Affirming* 18 Ins. L. J. 813.

In *Lozano v. Palatine Ins. Co.* 24 C. C. A. 85, 41 U. S. App. 694, 78 Fed. Rep. 278, the court said: "The policies sued upon and produced in court, although respectively made up on two pieces of paper attached together, really contained in each but one contract of insurance, all the parts of which were agreed upon and delivered at one time. Without the so-called 'appended paper' containing the description of the property, and the covenants as to keeping books, there would be, in fact, no policy of insurance on which a recovery could be had in a court of law."

A policy containing an iron-safe clause as to keeping books was held to be a warranty, and the entry of balances in the old ledger, and the production of books containing the same after the fire, were not a compliance with the demands of the iron-safe clause where the detail inventory was destroyed by the fire. *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 36 S. W. 935.

In *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, the court said the present case comes within a promissory warranty. "It is quite probable in the nature of the case that this stipulation was regarded as material; but whether it was or was not—for with that we have nothing to do—the contract is express that the books would be thus safely kept, and if, as has been admitted, the promise has not been fulfilled, there can be no recovery." In this case the evidence that the insured could not read English, and that the questions and answers were not read to him, was excluded in the absence of any pleading of fraud.

In *Brown v. State Ins. Co.* 74 Iowa, 428, 38 N. W. 125, it was said that, when the insurance company was informed of the destruction of the books and inventories, by reason of their being kept in a wooden desk, and noncompliance with the iron-safe clause, it had the right to stand upon the forfeiture, and declare the contract at an end.

And in the following cases it was held to be a condition precedent: *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, *Reversing* 58 Ill. App. 161; *American F. Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554; *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507.

A provision requiring books of account to be kept, and that such books should be kept in a fire-proof safe or other place secure from fire, and that a failure to observe this condition will work a forfeiture, is a reasonable condition, and the failure to perform the same with an intention to defraud the company works a forfeiture of the contract of insurance. *Niagara F. Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, *Reversing* 58 Ill. App. 161.

51 L. R. A.

The failure to produce the inventory and some of the books, because not kept in the safe, was held to be such a breach as prevented a recovery. *American F. Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 554. In this case the clause provided that "the assured under this policy hereby covenants and warrants to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with a last inventory of stock insured; and further covenants and warrants to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire." This clause contained also the description of the stock of goods and the amount of insurance, and was pasted on the face of the policy.

An iron-safe clause is a condition precedent, although printed on a slip and attached to the policy when delivered, if the insured does not object to it when he receives it. *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11.

But in *McNutt v. Virginia F. & M. Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61, and *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. Rep. 708, this provision was held to be a condition subsequent, and a failure to comply strictly did not work a forfeiture.

The iron-safe clause was held to be a promissory warranty and a condition subsequent, and was sufficiently performed where the books kept in the safe showed entries of sales through the whole period of business with bills of particulars, and the inventory of stock showed the condition up to fifteen days prior to the fire, and the entries of bills payable showed all the purchases from the beginning to the time of the fire. Neither the accounts of goods purchased, nor the account of cash sales, particularized the articles or the price. The cash-sales book covering twenty-one days prior to the fire was inadvertently left out of the safe, and was destroyed. *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. Rep. 708. In this case the policy provided: "The insured shall keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, and take an itemized inventory of stock on hand at least once every year; . . . will keep such books and inventory securely locked in a fire-proof safe at night. . . . In the event of loss, insured will produce said books and inventory. Failure to comply with these conditions shall render this policy null and void, and no suit or action at law shall be maintained thereunder for any loss."

And in *Goddard v. East Texas F. Ins. Co.* 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906, the clause in regard to keeping in an iron safe was held to be a representation, and not a warranty. This clause was pasted on a blank space on the face of the policy, and the insured disclaimed all knowledge of its existence. It was attached and inserted in the policy in an improper place. In this case it was also held that the company had not been damaged, for the value of the stock at the time the inventory was made was fully proved, and the amount of subsequent sales which were all for cash could be easily ascertained from accounts kept in books which were preserved. See also *East Texas F. Ins. Co. v. Brin*, 3 Tex. App. Civ. Cas. (Willson) § 333, p. 400.

This case was distinguished in *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321, the court saying: "In that case the iron-safe provision did not in terms provide that it should

constitute a warranty, was not referred to in the policy, nor did it refer to the policy. It was pasted on the policy in the midst of a sentence which had no reference to the stipulations of the assured, in such connection as to destroy the sense of the sentence; and, what is more important than all these circumstances, the policy was complete without the attached paper containing the clause in question, and expressly stipulated in other parts what were its warranties." And was distinguished in *Landman v. Hartford Ins. Co. (La.)* 19 Ins. L. J. 572, Affirming 18 Ins. L. J. 813, on the ground that in the *Goddard Case* the clause was upon a separate slip pasted on the policy; but it did not appear that the clause was upon the sheet intended to constitute the very filling itself of the blank left in the printed form; and in that case the insurer was ignorant of the existence of this clause; and in the *Goddard Case* the books were preserved; here material books were lost.

In *Allred v. Hartford F. Ins. Co. (Tex. Civ. App.)* 37 S. W. 96, it was said that the facts were different from those before the court in *Goddard v. East Texas F. Ins. Co.* 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906. The doctrine there established and supported by other authorities (*Sun Ins. Co. v. Texarkana Foundry & Mach. Works Co.* 3 Tex. App. Civ. Cas. (Willson) § 320, p. 888; *East Texas F. Ins. Co. v. Brin*, 3 Tex. App. Civ. Cas. (Willson) § 333, p. 400; and *Brown v. Adams*, 3 Tex. App. Civ. Cas. (Willson) § 392, p. 464) does not apply to this case.

In *Clity Drug Store v. Scottish Union & Nat. Ins. Co. (Tex. Civ. App.)* 44 S. W. 21, the *Goddard Case*, 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906, was distinguished, as in that case the policy contained no reference to the iron-safe clause, which was placed after a description of the property insured, and in the midst of the covenants assumed by the underwriters, so as to leave it doubtful whether the promises exacted of the assured in the first part of the instrument are to be superadded as warranties to those enumerated in the last part, or whether the latter are to be considered the only warranties, leaving the former to be treated as representations.

Where the iron-safe clause was attached to the policy in the same manner as in *Goddard v. East Texas F. Ins. Co.* 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906, and it was not referred to in the body of the policy so as to identify it as a part of the policy, it was held to be a representation merely, and not a warranty. *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606.

c. Compliance.

Substantial compliance with the provision of a policy requiring books of account and inventory to be kept in a safe, or safe place, is held sufficient. *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060, Reversing (Tex. Civ. App.) 34 S. W. 462; *Sun Mut. Ins. Co. v. Brown (Tex. Civ. App.)* 36 S. W. 591; *Royal Ins. Co. v. Brown (Tex. Civ. App.)* 36 S. W. 591.

The accidental omission to put in the safe a small, paper-bound book containing a part of an invoice whose total is carried to the ledger, when the stock of goods insured had been seen only eighteen days before the fire by the agent, is not such a breach as will forfeit the insurance under a condition which agrees to take an itemized inventory of the stock on hand at least once every year, and to keep such books and inventory securely locked at night in a fire-proof

safe. An inventory made within the year will be sufficient under this clause. *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574.

And where the blotter for the sales on the day preceding a fire was left out of the safe, but the rest of the books were preserved, it was held that the finding by the trial court that the books were kept in substantial compliance with a warranty in the policy would not be reversed. *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060, Reversing (Tex. Civ. App.) 34 S. W. 462; *Sun Mut. Ins. Co. v. Brown (Tex. Civ. App.)* 36 S. W. 591; *Royal Ins. Co. v. Brown (Tex. Civ. App.)* 36 S. W. 591. In the latter case it was said: "It has been held by the supreme court of Texas, however, in a companion case, that a substantial compliance with a warranty is all that is required. *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060. While that decision seems to be in conflict with the decisions of the American courts, as well as the case of *East Texas F. Ins. Co. v. Kemper*, 87 Tex. 229, 27 S. W. 122, still, the facts being exactly the same, we deem it the law of this case."

The failure to keep the books of account and inventory in a fire-proof safe as required by the policy was held not to prevent a recovery where the inventory was not to be taken until thirty days after the policy, and the books were to be kept from the date of the inventory, and the fire occurred before the thirty days had elapsed. *Continental Ins. Co. v. Waugh (Neb.)* 83 N. W. 81.

A clause in regard to keeping books in a safe place is complied with where the books are placed in a safe of the kind in general use throughout the country as fire-proof, the materials of which are classed as uncombustible, although the books therein are destroyed. *Sneed v. British-America Assur. Co.* 73 Miss. 279, 18 So. 928.

And where the insured complied with that provision of the iron-safe clause requiring the books to be kept in a safe, but after the fire mislaid and lost one of the books and the last inventory, a recovery was allowed. *East Texas F. Ins. Co. v. Brin*, 3 Tex. App. Civ. Cas. (Willson) § 333, p. 400. In this case the court said: "It is contended by appellant that this case is different from the case of *Goddard v. East Texas F. Ins. Co.* 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906, in that the slip in the *Goddard Case* did not contain a description of the property, while the slip in this case does; that the iron-safe clause in the *Goddard Case* had no penalty provided for a failure to observe it, while in this a penalty is provided; that in the *Goddard Case* the iron-safe clause did not refer in any way to the policy, while in this case it does. Conceding the differences, we regard the decision in the *Goddard Case* as applicable to, and decisive of, this case, the principles involved being precisely the same."

The covenant to keep books, and the covenant to keep them in a safe, must be construed together, and, in the absence of an express stipulation to the contrary, the covenant to keep books will be construed to mean that the books shall be kept in the time and manner usual and customary with merchants. The failure to have the books in a safe at night will not prevent a recovery where the store door was locked but ready to be opened for trade to anyone who called, and the day's accounts were being posted on the books. *Jones v. Southern Ins. Co.* 38 Fed. Rep. 19; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034. (See *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507.)

In these cases the clause was: "Covenantants and agrees to keep a set of books showing a complete record: . . . and further covenantants and agrees to keep such books and inven-

tory securely locked in a fire-proof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on."

Loss of the books, inventory, or vouchers by reason of their not being in the safe was held not to prevent a recovery where such loss did not prejudice the insurers. *McNutt v. Virginia F. & M. Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61; *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Brown v. Palatine Ins. Co.* 89 Tex. 590, 35 S. W. 1060, *Reversing* (Tex. Civ. App.) 84 S. W. 462; *Sun Mut. Ins. Co. v. Brown* (Tex. Civ. App.) 86 S. W. 591; *Royal Ins. Co. v. Brown* (Tex. Civ. App.) 86 S. W. 591.

In *McNutt v. Virginia F. & M. Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61, it was held that inadvertently leaving the inventory book out of the safe on the night of the fire, and its destruction, did not work a forfeiture of the right to recover under an iron-safe clause. This was held to be a condition subsequent, and the insured supplied all deficiencies by obtaining duplicate invoices. It was further held that the contents and result of the inventory would in effect be a production of it, and if its contents were proved by oral testimony this in effect would be a production of the inventory.

Loss of books in moving them from a safe to a safe place was held not to bar a recovery.

The condition to keep books in a fire-proof safe, or in some other secure place not exposed to a fire which would destroy the house where such business is carried on, is not violated by reason of the loss of the inventory in removing the books from the safe to a safe place to prevent their destruction. *Liverpool & L. & G. Ins. Co. v. Kearney*, 82 C. C. A. 265, 94 Fed. Rep. 314.

And where books were kept in an iron safe under a clause in a policy requiring the books to be kept in an iron safe, or in a safe place, the attempted removal of the books from the safe to prevent their destruction, although the clerk dropped them in carrying them out, and they were destroyed, was held not to prevent a recovery where the removal was with due care. *Hast Texas F. Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720. In this case the court said: "If it be conceded that the clause referred to constitutes a warranty, we do not think the facts show, as contended by appellant, that it was broken. It did not require appellee absolutely and unconditionally to keep his books in a fire-proof safe."

But an iron-safe clause as to keeping and preserving books and inventory in a safe, or in a secure place, is not complied with when the only books preserved are a ledger and a day book showing sales and purchasers' names, kept in another building at night, but a set of single-entry books, invoices, and last inventory were left exposed and burned. *Criger v. Standard F. Ins. Co.* 49 Mo. App. 11.

In *Southern Ins. Co. v. Parker*, 61 Ark. 207, 32 S. W. 507, it was held that the habit of leaving the books under a counter in a saloon, instead of in a safe, although the saloon was kept open all night and the books contained a record of the hotel business, which hotel was attached to the saloon, making it inconvenient to use the books in the night if the books were locked up in the safe, prevented a recovery. In this case *Jones v. Southern Ins. Co.* 83 Fed. Rep. 19, was distinguished. The court said that "the covenant to keep the books in a fire-proof safe at night, or in some place secure from fire, was recognized as valid and binding; but it was said that the proper construction of that clause was not that the books shall be

kept in a safe from sunset to sunrise, but that they should be so kept from the time the business of the day is ended, and the store closed for the night." This construction did no violence to that clause of the policy by which the assured obligated himself to keep his books "in a fire-proof safe at night, etc." It only gave it a reasonable interpretation. But this would not be true if we should adopt the construction contended for by appellee."

And the oversight of the clerk in leaving the books out of the safe on the night of the fire was held to prevent a recovery, in *Goldman v. North British Mercantile Ins. Co.* 48 La. Ann. 223, 19 So. 182. In this case the court said: "But the plaintiffs contend that under the allegations in the supplemental petition the failure of compliance with the clause is excused. The allegation is the books and papers were not in the safe on the night of the fire, owing to the oversight or unintentional neglect of the assured or their clerk. We cannot accept the allegation as importing an equivalent or excuse for noncompliance with the plain obligation of the policy. If such an excuse could be accepted, it would be to change the contract. It would be idle to insert such a stipulation in the policy, if neglect or oversight of the assured could be deemed sufficient to avoid the effect of their failure to observe a duty imposed on them in explicit terms."

The failure to comply with the conditions in an iron-safe clause which will forfeit the policy as to the goods therein will not avoid the policy on the building where the value is separately stated in the same policy. *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606.

So, a policy may be sustained as to store fixtures, and furniture, although there is a non-compliance with the fire-proof-safe clause in regard to preserving inventory and books of account in a safe. *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 18 So. 86.

d. Waiver.

It seems that in some cases it is held that the failure to comply with the iron-safe clause as to the place in which books are to be kept may be waived by the fact that the insurer had knowledge of noncompliance with such provision, and may be waived by denial of liability on other grounds, and by causing expense in proof of loss. But a waiver by an agent will be of no force unless such agent has the power. A waiver may be prevented by a stipulation.

In some cases it is held that knowledge by the insurance company of failure to comply with the iron-safe clause will be treated as a waiver of that condition. *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. E. 580; *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 18 So. 86; *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 383, 50 N. E. 772.

The failure to comply with an iron-safe clause requiring the insured to keep said inventory and the books securely locked in an iron safe (not a fire-proof safe) during the hours that such store is closed for business was held not to prevent a recovery where such books were kept in the dwelling house, and were not burned, and the company knew that the insured had no safe and kept his books at the house. *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. E. 580.

And an insurance company cannot avoid a policy for breach of an iron-safe clause where the agent, when he issued the policy and collected the premium, knew that the insured had no safe and did not intend to keep one. *Mitch-*

ell v. Mississippi Home Ins. Co. 72 Miss. 53, 18 So. 86.

An iron-safe clause providing for keeping books and for keeping them in a safe, or safe place, was held to be a warranty; but the knowledge by the company that such agreement was not complied with, without taking steps to forfeit the policy, was held to amount to a waiver of such provision. *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772. In this case the books were kept in a wooden desk, and were burned.

A stipulation in a slip, signed by the agent alone, requiring the books to be kept in a safe, may be waived by such agent. *Niagara F. Ins. Co. v. Brown*, 24 Ill. App. 224. In this case the court said: "If the agent had the power to bind the company by detaching it entirely we think he could waive the performance of it and still leave it physically pinned to the policy,—at least as he alone signed and attached it, and the policy made out and delivered by him without it would be valid." In this case the agent knew no safe was kept, and on the Saturday preceding the fire made a personal examination of the risk.

An application made a part of the policy as follows: "Question. Do you agree to keep your books in an iron safe at night? Answer. Keep them in dwelling at night",—is a waiver of warranty contained in a policy issued on such application, although the policy provides that the insured should keep the books of his business and the last inventory of his stock at night in a fire-proof safe, or in some secure place not exposed to the fire which would destroy the building insured. *Sprott v. New Orleans Ins. Asso.* 53 Ark. 215, 13 S. W. 799.

In *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11, the case of *Sprott v. New Orleans Ins. Co.* 53 Ark. 215, 13 S. W. 799, was distinguished, as in that case the applicant told the solicitor that he had no safe, and would keep the books in the dwelling part of the building insured, and the answer of the applicant showed that the books would be kept in a designated place, and the issuance of the policy was held to be an acquiescence in the purpose expressed.

Where the insured made an affidavit that the cash book was not in the safe at the time of the fire as required by the iron-safe clause, and after the affidavit was made the book was found and taken to the adjuster, who said, "That's all right," and the other cash book was afterwards found and was in the safe, it was held that it was a question for the jury whether the statement made by the adjuster was a waiver of a strict compliance with the requirements of the policy. *Curnow v. Phoenix Ins. Co.* 46 S. C. 79, 24 S. E. 74.

But the failure to keep a set of books, and to preserve them in an iron safe as required by the policy, will be sufficient to defeat a recovery unless the company or its agent, with full knowledge of the forfeiture, waives such requirement. *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. 399.

Under an iron-safe clause warranting that the insured will keep a set of books and keep them in an iron safe, a petition alleging ignorance of such clause, and attempting to avoid it by charging that defendant's agents took possession of the *débris* and sold the same, was held to fail in alleging waiver, where it did not allege that such agents knew that the insured had not complied with such clause. *German-American Ins. Co. v. Waters*, 10 Tex. Civ. App. 363, 30 S. W. 576.

Where an inventory had been taken in 1893, and a partial inventory in 1894, more than one year prior to the issuance of the policy, it was

held that the company could not avoid the policy for failure to preserve such inventory in a fire-proof safe, where the denial of liability had been made upon the ground that a new inventory had not been taken. *Continental Ins. Co. v. Waugh* (Neb.) 38 N. W. 81. In this case the court said: "Having assigned as a reason for refusal to pay, the alleged failure of the assured to preserve his books of account, and presenting that objection alone as justification for disavowing liability under its contract of indemnity, it cannot, after litigation is begun, be heard to urge other and additional grounds for refusing payment for the loss sustained."

This clause may be waived by causing expense in substitution of lost books.

A fire-proof clause requiring the insured to keep his books and invoices in a fire-proof safe, or in a safe place, was waived where the company, upon being informed that they were kept in a wooden desk and were burned, directed him to incur trouble and expense in procuring duplicates of the burned invoices to be used instead of the original. *Brown v. State Ins. Co.* 74 Iowa, 428, 38 N. W. 125.

And where the adjuster was fully advised of the destruction of the books and the statement of cash sales, and made no objection, but proceeded to go through the books and examine the original invoices, and required plaintiff to secure from the collector of internal revenue a statement of all whisky purchased, it was held that the fire-proof-safe clause was waived. *McCollum v. Niagara F. Ins. Co.* 61 Mo. App. 352. In this case a book containing purchases of whisky was left out of the safe and burned, and also about one half of the slips upon which were registered the daily sales, because the safe was full, and the book was too large to go into the safe.

But in *Crigler v. Standard F. Ins. Co.* 49 Mo. App. 11, it was held that a notice to the insurance agent at the time of application for the policy that the applicant had no safe would not constitute a waiver of the "iron-safe clause" requiring the books to be kept in an iron safe, or in some secure place, and a failure to comply defeated a recovery. In this case the court said that, if the iron-safe clause was waived, the other condition to keep the books in a secure place not exposed to the fire that would destroy the house where said business is carried on would still be binding.

A waiver will not be effective if the agent has not power.

So a waiver by a local agent informing the insured that it was not necessary to have an iron safe, or to keep a set of books, will not bind the company, under a policy providing that no agent shall have authority to waive the requirements of an iron-safe clause. *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670.

And a verbal waiver, made at the time of the execution of the policy, dispensing with the iron-safe clause as to preserving books, will not bind the company, where the policy provides that no officer or agent shall have power to waive any condition of the policy unless such waiver shall be written upon, or attached to, the policy. *Murphy v. Royal Ins. Co.* 52 La. Ann. 775, 27 So. 148.

An appraisal made under an agreement that the making of the appraisal should not waive the company's right to claim a forfeiture will not be a waiver of a forfeiture for non-compliance with the iron-safe clause requiring inventory to be kept in a safe. *City Drug Store v. Scottish Union & Nat. Ins. Co.* (Tex. Civ. App.) 44 S. W. 21.

IV. Summary.

A fire insurance policy usually requires: Keeping of books of account and inventory; production of the same on demand; preserving the same in a fire-proof safe. The connection of the clauses by the conjunction "and" may require that all of the conditions must be broken to prevent a recovery, as in *CONNECTICUT F. INS. CO. v. JEARY*. Generally these clauses are held reasonable and valid and a warranty, and a compliance with them to be a condition precedent to a recovery. The weight of authority is that a substantial compliance, or a compliance with the same so far as possible, will be required. The conditions in these clauses may be waived by the company.

The exceptions to the foregoing are the cases in Kentucky and Nebraska, which say that the clause as to keeping of books in a safe is without consideration. A clause providing for preserving books and papers, pasted in the wrong place on the policy, is not a warranty. The cases usually hold that a slight omission, as error in bookkeeping or the loss of an unimportant book, will not prejudice the insured.

L. T.

BULLARD & HOAGLAND, *Plffs. in Err.*,v.
C. L. CHAFFEE.

(.....Neb.....)

*It is the settled doctrine of this court that one can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor.

(December 4, 1900.)

ERROR to the District Court for Douglas County to review an order releasing defendant from liability in a garnishment proceeding to reach a debt which he owed to William Cameron & Company. *Affirmed*.

The facts are stated in the opinion.

Mr. Ed. P. Smith, for plaintiffs in error:

The very spirit and purpose of the attachment law is to enable the creditor to reach and hold in a proper case every species of property, goods, credits, or effects which may be of value and which ought to be applied to the payment of his claim.

*Headnote by NORVAL, Ch. J.

NOTE.—The above decision, holding that in Nebraska a person can be garnished for a debt which he owes to another, only when his creditor is a resident of the state, is in accordance with the doctrine declared in several jurisdictions, as shown by the note to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577.

On the doctrine that the situs of a debt is not at the domicile of the debtor, see also *Swedish American Nat. Bank v. Bleeker* (Minn.) 42 L. R. A. 283.

Later cases since the note above referred to, to the effect that the situs of a debt is at the debtor's domicile, are *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* (Mo.) 27 L. R. A. 651; *Neufelder v. German American Ins. Co.* (Wash.) 22 L. R. A. 287; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161; *Lancashire Ins. Co. v. Corbetts* (Ill.) 36 L. R. A. 640.

The doctrine that such a debt has a situs at the debtor's domicile sufficient to sustain jurisdiction 51 L. R. A.

If the theory is correct, that this debt from Chaffee to Cameron & Co. can be reached by garnishment only in Waco, Texas, the place where Cameron & Co. resides, and where this debt is payable by its terms, then and in that event it is absolutely exempt from attachment or garnishment process at all.

The rule is universal that a garnishee can be required to appear and answer only in the state of his residence.

Wright v. Chicago, B. & Q. R. Co. 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90.

While, by fiction of law, a debt, like other personal property, is for most purposes—as, for example, transmission and succession—deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction always yields to laws for attaching the property of nonresidents, because such laws necessarily assume that the property has a situs distinct from the owner's domicile.

Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905; *Embre v. Hanna*, 5 Johns. 101; *Blake v. Williams*, 6 Pick. 285, 17 Am. Dec. 372; *Lewis v. Bush*, 30 Minn. 247, 15 N. W. 113; *Drake, Attachment*. ¶ 597; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663; *Pomeroy v. Rand, McN. & Co.* 157 Ill. 176, 41 N. E. 630.

Wherever a creditor may maintain a suit to recover his debt it may be attached as his property, provided the laws of such place authorize it.

Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 27 L. R. A. 651, 29 S. W. 1010, 54 Mo. App. 147; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 36 S. W. 29; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Berry Bros. v. Davis*, 77 Tex. 191, 13 S. W. 978; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919.

The attachment laws recognize the right of a creditor of a nonresident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state for the purposes of attachment proceedings

tion and make a judgment there rendered valid in another state, though not accepted in some of the decisions referred to in the above note and in some of the later cases, has been settled by decisions of the United States Supreme Court upholding such judgments. See *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *King v. Cross*, 175 U. S. 896, 44 L. ed. 211, 20 Sup. Ct. Rep. 131. These decisions are, of course, binding in all the states, but they do not overthrow such decisions as that of *BULLARD v. CHAFFEE*, above reported; that is to say, if a state court entertains jurisdiction in such a case, the Federal decisions require its judgment to be respected in other states, but if the state court refuses to entertain jurisdiction in such case, on the ground that it is contrary to correct principles to sustain the suit, its decision is not subject to control by the Federal court.

may fix the situs of a debt at the domicile of the debtor.

Douglas v. Phenix Ins. Co. 138 N. Y. 209, 20 L. R. A. 118, 33 N. E. 938; *Embree v. Hanna*, 5 Johns. 101; *Williams v. Ingersoll*, 89 N. Y. 508.

The liability of the garnishee will not be affected by the fact that he has agreed with the defendant to pay the money or deliver the property for which he is sought to be charged, to the defendant himself, or any other person, at some particular time, or in some state or county other than the one in which he is sought to be charged.

Rood, Garnishment, § 60; *Cross v. Brown*, 19 R. I. 220, 33 Atl. 147; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 46 N. E. 631.

Mr. Martin Langdon for defendant in error.

Norval, Ch. J., delivered the opinion of the court:

This is an error proceeding brought to review a judgment of the district court of Douglas county. The cause was submitted on an agreed printed abstract of the record, in pursuance of § 1, rule 2. The brief of counsel for plaintiff contained a very clear and concise statement of the case, and which we adopt: "Bullard & Hoagland is a partnership carrying on a retail lumber business in Omaha. William Cameron & Co. are wholesale dealers in lumber located at Waco, Tex., and carrying on business from that point. C. L. Chaffee is also a dealer in lumber, residing and doing business in Omaha. Bullard & Hoagland brought suit in justice court of Douglas county against Cameron & Co., to recover damages for the failure of Cameron & Co. to deliver certain lumber sold to Bullard & Hoagland. An affidavit for an attachment was filed on the ground that Cameron & Co. were nonresidents of the state of Nebraska, and C. L. Chaffee was garnished as having money in his hands belonging to, or as being indebted to, Cameron & Co. Service was had on Cameron & Co. by publication. Chaffee appeared in answer to the garnishment summons, and his examination disclosed that he was indebted to Cameron & Co. in an amount exceeding the claim of Bullard & Hoagland, but he also testified that the money which he owed Cameron & Co. was payable in Waco, Tex. On this showing the justice dismissed the action for want of jurisdiction, and released the garnishee, holding the money was not subject to garnishment. The case was then carried to the district court, and in that court Chaffee filed objections to the jurisdiction of the court over the fund on the ground that the same was payable in Texas. The district court sustained the objection, and released the garnishee. From this order releasing the garnishee, these proceedings in error are prosecuted."

One question is presented for consideration, viz.: Can a debtor be garnished in this state if the debt he owes is payable in another state, his creditor also being a resident in that other state? The brief of plain-

tiff very ably presents the arguments which go to sustain the affirmative of this proposition, and decisions of courts which adhere to that rule are carefully collated and presented. On the proposition there is a conflict in the decisions. Were the question open to discussion in this state, it would be a pleasure for us to amplify upon the subject, but, unfortunately for plaintiff, this court has adopted the opposite rule, and, as it can be upheld by both reason and authority, it is not the inclination of the court to change it. Both views have their advantages and defects, as will appear in the elucidation of the matter. The leading case in this state is *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 56 N. W. 711, the opinion being by Maxwell, Ch. J. The action was begun in Saline county by the holder of an insurance policy to recover for loss under its terms. The defendant set up in its answer that its principal place of business was in St. Louis, Missouri; that it had a regularly appointed agent in Chicago, Illinois, and also one in Crete, Nebraska; that by the terms of the policy any loss under it was payable at Crete; that after the loss the company was garnished in Chicago, in a suit commenced there against Hettler, plaintiff in that action, service being had on him by publication; that it had answered in said garnishment proceedings, admitted that it owed Hettler, but that judgment had not yet been rendered in the case. Under this state of facts we held that the Illinois court had no jurisdiction to entertain garnishment proceedings against the company; that, the debt being payable in Crete, Nebraska, that being the place of residence of the principal debtor, there was no money or property of his in the hands of the insurance company in the state of Illinois subject to garnishment proceedings. And in so holding we but followed other decisions of this court. *Matthews v. Smith*, 13 Neb. 178, 12 N. W. 821; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Turner v. Sioux City & P. R. Co.* 19 Neb. 241, 27 N. W. 103. Decisions of other states upholding the same rule are easily obtainable. *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. 278; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 525; *Taylor v. Life Asso. of America*, 13 Fed. Rep. 493.

No doubt objection can be made to this rule. It is possible that under it no garnishment of a debt can be had where the debtor and creditor live in different states, the debt being payable in the state wherein the creditor is resident. Of course, it does not follow from the fact that the creditor of such a creditor is remediless. However, the opposite rule has also its drawbacks, quite as objectionable, obviously as the rule already adopted by this court. Some of the difficulties encountered in these jurisdictions are well represented in one of the cases cited by counsel for plaintiff, as the court found itself involved in a case where questionable application of legal maxims must be resorted to, to save a garnishee from paying his debt twice; the case being *Lancashire*

Ins. Co. v. Corbetts, 165 Ill. 592, 36 L. R. A. 640, 46 N. E. 631. The court, while it announced the law to be that a debt could be garnished in any jurisdiction where the garnishee might be sued by his creditor, recognized the difficulty mentioned, and, because the court of another state had already rendered garnishment judgment against the garnishee in a suit instituted by another creditor of its creditor, refused to sustain a judgment rendered in favor of the plaintiff in the action decided by it. This, although the justice who wrote the opinion conceded that the rule that, where courts have concurrent jurisdiction, the one first acquiring jurisdiction will retain it until the matter is finally disposed of, does not apply to courts in different states. The court obviously rested its decision on the doctrine that the garnishee is not to be placed in any worse position by the garnishment than he occupied as the debtor of the principal defendant. The court further disclaimed that to refuse to render judgment against the garnishee was to discriminate against its own citizens, but asserted that, as the citizens of that state had the same facilities for obtaining judgment and satisfaction as the citizens of other states, the maxim, *Qui prior est tempore potior est jure*, was applicable. The decision seems also to have been rested somewhat upon the doctrine of comity between states, whereby the judgments of the courts of one state are recognized by those of other states. Unfortunately, sometimes, for litigants, courts refuse to set aside the doctrine that the courts will protect the rights and interests of citizens, even at the expense of the rights and interests of the citizens of other states, or to hold that such doctrine must give place to the maxim that he who is first in time is strongest in right. Hence, from this conflict of law has followed the evil occasionally that a debtor has, by garnishee process, been compelled to pay his debt twice, notwithstanding the rule that the garnishee is not to be placed in any worse position by garnishment process than he would occupy as debtor of the principal defendant. While we are not entirely satisfied with the doctrine to which this court is committed, we are constrained to adhere to that rule that a debtor can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor, as long as it appears that no greater evils can flow from it than from the one holding that the garnishment process may issue in any jurisdiction where the garnishee may reside, regardless of the place where his debt may be payable or his creditor may reside. It is true that our holding prevents garnishment process from issuing where a debtor resides in this state, his debt being payable in another state, the latter being the place of residence of his creditor; but that is a defect in the law readily remedied by legislative enactment.

The order of the District Court is affirmed.

Rehearing denied.

51 L. R. A.

Charles W. LITTLE, *Plff. in Err.*,
v.

STATE of Nebraska.

(.....Neb.....)

- *1. One who, without complying with the statute establishing a state board of health and prohibiting the practice of "medicine, surgery, and obstetrics" without a license, practises medicine, is liable to the penalty prescribed by such. *State v. Buswell*, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728.
2. In construing statutes effect should be given to the intention of the legislature.
3. One who practises what is known as "osteopathy" without obtaining a certificate from the state board of health is a practitioner of medicine as defined by article 1, chap. 55, Comp. Stat., and is liable to the penalty prescribed specifically for practising medicine without a license.
4. Section 17, art. 1, chap. 55, Comp. Stat., is within the purview of the title of the act.
5. "Surgery and obstetrics," as those terms are popularly understood, are embraced in the title of an act to regulate the practice of medicine.
6. The statute is not prohibitive in its effect, but attempts to regulate the practice of the art of healing.
7. Several misdemeanors of the same kind may be set forth in as many counts of an information, and the prosecutor is not required to elect upon which count he will proceed.

(November 21, 1900.)

ERROR to the District Court for Lancaster County to review a judgment convicting defendant of practising medicine without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. Abbott, Selleck, & Lane, for plaintiff in error:

The first statute on the subject was enacted in 1881 making it unlawful "for any person to practise medicine, surgery, or obstetrics, or any of the branches thereof, in the state without first having complied with the provisions of" the act.

Section 16 of the act of 1891 is a re-enactment of § 9 of the act of 1881, and is the only section in the act which prescribes a penalty.

The re-enactment of that section operates to continue in force the section re-enacted, and does not give that section any other or greater force or effect than it had before the re-enactment.

State ex rel. Baldwin v. McColl, 9 Neb. 203, 2 N. W. 213; *State ex rel. Churohill v. Bennis*, 45 Neb. 724, 64 N. W. 348.

Section 17 of the statute of 1891 purports to create an additional offense or offenses, but does not impose any penalty therefor.

The penalty prescribed in § 16 cannot be held to apply to any acts which did not con-

*Headnotes by NORVAL, Ch. J.

NOTE.—For other cases in this series as to practice of osteopathy, see *State v. Liffing* (Ohio) 40 L. R. A. 334; and *Nelson v. State Bd. of Health* (Ky.) 50 L. R. A. 383.

stitute an offense when the section prescribing the penalty was enacted.

The offense created by § 17 does not come within the meaning of the title of the act.

Smith v. Lane, 24 Hun, 632; *State v. Liffing*, 61 Ohio St. 39, 46 L. R. A. 334, 55 N. E. 168.

The title of the act purports to regulate the practice of medicine, while the body of the act relates to "surgery" and "obstetrics," as well as the offenses charged against accused. This fact would render the entire act void, unless it be held that surgery and obstetrics, as treated in the body of the act, come within the purview or meaning of the term "practice of medicine," as used in the title.

Sheasley v. Kcens, 48 Neb. 57, 66 N. W. 1010; *West Point Water Power & L. Improv. Co. v. State ex rel. Moodie*, 49 Neb. 223, 68 N. W. 507; *State v. Hurds*, 19 Neb. 316, 27 N. W. 139; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349; *Crowther v. Fidelity Ins. T. & S. D. Co.* 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. Rep. 41; *State v. Beck*, 21 R. I. 288, 45 L. R. A. 269, 43 Atl. 366.

It would not be advisable to require efficiency or perfection in the same branches of study for the successful practice of medicine, practice of surgery, practice of obstetrics, or the practice of treating by rubbing and manipulation with the hands for a physical ailment.

Messenger v. State, 25 Neb. 674, 41 N. W. 638; *Ives v. Norris*, 13 Neb. 252, 13 N. W. 276.

The act is void, at least as to the alleged offense charged against plaintiff in error, because it is prohibitive in its effect.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

On petition for rehearing.

The words "who shall practise medicine in any of its branches, or who shall treat or attempt to treat any sick or afflicted person by any system or method whatsoever for reward or compensation, without first complying with the provisions of this law," must be held to refer to physicians or surgeons belonging to some school or system of medicine practising or desiring to practise medicine in this state.

Nelson v. State Bd. of Health, 22 Ky. L. Rep. 438, 50 L. R. A. 383, 57 S. W. 501.

Penal statutes should be construed strictly, and forfeiture and punishment must be specifically imposed, and not left as a matter of intention.

Bishop, Statutory Crimes, 2d ed. chap. 22, § 194; *Endlich*, Interpretation of Statutes, ed. 1888, § 320, p. 455.

Messrs. C. J. Smyth, Attorney General, *Paul Pixey*, and *T. C. Munger*, for defendant in error:

Chapter 55 of the Compiled Statutes is constitutional in its general scope.

O'Connor v. State, 46 Neb. 157, 64 N. W. 719.

Under the statute no one can lawfully practise medicine in this state "without hav-

ing first obtained and registered the certificate provided for by this act."

It is the duty of the court to give effect to the intention of the law-making power as embodied in the statutes. The legislature is presumed to mean what it has plainly expressed, and when it has so expressed its meaning, construction is excluded.

Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935.

The words of § 17 in their ordinary acceptance and popular meaning declare treatment such as Dr. Little gave to be practising medicine.

Dogge v. State, 17 Neb. 140, 22 N. W. 348.

The definition of practising medicine given in the statute is in fact the popular meaning of the term, to wit, the discovery of the cause and nature of the disease and pain and the administration of remedies, or the prescription of treatment therefor.

State v. Mylod, 20 R. I. 632, 41 L. R. A. 428, 40 Atl. 754; *Eastman v. People use of State Bd. of Health*, 71 Ill. App. 236; *State v. Buswell*, 40 Neb. 159, 24 L. R. A. 68, 58 N. W. 728; *O'Connor v. State*, 46 Neb. 158, 64 N. W. 719; *Mawell v. Swigart*, 48 Neb. 789, 67 N. W. 789.

The legislature has the power to say who may lawfully practise medicine, and such power is not unconstitutional.

The title is a comprehensive one, and fully complies with all the requirements of § 11 of article 3 of the Constitution.

Affholder v. State ex rel. McMullen, 51 Neb. 91, 70 N. W. 544; *State ex rel. Wheeler v. Stuht*, 52 Neb. 209, 71 N. W. 941.

The legislature having adopted a definition of what is meant by "practice of medicine," which covers surgery and obstetrical cases, the title to the act covers both.

State v. Buswell, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728; *Leighton v. Sargent*, 27 N. H. 468, 59 Am. Dec. 388; 1 Bouvier, Inst. 403.

Such regulation is in the power of the legislature.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Fleischer*, 41 Minn. 69, 42 N. W. 696; *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789; *Kennedy v. Schultz*, 6 Tex. Civ. App. 461, 25 S. W. 667; *Dowdell v. McBride*, 18 Tex. Civ. App. 645, 45 S. W. 397; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; 18 Am. & Eng. Enc. Law, *Statutory Regulations*, p. 428; *Iowa Eclectic Medical College Asso. v. Schrader*, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24.

Norval, Ch. J., delivered the opinion of the court:

Charles W. Little comes on error from the district court of Lancaster county, he having been there convicted of practising medicine without having procured a license, as required by article 1, chap. 55, Comp. Stat. He is what is known as a "practitioner of osteopathy," the practice of which consists principally in rubbing, pulling, and

leading with the hands and fingers certain portions of the bodies, and flexing and manipulating the limbs, of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble. He urges a number of errors, the principal contention, however, being that his occupation does not fall within the definition of a practitioner of medicine as found in § 17 of the said article. This court, however, is of the opinion that those who practise osteopathy for compensation come within the purview of the statute as clearly as those who practise what is known as "Christian Science," and therefore this case falls within the principle of *State v. Buscull*, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728. With the rule announced in that case we are fully satisfied, although it is possible that the decisions of some other courts are in conflict with it. The doctrine declared in that case will carry out the legislative intent, and effect the object of the statute, which is "to protect the afflicted from the pretensions of the ignorant and avaricious, no matter whether the persons pretending to heal bodily or mental ailments do or do not profess to follow beaten paths and established usages." In construing statutes effect should be given to the intention of the legislature. It is argued that osteopaths do not profess to treat any physical or mental ailment, but that they merely seek to remove the cause of such ailment or disease, and therefore do not come within the definition mentioned. The writer is not deeply versed in the theory of the healing art, but he apprehends that all physicians have the same object in view, namely, the restoring of the patient to sound bodily or mental condition; and, whether they profess to attack the malady or its cause, they are treating the "ailment," as the word is popularly understood. We can therefore see no good reason why the practice of osteopathy does not fall within the provisions of the statutes under which defendant was prosecuted, as clearly so as do ordinary practitioners, or those who profess to heal by what is known as "Christian Science." *Eastman v. People use of State Bd. of Health*, 71 Ill. App. 236.

Some technical objections it will be necessary to notice before finally disposing of the case. It is urged that no penalty is imposed for the alleged offense, it being claimed that, after the section defining the offense was amended so as to include a wider scope of offenses, the one for which he was prosecuted was included among those injected into the section by the amendment. And it is claimed that, as the section imposing the penalty was not re-enacted at the same time the other section was amended, the penalty can apply only to those offenses included in the amended section as originally enacted. The objection is perhaps ingenious, but un-

51 L. R. A.

tenable. Had the legislature intended that no penalty should attach to the new classes of offenses denounced in the section as amended, it is more reasonable to suppose that it would have amended the section denouncing the penalty so as to leave no room for doubt that no penalty was intended, rather than that it should leave the latter unchanged. The fact that it was left in its original condition seems to furnish indubitable proof that the legislature was satisfied with this section, and that it was intended to include and define the proper punishment for all offenses defined in the amended section.

Another objection is that the definition included in § 17 is wider than the title of the act, the title being, among other things, "to regulate the practice of medicine;" and, further, that the act attempts to regulate, not only the practice of medicine, but also the practice of surgery and obstetrics. We have no doubt but that the legislature had the power to define what acts would constitute the practice of medicine, which it had done in § 17. Further, as popularly understood, surgery and obstetrics are each a part of the healing art,—the art of medicine. In this country, as a rule, the surgeon, physician, and obstetrician are usually comprised in one and the same person, and he who practises these arts combined is popularly considered as practising medicine, no matter which one of the three arts he may at any one time be utilizing. The objection is untenable.

It is insisted that the statute under consideration is void, because it is prohibitive in its scope and effect. The construction of the act which counsel places upon it we are unwilling to adopt. The statute undertakes to regulate, and it is not prohibitive in its nature. Anyone who has complied with the provisions may practise medicine in this state. It is prohibitive only as to those who have not been duly licensed by the state board of health to practise the art of healing.

The information contained sixteen counts, each charging a misdemeanor in violating the statute in question. It is claimed the court erred in not requiring the county attorney to elect upon which count he would proceed. The ruling was proper, as the offenses charged were of a similar kind. *Hans v. State*, 50 Neb. 150, 69 N. W. 838; *Hurlburt v. State*, 52 Neb. 428, 72 N. W. 471.

A number of objections are urged in the brief of defendant, all of which have had due consideration, and we have failed to discover that any reversible error has been pointed out by his counsel. The verdict is supported by ample evidence.

The judgment is affirmed.

Rehearing denied January 3, 1901.

GEORGIA SUPREME COURT.

Edward HANDEL, *Plff. in Err.*,v.
William F. CHAPLIN, Superintendent of
Public Works.

(111 Ga. 800.)

*Congress not having legislated upon the subject of the offense of aiding articleed seamen or apprentices to desert or leave a foreign vessel while in the waters of this state, the legislature of the state had the right and power to enact § 655 of the Penal Code, making it a misdemeanor for any person to aid or induce an articleed seaman or apprentice to desert from or leave his vessel while in the waters of this state. The act in no way attempts to regulate or interfere with commerce, but is an aid thereto. Where the subject is local, and not national, in its nature, and does not require a uniform system of regulation, then, in the absence of legislation on it by Congress, it may be regulated by the state.

(August 7, 1900.)

ERROR to the Superior Court for Chatham County to review a judgment refusing to release petitioner in a habeas corpus proceeding from custody to which he had been committed for violation of a statute against assisting the desertion of sailors. *Affirmed.*

The facts are stated in the report officially prepared for consideration by the supreme court, which was as follows:

Handel filed his petition for the writ of habeas corpus. The grounds of his petition are as follows: "(1) That your petitioner is restrained of his liberty. (2) The person restraining the liberty of your petitioner is William F. Chaplin, and the mode of such restraint is compulsory work and labor, and confinement in the county chain gang of Chatham county; and the place of such detention is at the camps of said county chain gang in the county of Chatham, as aforesaid. (3) The cause or pretense of such restraint of your petitioner as aforesaid is a sentence passed upon your petitioner on January 26, 1900, by the Honorable T. M. Norwood, judge of the city court of Savannah, a copy of which sentence is hereto annexed, and made a part of this petition. (4) Petitioner says that said restraint of him, your petitioner, by the said William F. Chaplin, superintendent of the public works of said county, is illegal in that: First. Your petitioner was sentenced, as hereinbefore set forth, for violation of the provisions of § 655 of the Penal Code of 1895 of this state, as will appear from the accusation in said case, of file with the clerk of said city court, a copy of which

*Headnote by FALLIGANT, J.

NOTE.—That a state statute making it an offense to solicit seamen to desert is not a regulation of foreign or interstate commerce, see in this series the case of *Re Young* (Or.) 48 L. R. A. 153, and footnote as to liability of third party for inducing breach of contract. 51 L. R. A.

is hereto attached and made a part of this petition, and leave of reference to which is hereby prayed. Second. Said § 655 is void and unconstitutional for the following reasons: (a) The power to legislate upon the subject-matter of said section was and is the exclusive right of Congress, and taken completely from state legislatures. (b) That by reason of the nature of the subject-matter legislated upon in said § 655, and the questions and interests involved in said law, the power to legislate thereon resides with, and should be exercised exclusively by, Congress. (c) Congress had full power to legislate upon the subject-matter involved in said § 655, and to pass laws to prevent the evil consequences of the acts in said section aimed at by the legislature of this state, and in pursuance of such rightful power Congress has passed a full and complete body of laws, and said laws are now still in force; and therefore said § 655 is void and unconstitutional, and especially so in that said § 655 is in many and material respects at variance with and in repugnance to the aforementioned laws of the United States. (d) Said § 655 is void by reason of its repugnance to the laws of the United States. (e) Said § 655 is void by reason of § 2, art. 6, of the Constitution of the United States, and §§ 1, 2, and 3 of § 1, art. 12, of the Constitution of the state of Georgia. (f) That, if any part of said § 655 is valid, such valid part cannot be separated from the unconstitutional and void parts of said act, and that therefore said section should be declared to be void and ineffective. Third. The bark referred to in the attached accusation, and called the 'D. H. Morris,' is a Norwegian bark."

Accusation:—

State of Georgia, County of Chatham, City of Savannah.

And now, on this 26th day of January, in the year of our Lord 1900, comes William W. Osborne, solicitor general of the eastern judicial circuit of Georgia, who prosecutes for the state of Georgia, in the city court of Savannah, and by accusation made on oath, and in accordance with the statute in such case made and provided, in the name or behalf of the citizens of Georgia, charge and accuse John Bowen and Edward Handel, of the county of Chatham and state aforesaid, with the offense of misdemeanor for that the said John Bowen and Edward Handel, in the county of Chatham and state of Georgia aforesaid, on the 20th day of January, in the year of our Lord 1900, did aid one John Bendecken, an articleed seaman on bark D. H. Morris, to desert from or leave his vessel while in the waters of this state, contrary to the laws of the said state, the good order, peace, and dignity thereof.

W. W. Osborne,
Solicitor General, E. J. C. of Georgia.

On return of the petition and answer thereto, and after argument had, the court rendered the following judgment:

Judgment of the Court.

In Chatham Superior Court.

Edward Handel

v.

William F. Chaplin, } Habeas corpus.
Supt. of Public Works. }

The petitioner was convicted and sentenced by the city court of Savannah, under § 655 of the Penal Code of 1895, for aiding one John Bendecksen, a seaman, to desert from the bark D. H. Morris. It is admitted that the bark was a foreign, Norwegian, bark, and that there is no law of the United States covering the precise case, and that the section of the Criminal Code does not conflict with any statute of the United States, nor interfere directly or indirectly with foreign or interstate commerce. It is claimed, however, that the United States having exclusive jurisdiction, and having legislated with reference to American seamen and ships, the silence of Congress upon the subject of foreign ships and seamen amounts to the exclusion of state action; and the section is therefore claimed to be unconstitutional for the reasons stated in the petition, and the conviction and sentence void and of no effect. Regarding this state statute as a purely local law, under the police power, affecting persons within this jurisdiction, and not in conflict with any law or jurisdiction of the United States, interfering in no respect with foreign or interstate commerce, or with any jurisdiction of the laws of the United States, but, rather, promotive of both, it is held that § 655 is a valid, constitutional law; and, petitioner having been lawfully convicted under said law, his application for release is refused, and he is hereby remanded back into custody, that the sentence of the city court of Savannah may be carried out. R. Falligant, Judge.

In open court, Apl. 7, 1900.

To which judgment Handel excepted.

Messrs. Robert J. Travis and John L. Travis, for plaintiff in error.

The power of Congress to legislate upon the subject-matter is exclusive.

Desty, Shipping & Admiralty, ¶ 2; *United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004; *Prentice & Egan*, Commerce Clause of Fed. Const. p. 59.

The state should not legislate where the subject-matter will clearly admit of one uniform system of legislation, or where uniformity of regulations affecting alike all the states is required.

Henderson v. New York, 92 U. S. 260, 272, sub nom. *Henderson v. Wickham*, 23 L. ed. 543, 549; *Cardwell v. American Bridge Co.* 113 U. S. 210, 28 L. ed. 961, 5 Sup. Ct. Rep. 423.

This is not an exercise of the police power of the state.

Henderson v. New York, 92 U. S. 260, sub nom. *Henderson v. Wickham*, 23 L. ed. 543. 51 L. R. A.

A statute which obstructs the entrance into the state of persons who are neither paupers, vagabonds nor criminals, or in any wise unsound in body or mind, is not an exercise of the police power in any just sense of that term.

Prentice & Egan, Commerce Clause of Fed. Const. p. 58; *State v. The Constitution*, 42 Cal. 579.

Had the state a right originally to enact these laws, Congress has now covered the whole subject with a set of statutes.

State laws on the same subject are void. Desty, Shipping & Admiralty, ¶ 4, note 6.

The state cannot pass even supplementary or auxiliary legislation on the same subject, Congress having acted.

Prigg v. Pennsylvania, 16 Pet. 617, 10 L. ed. 1089; *Houston v. Moore*, 5 Wheat. 21, 5 L. ed. 24; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819.

The intention of Congress may be manifested as clearly by what it leaves out as by what it expressly provides for.

Desty, Shipping & Admiralty, ¶ 2, note 7; *Golden v. Prince*, 3 Wash. C. C. 313, Fed. Cas. No. 5,509, headnote 9; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 212, 38 L. ed. 986, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *State v. Patterson*, T. U. P. Charlt. (Ga.) 311; *State v. Plime*, T. U. P. Charlt. (Ga.) 142.

Even a valid police regulation by a state is not to be respected in a case like that at bar, after the subject has been covered with legislation by Congress.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 298, 43 L. ed. 707, 19 Sup. Ct. Rep. 465; *New York, N. H. & H. R. Co. v. New York*, 105 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

Section 649 of the Code clearly applies to all seamen, whether serving on American or foreign boats.

The United States statute on the same subject applies only to American seamen.

Ex parte D'Oliveira, 1 Gall. 474, Fed. Cas. No. 3,967.

Hence the state law is void by reason of repugnance.

Cooley, Const. Lim. 6th ed. p. 211.

A further repugnance lies in the action of the state law upon foreign seamen. Not only has it been the established policy of Congress not to punish foreign seamen who may desert from their vessels, but it has been its clear and unvaried policy not to interfere with or in any way punish the encouragement of such desertion.

Grant v. United States, 7 C. C. A. 436, 15 U. S. App. 243, 58 Fed. Rep. 696; *United States v. Minges*, 5 Hughes, 494, 16 Fed. Rep. 657.

If such has been the policy of Congress, then the state law cannot stand.

Holmes v. Jennison, 14 Pet. 574, 10 L. ed. 596.

Messrs. W. W. Osborne and J. R. Saussy, Sr., for defendant in error.

Per Curiam: Judgment affirmed.

INDIANA SUPREME COURT.

Re Petition of George L. DENNY for Permission to Practise Law.

(.....Ind.....)

1. Judicial notice will be taken of the number of votes cast in the state at a general election on a constitutional amendment and also the number cast for governor and for presidential electors, as the same have been returned to the secretary of state.
2. A constitutional amendment is not ratified by a majority of "the electors of the state," within the meaning of Const. art. 16, § 1, requiring a majority of said electors to ratify an amendment, where the persons voting in favor of it at a general election, though more than those who vote against it, are less than half of those who vote for governor or for President, or even for another constitutional amendment on the same ballot, notwithstanding the provision of art. 16, § 2, that where two or more amendments are submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of them separately.
3. The vote on a constitutional amendment at a general election at which the question was submitted by the last preceding general assembly, which was the only general assembly authorized to speak on the subject, is not to be deemed a special election so that judicial notice of the votes cast at the general election cannot be taken in determining whether or not the amendment received the requisite vote, merely because the procedure did not conform to a statute passed some years previously, respecting the submission of such amendments.
4. A constitutional requirement that amendments shall be submitted so that the electors shall vote for or against each separately does not limit the consideration to the votes cast for or against the amendment alone, in determining whether or not it has been ratified by a majority of the electors of the state.

(Jordan, J., dissents.)

(February 1, 1901.)

A PPEAL by petitioner from a judgment of the Circuit Court for Marion County refusing him permission to practise law. *Reversed.*

The facts are stated in the opinion.

Messrs. William Watson Woollen and Evans Woollen, for appellant:

The proposed amendment of the constitutional provision as to admission to practise law was not ratified by the electors, for the reason that, while receiving a majority of the votes cast on the question, it was not, as required by article 16 of the Constitution, ratified by "a majority of said electors."

The argument based on the rule as to the

presumption of acquiescence by those absent (or present and not voting) is unsound for the reason that the rule is only applicable in default of unmistakable provision regarding the number of votes which shall be determined.

South Bend v. Lewis, 138 Ind. 512, 37 N. E. 980, distinguished; *Oldknow v. Wainwright*, 2 Burr. 1021; *Logansport v. Legg*, 20 Ind. 315; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315, 23 N. E. 72; *State ex rel. Duane v. Fagan*, 42 Conn. 32.

We have such unmistakable provision in the words "majority of said electors," and therefore the rule as to the presumption of acquiescence does not apply.

United States v. Willberger, 5 Wheat. 76, 5 L. ed. 37; *Black, Stat. Constr. & Interpretation of Laws; Sanford v. Prentice*, 28 Wis. 358; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773.

It being impossible to ascertain accurately the number of the electors, the court will accept the testimony of the ballot box as conclusive, but, in doing so, will recognize that every person who has put in the box a ballot, for whatsoever, has thereby proved himself an elector, and must be counted as one of the electors.

Carroll County Supers. v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *McCrary, Elections*, § 183; *County Seat of Linn County*, 15 Kan. 526; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *State ex rel. Durkheimer v. Grace*, 20 Or. 154, 25 Pac. 382; *May v. Bermel*, 20 App. Div. 53, 46 N. Y. Supp. 622; *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958; *Bayard v. Klinge*, 16 Minn. 249, Gil. 221; *People ex rel. Wheaton v. Wiant*, 48 Ill. 263; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 46 L. R. A. 652, 27 So. 927; *State ex rel. Stevenson v. Babcock*, 17 Neb. 188, 22 N. W. 372; *State ex rel. Cope v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491.

The following cases, not involving the adoption of constitutional amendments, support our proposition:

People v. Berkeley, 102 Cal. 298, 23 L. R. A. 838, 36 Pac. 591; *People ex rel. Wheaton v. Wiant*, 48 Ill. 263; *Stobbins v. Grand Rapids Super. Judge*, 108 Mich. 693, 66 N. W. 594; *Bayard v. Klinge*, 16 Minn. 249, Gil. 221; *State v. Winkelmeier*, 35 Mo. 103; *State ex rel. Litson v. McGowan*, 138 Mo. 187, 39 S. W. 771; *Enyart v. Hanover Twp.*, 25 Ohio St. 618.

NOTE.—As to what constitutes sufficient majority, there is to be found in this series a note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 310; also the cases of *State ex rel. Cope v. Foraker* (Ohio) 6 L. R. A. 422; *Smith v. Proctor* (N. Y.) 14 L. R. A. 403; *People ex rel. Wells v. Berkeley* (Cal.) 23 L. R. A. 838; *State ex rel. Little v. Langlie* (N. D.) 32 L. R. A. 51 L. R. A.

723; *Belknap v. Louisville* (Ky.) 34 L. R. A. 256; *Bryan v. Stephenson* (Neb.) 35 L. R. A. 752; *De Soto Parish Citizens & Taxpayers v. Williams* (La.) 87 L. R. A. 761; *State ex rel. Douglas County v. Cornell* (Neb.) 39 L. R. A. 513; *Montgomery County Fiscal Ct. v. Trimble* (Ky.) 42 L. R. A. 738; *State ex rel. McClurg v. Powell* (Miss.) 48 L. R. A. 652.

Messrs. Timothy B. Howard, Merrill Moores, and Cassius C. Hadley, with Mr. W. L. Taylor, Attorney General, for the State:

Where a measure is proposed to the people, and its adoption is made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.

St. Joseph Twp. v. Rogers, 16 Wall. 644, 21 L. ed. 328; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 908; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Know County v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. ed. 96, 13 Sup. Ct. Rep. 267; *Mobile Sav. Bank v. Oktibbeha County Supers.* 22 Fed. Rep. 580, 24 Fed. Rep. 110; *Madison County v. Priestly*, 42 Fed. Rep. 817; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 637, 62 Am. Dec. 452; *State ex rel. Lanier v. Padgett*, 19 Fla. 539; *Dunnovan v. Green*, 57 Ill. 67; *People ex rel. Gilman, C. & S. R. Co. v. Harp*, 67 Ill. 62; *Taylor v. McFadden*, 84 Iowa, 269, 60 N. W. 1070; *De Soto Parish Citizens & Taxpayers v. Williams*, 49 La. Ann. 437, 37 L. R. A. 768, 21 So. 647; *Taylor v. Taylor*, 10 Minn. 107, Gil. 81; *Reiger v. Beaufort Comrs.* 70 N. C. 319; *Alley v. Denson*, 8 Tex. 207; *State ex rel. Bassett v. Kenick*, 37 Mo. 272; *State v. Binder*, 38 Mo. 455; *Metcalfe v. Seattle*, 1 Wash. 297, 25 Pac. 1010; *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *Sanford v. Prentiss*, 28 Wis. 358.

When a question is to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at "such election," a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question.

State ex rel. Stevenson v. Babcock, 17 Neb. 188, 22 N. W. 372; *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779; *State ex rel. Cope v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491; *State ex rel. Dobbins v. Sutterfield*, 54 Mo. 391; *State ex rel. Litson v. McGowan*, 138 Mo. 187, 39 S. W. 771; *State ex rel. Jones v. Lancaster County Comrs.* 6 Neb. 474; *People ex rel. Davenport v. Brown*, 11 Ill. 480; *People ex rel. Gaines v. Garner*, 47 Ill. 246; *Bayard v. Klinge*, 16 Minn. 249, Gil. 221; *People v. Berkeley*, 102 Cal. 307, 23 L. R. A. 838, 36 Pac. 591; *Enyart v. Hanover Twp.* 25 Ohio St. 618.

Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law under which it is submitted, to the contrary.

Dayton v. St. Paul, 22 Minn. 400; *Green v. State Bd. of Canvassers (Idaho)* 47 Pac. 259; *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883; *Gillespie v. Palmer*, 20 Wis. 544; *Boit v. Wurts*, 63 N. J. L. 289, 45 L. R. A. 251, 43 Atl. 744, 881; *Howland v. San Joaquin County Supers.* 109 Cal. 152, 41 L. R. A.

Pac. 864; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *State ex rel. Little v. Langlio*, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958; *Marion County Comrs. v. Winkley*, 29 Kan. 36; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523.

Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to it shall cast a negative vote, and that a "majority of the votes given" shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved.

Montgomery County Fiscal Ct. v. Trimble, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *Holcomb v. Davis*, 56 Ill. 413; *Davis v. Brown*, 46 W. Va. 722, 34 S. E. 839; *Walker v. Oswald*, 68 Md. 150, 11 Atl. 711; *Green v. State Bd. of Canvassers (Idaho)* 47 Pac. 259; *South Bend v. Lewis*, 138 Ind. 536, 37 N. E. 986.

The Constitution requires an amendment to be agreed to "by a majority of all the members elected to each house," but does not require for its adoption a vote of all "the electors of the state."

De Soto Parish Citizens & Taxpayers v. Williams, 49 La. Ann. 437, 37 L. R. A. 768, 21 So. 647.

As by the Constitution officers may only be elected on the day fixed by the Constitution for general elections, while proposed amendments may be submitted at any time, the coincidence of two elections, one for officers, and the other upon proposed amendments, does not make the votes taken on that day one election. The elections then taken are as separate and distinct as if taken on different days.

Howland v. San Joaquin County Supers. 109 Cal. 152, 41 Pac. 864; *State ex rel. Durkheimer v. Grace*, 20 Or. 154, 25 Pac. 382; *Armour Bros. Bkg. Co. v. Finney County Comrs.* 41 Fed. Rep. 321; *Jones v. Com.* 20 Ky. L. Rep. 651, 47 S. W. 328; *Rush v. Com.* 20 Ky. L. Rep. 775, 47 S. W. 587.

Voters who cast an amendment ballot marked neither "for" nor "against" are to be treated as "present and not voting," and to be regarded as assenting to the will of the majority.

Walker v. Oswald, 68 Md. 150, 11 Atl. 711; *Smith v. Proctor*, 130 N. Y. 319, 14 L. R. A. 403, 20 N. E. 312; *May v. Bermel*, 20 App. Div. 53, 46 N. Y. Supp. 622; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *Marion County Supers. v. Winkley*, 29 Kan. 40; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523; *Deuster v. Raine*, 18 Ohio L. J. 61; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *Schlichter v. Keiter*, 156 Pa. 119, 22 L. R. A. 161, 27 Atl. 45; *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 815, 23 N. E. 72; *State ex*

rel. Drummond v. Dillon, 125 Ind. 69, 25 N. E. 136; *State ex rel. Walden v. Vanosda!*, 131 Ind. 391, 13 L. R. A. 832, 31 N. E. 79; *Davis v. Brown*, 46 W. Va. 720, 34 S. E. 839; *State ex rel. Young v. Yates*, 19 Mont. 239, 37 L. R. A. 205, 47 Pac. 1004; *Somers v. Bridgeport*, 60 Conn. 528, 22 Atl. 1015; *Atty. Gen. v. Shepard*, 62 N. H. 383; *Oldknow v. Wainwright*, 2 Burr. 1017.

In the absence of restrictive legislation, courts have an inherent power of self-protection in the matter of the admission of attorneys as officers of the court.

Re Leach, 134 Ind. 671, 21 L. R. A. 701, 34 N. E. 641; *Ex parte Secombe*, 19 How. 13, 15 L. ed. 565; *Manning v. French*, 149 Mass. 391, 4 L. R. A. 339, 21 N. E. 945; *Ex parte Griffiths*, 118 Ind. 83, 3 L. R. A. 398, 20 N. E. 513; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 4 L. R. A. 101, 21 N. E. 244.

Baker, J., delivered the opinion of the court:

Section 21 of article 7 of the Constitution, in force from November 1, 1851, reads, "Every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice." At the election in November, 1900, a proposed amendment, to take the place of the foregoing provision, to the effect that "the general assembly shall by law prescribe what qualifications shall be necessary for admission to practise law in all courts of justice," was submitted to the electors of the state. On the assumption that the proposed amendment had been adopted, and on the further assumption that it was within the court's prerogative to prescribe qualifications by rule, without waiting for the general assembly to change the present statutory provisions on the subject, the Marion circuit court established rules and appointed a board of examiners. Thereafter the petitioner, Mr. Denny, applied to be admitted to practise law in the Marion circuit court, on the qualifications only that he was a person of good moral character and a voter in Marion county, Indiana. On the trial the court specially found these facts: Mr. Denny is a person of good moral character, and a voter in Marion county, Indiana. At the general election in Indiana on November 6, 1900, 655,965 votes were cast for various candidates for the office of governor of Indiana. At an election held upon the same day throughout the state of Indiana, pursuant to an act of the general assembly approved March 6, 1899 (Acts 1899, p. 560), there were cast for the amendment in question 240,031, votes, and against it 144,072 votes. A motion was made for the admission of Mr. Denny to practise law in the Marion circuit court, and he declined to submit to an examination as to his qualifications to be admitted, as provided by the rules of that court. As a conclusion of law the court stated that Mr. Denny was not entitled to admission, and judgment was entered accordingly. Mr. Denny appeals, and assigns that the conclusion of law is erroneous. The attorney general appears in support of the

judgment. If the proposed amendment has not been adopted, the conclusion of law and the judgment cannot be sustained.

The Constitution lays down the only procedure by which an amendment may be adopted:

"Art. 16, § 1. Any amendment or amendments to this Constitution may be proposed in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if, in the general assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

"Sec. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately; and while such an amendment or amendments which shall have been agreed upon by one general assembly shall be awaiting the action of the succeeding general assembly, or of the electors, no additional amendment or amendments shall be proposed."

The proposed amendment in question and one other received the affirmative votes of a majority of the members elected to each house of the general assemblies of 1897 and 1899. It thereupon became the duty of the general assembly of 1899 to provide for the submission of the proposed amendments to the electors of the state. For this purpose the above-mentioned act was passed, which provides "that there shall be a vote taken by the people at the next general election," to be held on November 6, 1900, on the adoption or rejection of the proposed amendments; that the clerks of the circuit courts shall cause to be printed twice as many ballots, containing the two amendments, as there were votes cast in their respective counties for governor at the general election in 1896; that there shall be printed at the left of each amendment the words, "For the amendment," and "Against the amendment," and the voter shall make a cross with a blue pencil in the square to the left of whichever set of words he desires to vote; that the ballots shall be delivered to the election precincts in the same manner as ballots for voting for district and county officers are now delivered, and they shall be delivered to the voters before entering the election booth, in the manner now provided by law for delivering the ballots to the voters; that the election board shall count and return the vote according to the general law governing elections; that, after the returns in each county are tabulated, the clerk shall certify to the

secretary of state the total vote cast for and against each amendment; that, after the secretary tabulates the returns from all the counties, he shall certify to the governor the total vote for and against each amendment; that, "if it shall appear that a majority of all the votes cast at such election were given in favor of the adoption of either or both of said proposed constitutional amendments, the governor shall make proclamation, and it or they shall then become part of the Constitution of the state of Indiana." The governor's proclamation announced that 240,031 votes had been cast for and 144,072 against the proposed amendment in question, and 314,710 for and 178,960 against the other proposed amendment, but did not state whether either had been adopted or rejected.

In our system of government a written constitution is the highest expression of law. None other emanates directly from the sovereign people themselves. It is the deliberate and affirmative utterance of the sovereign majority. It seems unnatural to say that the sovereign majority, the authors of the designedly permanent, the fundamental, the organic law, intended that any of its safeguards should be abrogated by a failure to demand the abrogation; that the indifference of the many should be a positive element in effecting an organic change desired by the few; that a judgment abolishing the writ of habeas corpus or the right of trial by jury should be taken by default. On the contrary, one would expect a provision that the charter of our liberties should stand unaltered until the sovereign majority by affirmative action expressed their desire for and effected a change. And such is the clear letter and spirit of article 16. If a majority of the electors of the state shall ratify a proposed amendment, it shall become a part of the Constitution; otherwise, not. There is no room for construction. The language is too plain to admit of quibbling. "Majority" means "more than half." "Electors," with reference to an election, means, according to the lexicographers and universally accepted usage, "persons possessed of the legal qualifications entitling them to vote." The word "voters," on the other hand, has two meanings,—“persons who perform the act of voting,” and “persons who have the qualifications entitling them to vote.” Constitutions are drafted with care. The framers of our Constitution deliberately selected and used the words in the meaning of which there could be no ambiguity. The sentence, "If more than half of the persons in the state who possess the legal qualifications entitling them to vote shall ratify the proposed amendment it shall become a part of the Constitution," is a cumbersome equivalent. The idea is clearly and more succinctly expressed in the wording of the Constitution. No other standard for the adoption of proposed constitutional amendments may be set up by this court, becomingly or lawfully, than the one fixed by the Constitution,—the affirmative ratification by "a majority of the electors of the state." So, in any case, the question becomes one, 51 L. R. A.

not of constitutional construction, but of evidence.

It is universally held that, in the absence of a provision for registration, the number of persons who possess the qualifications entitling them to vote at a given election is determined by the election itself. Deaths, minors coming of age, disfranchisements, removals from the state or from the county, township, ward, or precinct within certain limits of time make the number of electors a continually variable quantity. But when a person goes to the polls in his precinct, is passed by the challengers, is accepted by the election officers, and has his name enrolled on the poll lists as having voted, he thereby furnishes proof of the fact that he is an elector,—a person possessed of the legal qualifications entitling him to vote at that election. And the poll lists furnish evidence of the total number of electors. And this evidence is just as definite and certain as that which could be afforded by a registration of the persons entitled to vote at that election, for the poll lists themselves form a registration.

After the proposed amendments were approved by the general assemblies of 1897 and 1899, it became the duty of the general assembly of 1899 to submit them to the electors of the state. It was within the power of that general assembly to provide for submitting them at a general or at a special election. The general assembly enacted that a vote on the proposed amendments should be taken at the next general election. The trial court found that 240,031 votes were cast in favor of the adoption of the proposed amendment in question. The trial court probably made the finding from the facts within its judicial knowledge. It was unnecessary for the parties to prove the vote. This court takes judicial notice of the returns made to the secretary of state, and if the trial court had stated a different number the finding would be ignored, because this court is charged with judicial knowledge of the fact that 240,031 is the correct number. From the same source and with the same authenticity this court knows judicially that at the same election 664,094 votes were cast for presidential electors, 655,965 votes for governor, and 493,670 votes on the other proposed amendment. Since we know absolutely that more than twice 240,031 electors of the state participated in the election, we hold that the proposed amendment in question was rejected.

It is argued that the proposed amendment was submitted at a special election, and that therefore this court cannot take judicial knowledge of any returns except those of the alleged special election. The argument that the election was special is based on § 62 of the election law (Acts 1889, p. 184; Burns' Rev. Stat. 1894, § 6258). By that section the general assembly of 1889 undertook to say that, whenever any constitutional amendment is required by law to be submitted to popular vote, the state board of election commissioners shall cause a brief statement of the same to be printed on the

state ballots, and the words "Yes" or "No" under the same, so that the elector may indicate his preference by stamping at the place designated in front of either word. The argument then proceeds: Since the general assembly of 1899 did not conform to the law of 1889, the act of 1899 submitting the proposed amendments to the electors of the state must be held to be a provision for a special election. In the first place, it is somewhat unusual to give an act of one general assembly the effect of a constitutional restraint upon the action of its successors. In the next place, the general assembly of 1889 was not the proper one to take action. There were no constitutional amendments pending, approved by it, to be submitted to the electors of the state. The Constitution points out the steps to be taken. If one general assembly approves a proposed amendment, it is referred to the next general assembly. If that body approves the proposed amendment, it thereupon becomes the duty of that body to submit the question to the electors of the state. "It is only by virtue of the Constitution's command to that body that the proposed amendment may be submitted by a legislative act. Prior to the designated time there is no constitutional power in any general assembly to speak authoritatively on the subject of the submission of proposed amendments. And finally, the act of 1899 is a clear expression, by the only general assembly empowered to speak, of the intention to submit the question "at the next general election." On November 6, 1900, there was but one election in Indiana, and that was the "general election" at which the general assembly of 1899, determined to submit the proposed amendments to the electors of the state; and every person who voted at that election thereby furnished proof that he was an elector of the state. There was but one voting place in each precinct, but one set of election officers at each voting place, but one poll list, but one delivery of tickets to each elector, but one standard of qualification for all electors, no matter what they voted upon, but one act of voting by each elector, and but one recording of the fact that he had voted.

But, even if the act of 1899, were legitimately open to the construction that the proposed amendments were submitted at a special election, the proposed amendment in question has been rejected. First. The fact that 240,031 votes were counted for and 144,072 against the proposed amendment in question is not definite proof that only 384,103 persons cast ballots on the proposition submitted at the alleged special election. At any election on a constitutional amendment, whether general or special, the question is, Has the amendment been ratified by a majority of the electors of the state? The act of 1899, viewed as a submission at a general election, is deficient in not providing for a return of the total number of electors marked on the poll lists as having voted; and, viewed as a submission at a special election on the constitutional amendments only, it is deficient in not providing for a return

of the total number of electors whose ballots on the constitutional amendments were deposited in the ballot box. One's standing as an elector—a person qualified to vote—is not destroyed by the election officers' decision to throw out his ballot on the ground, real or not, that it is mutilated or bears a distinguishing mark. Second. The two proposed amendments were printed on a single ballot. If the election were special as to them, and if this court could look only to the returns of the alleged special election, how can the court properly shut its eyes to the fact that the 240,031 votes cast for the proposed amendment in question are less than half of the 493,670 votes recorded as having been counted on the other? What ones of the 493,670 are to be held as not being "electors of the state?"

It is also urged that, because the number of persons in the state who were entitled to vote at the election on November 6, 1900, in excess of the 664,094 persons who were counted as having voted for presidential electors is a matter of conjecture, it is therefore permissible to indulge in the conjecture that there were no more electors (persons entitled to vote) on the proposed amendment in question than the 240,031 that were recorded as having voted for and the 144,072 against its adoption. The difference is vital. On the conjecture that there were more electors of the state than 664,094, by so much more has the proposed amendment failed to be ratified by a majority of them. But it is not necessary to deal in that or in any other conjecture, to hold that the proposed amendment has been defeated. The absolute judicial knowledge (evidence of the very highest class) that there were at least 664,094 persons entitled to vote on the proposed amendment proves that the proposed amendment was defeated for a lack of a majority. On the other hand, to hold that the proposed amendment has been adopted requires the acceptance of the conjecture that only the persons who succeeded in having their votes counted for and against the proposed amendment were legally qualified to vote on the subject. And this in the face of the facts that 493,670 votes were counted for and against the other proposed amendment, that 655,965 were counted for candidates for governor, and that 664,094 were counted for candidates for presidential electors. It is possible to conjecture that there may have been more persons entitled to vote than the definitely known number of 664,094. But how can it be made a matter of conjecture that there were less?

The attorney general invites our consideration of the claim that "a majority of the electors of the state" was not intended to mean "a majority of all the electors of the state," because the constitutional convention rejected a substitute inserting "all" before "the electors," and because the article adopted requires a proposed amendment to be agreed to by "a majority of all the members elected to each house." First. The substitute was rejected, not on account of the presence of the word "all," but because it

ran counter to the plan favored by the convention. The substitute was, "No amendment shall be made to the Constitution unless the same shall have been called for and approved by a majority of all the voters [electors] of the state." 2 Const. Debates, pp. 1938-1942. Second. "A majority of the electors of the state" is as comprehensive as "a majority of all the electors of the state," just as "a majority of the members elected to each of the two houses" is as wide-embracing as "a majority of all the members elected to each house." The one form of expression may be more intensive than the other, but it is not more inclusive. Third. That the convention attached no importance to the presence or absence of the word "all" is shown by the use of "a majority of the members elected to each of the two houses" as the equivalent of "a majority of all the members elected to each house," in § 1 of this article 16.

The attorney general further contends that § 2 of article 16 shows that only the votes counted for and against the proposed amendment in question should be considered in determining the number of "the electors of the state." Section 2 provides, "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately." The controlling idea to be expressed was this: If two or more amendments are to be submitted at the same time, they ought not to be voted upon *en masse*, but separately, so that each may stand or fall on its own merits. Section 2 directs the submission of two or more amendments to be made "in such manner that the electors shall vote for or against each of such amendments separately," but does not undertake to state the effect of the votes cast on such submission. That effect is expressed in § 1. It is incredible that it was intended that a different effect should follow from the vote "if two or more amendments are submitted at the same time" from that which would follow the submission of one amendment. The only condition under which an amendment "shall become a part of this Constitution" is that "a majority of the electors of the state shall ratify the same." No other terms of adoption are named in any part of the article, and yet the argument of counsel assumes that the positive declaration in § 1 is destroyed by their inference that the provision for taking a vote "for" and "against" means that only the votes counted "for" and "against" are to be considered. Counsel's inference would destroy as well the direct command in § 1 that a proposed amendment "shall be agreed to by a majority of the members elected to each of the two houses," since a record of the votes "for" and "against" in each of the two houses is directed to be entered on their journals. But counsel do not claim or even suggest that under the plain language of the article a proposed amendment may be agreed to in either house by a majority of those voting "for" and "against," or by any number less than

"a majority of the members elected." When the number of members elected to the senate is definitely known, that is the number of which it takes more than half to act affirmatively upon a proposed amendment. Similarly with the house. It is not a majority of the quorum or those voting "for" or "against," but it is a majority of the body, that is required. And similarly with the electors of the state. When the number of electors is definitely known, that is the number of which it takes more than half to act affirmatively upon a proposed amendment. The standard is made the same in the three bodies. And if the court has the means of knowing judicially the number composing each body, the rule is as easily applied in one body as in another.

The history of the article confirms our recognition of its plain meaning. The original resolution provided for ratification by "a majority of the qualified voters." A motion was made to instruct the committee on future amendments to substitute the words, "a majority of all the votes cast for and against the same." The motion, modified so as to require the committee only to consider the advisability of the substitution, was carried. The committee rejected the phrase, "a majority of all the votes cast for and against the same," and reported the following: ". . . It shall be their duty to submit the same to the people of the next general election, . . . and if a majority of all the electors voting at said election for members of the house of representatives . . ." In the convention the following phraseology was agreed upon: ". . . submit such amendment or amendments to the qualified electors of the state, and if a majority of said electors shall ratify the same, . . ." After the committee on revision and phraseology had excised the word "qualified," the article stood as it was finally approved by the convention and ratified by the people. Const. Journal, pp. 69, 444, 693, 830-833, 837, 841, 842, 971, 975, 976; 2 Const. Debates, pp. 1258-1260, 1041, 1913-1918, 1938-1942, 2076. It is noteworthy that the unlimited words "a majority of the electors of the state" were adopted after an affirmative rejection, first, by the committee, of the limiting words, "a majority of the votes cast for and against the same;" and, secondly, by the convention, of the limiting words "a majority of the electors voting for members of the house." To hold in this case that the proposed amendment has been ratified, it would be necessary to strike out of article 16 the words, "a majority of the electors of the state," and to substitute therefor, "a majority of the votes cast for and against the same,"—a process just the reverse of that carried out by the framers of our organic law. To hold in this case that the proposed amendment has been defeated requires only an obedience to the clear letter and spirit of the Constitution, without adding to or taking from it one jot or tittle. And such obedience is our duty, for the Constitution is as binding upon the judicial de-

partment of the state as it is upon the legislative or executive.

The article relating to amendments of the organic law has been before this court but once. In *State v. Swift*, 69 Ind. 505, the question concerning the adoption of a proposed constitutional amendment which was submitted to the electors of the state at the election for township officers in April, 1880. The only vote certified to the secretary of state was the vote on the proposed amendment. The vote was 169,483 for and 152,251 against the proposed amendment. The elections of township officers in the various townships of the state were purely local elections. The returns thereof are not made to the secretary of state, and do not become a part of the archives of the state. It was held: First, that "it requires at least a majority of all the votes cast at the same election to ratify a constitutional amendment;" and, second, that the proposed amendment had not been adopted, on the ground that the court judicially knew that more electors had participated in the township elections than had voted for and against the proposed amendment; that the court could not definitely say that a majority of the electors of the state had ratified the proposed amendment, and therefore it did not affirmatively appear that it was adopted; and that the court could not definitely say that it had failed to receive the approval of a majority of the electors of the state, and therefore it had not been rejected, but might be resubmitted. The second proposition was decided incorrectly, for courts will not take judicial notice of the results of local elections. 17 Am. & Eng. Enc. Law 2d ed. p. 898. The error in the *Swift* decision, as well as the distinction between that case and one like the present, is pointed out in the dissenting opinion of Mr. Justice Niblack: "If the amendment under discussion had been submitted to the electors of the state at and as a part of a general election, and if the returns of that general election had shown affirmatively that a majority of those voting at such election had not voted to ratify such amendment, then quite a different question would have been presented for our consideration. There is good authority for holding that in such an event the amendment would not have been ratified. *People ex rel. Gaines v. Garner*, 47 Ill. 246; *People ex rel. Wheaton v. Wiant*, 48 Ill. 263. But no such element enters into this case. . . . Township elections are local, and not general, in their character, and returns from them are only made to the clerks of the respective counties, and are not made a part of the archives of the state, as the returns of the general elections are. We are therefore unable to take judicial notice of the aggregate number of votes cast at those township elections on the day the amendments were voted upon. That is a subject about which we judicially know nothing, and concerning which we can presume nothing, adverse to the amendment under consideration. . . . This is the essential point of difference between me and my brethren who speak for the court."

51 L. R. A.

In the case of *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986, a statute providing for an election on the question of the union of a city and a town was before the court for construction. It was very properly held that by the terms of the statute the union was affected by a majority of those in each municipality who voted upon the question voting in favor of the union. The statute required the city council and the town board to agree upon a day on which an election should be held for the people of the city and of the town to vote on the question of union. The day selected was one on which there was an election of officers in the city, but none in the town. In view of the fact that only a majority of the votes "given on the question of union" was necessary to an affirmative decision, it was held that the question as to the number of votes cast in the city for officers was immaterial. The statute in that case and the constitutional provision in this are essentially different, but the court there recognized, and, as it were, forecast, the doctrine that is controlling here. Among other things, the court said: "The learned counsel for the appellee seems to rely upon the provision that a town and city may be united if a 'majority of the qualified voters of the town and a majority of the qualified voters of the city' vote in favor thereof. If this section stood alone, it might be urged that a majority of all the voters are necessary, and the number of votes cast at the city election for officers should be taken as additional means for ascertaining the number of legal voters of the city. But the other sections of the act clearly show that such was not the intent of the framers of the act. . . . Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question."

The conclusion at which we have arrived is sustained, in our opinion, by the overwhelming weight of authority. The following decisions are directly in point: *People v. Berkeley*, 102 Cal. 298, 23 L. R. A. 838, 36 Pac. 591; *People ex rel. Davenport v. Brown*, 11 Ill. 478; *People ex rel. Gaines v. Garner*, 47 Ill. 246; *People ex rel. Wheaton v. Wiant*, 48 Ill. 263; *Ohestnutwood v. Hood*, 68 Ill. 132; *Belknap v. Louisville*, 99 Ky. 474, 34 L. R. A. 256, 36 S. W. 1118; *Stebbins v. Grand Rapids Super. Judge*, 108 Mich. 693, 66 N. W. 594; *Bayard v. Klinge*, 16 Minn. 249, Gil. 221; *Everett v. Smith*, 22 Minn. 53; *Slingerland v. Norton*, 59 Minn. 351, 61 N. W. 322; *Smith v. Renville County Comrs.* 64 Minn. 16, 65 N. W. 956; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L. R. A. 652, 27 So. 927; *State v. Winkelmeier*, 35 Mo. 103; *State ex rel. Dobbins v. Sutterfield*, 54 Mo. 391; *State ex rel. Allen v. St. Louis*, 73 Mo. 435; *State ex rel. Wear v. Francois*, 95 Mo. 44, 8 S. W. 1; *State ex rel. Litson v. McGowan*, 138 Mo. 187, 30 S. W. 771; *State ex rel. Jones v. Lancaster County Comrs.* 6 Neb. 474; *State*

ex rel. Stevenson v. Babcock, 17 Neb. 188, 22 N. W. 372; *State ex rel. Omaha & S. O. Street R. Co. v. Bechel*, 22 Neb. 158, 34 N. W. 342; *State ex rel. Mann v. Anderson*, 26 Neb. 517, 42 N. W. 421; *State ex rel. Norton v. Van Camp*, 36 Neb. 91, 54 N. W. 113; *Bryan v. Lincoln*, 50 Neb. 620, 35 L. R. A. 752, 70 N. W. 252; *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779; *Enyart v. Hanover Twp.* 25 Ohio St. 618; *State ex rel. Cope v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491. And see *Sanford v. Prentice*, 28 Wis. 358, on the difference between an elector and a voter. In *People v. Berkeley* the court said of a constitutional provision: "These words [whenever a majority of the electors voting at a general election shall so determine] clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required." In *People ex rel. Davenport v. Brown* the Constitution provided, "Whenever a majority of the voters of such county, at any general election, shall so determine." The court held: "It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county." In *People ex rel. Wheaton v. Wiant* the language of the Constitution under consideration was, "a majority of the voters." Held, that a majority of the votes cast on the question was insufficient. In *Stebbins v. Grand Rapids Super. Judge* the statute forbade the incurrence of bonded indebtedness "unless the qualified voters of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election or at a special election called for the purpose of voting upon such question." The vote in question was taken at a regular election. Held, that the decision was determinable by a majority of the votes cast at the election, not by a majority of the votes cast upon the question. In *Dayard v. Klinge* the words of the Constitution under examination were, "a majority of such electors." The court decided that a majority of those voting on the question was not sufficient. In *Slingerland v. Norton* and in *Smith v. Renville County Comrs.* it was held that the whole number voting at an election must be determined from the poll lists, not from the return of the votes counted as effective. The language of the Constitution under consideration in *State ex rel. McClurg v. Powell* was, "a majority of the qualified electors voting." It was held that the proposed constitutional amendment could only be adopted by a majority of those voting at the same time for any purpose. In *State v. Winkelmeier* the language of the statute was, "a majority of the legal voters." More than 13,000 voters participated in the election; 5,035 favored and 2,001 opposed the adoption of the question submitted. The court said: "It is evident that the vote of 5,000 out of 13,000 voters is not the vote of a majority, and under the act quoted no authority was given

to the city." In *State ex rel. Stevenson v. Babcock* the Constitution provided that "proposed amendments shall be published for three months immediately preceding the next election of senators and representatives. . . . and if a majority of the electors voting at such election adopt," etc. Held, that a majority of those voting on the amendment was insufficient. In *State ex rel. Omaha & S. O. Street R. Co. v. Bechel* the Constitution provided: "No such general law shall be passed by the legislature, granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof." The question of having a street railroad was submitted at a general city election at which 8,146 voters participated, of whom 1,650 voted for and 1,470 against the railroad. The court said: "It is impossible for us, by any system of logical reasoning, to say that the election held in the city of Omaha on the 3d day of May, 1887, was other than one election. . . . That being the case, . . . the consent of a majority of the electors was not given." In *State ex rel. Cope v. Foraker* the constitutional provision was that a proposed amendment should be published "for six months preceding the next election for senators and representatives, at which time the same shall be submitted to the electors. . . . and if a majority of the electors voting at such election shall adopt," etc. Held, that a majority of those voting on the amendment was insufficient.

There are many other cases that are in harmony with our conclusions, but in which the constitutional or statutory provision under consideration was found, as in our own case of *South Bend v. Lewis*, to condition the adoption of a particular question only upon its receiving a majority of the votes cast for and against it. *Gavin v. Atlanta*, 86 Ga. 132, 12 S. E. 262; *Decatur v. Wilson*, 96 Ga. 251, 23 S. E. 240; *Green v. State Bd. of Canvassers* (Idaho) 47 Pac. 259; *Holcomb v. Davis*, 56 Ill. 413; *County Seat of Linn County*, 15 Kan. 500; *Marion County Comrs. v. Winkley*, 29 Kan. 36; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *Jones v. Com.* 20 Ky. L. Rep. 651, 47 S. W. 328; *Rush v. Com.* 20 Ky. L. Rep. 775, 47 S. W. 586; *Duperier v. Viator*, 35 La. Ann. 957; *De Soto Parish Citizens & Taxpayers v. Williams*, 49 La. Ann. 422, 37 L. R. A. 761, 21 So. 647; *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711; *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 39 L. R. A. 513, 74 N. W. 59; *State, Bott, Prosecutor, v. Wurts*, 61 N. J. L. 163, 38 Atl. 1099, and *Id.* 62 N. J. L. 107, 40 Atl. 740; *People ex rel. Hctfield v. Fort Edward Trustees*, 70 N. Y. 28; *Smith v. Proctor*, 130 N. Y. 319, 14 L. R. A. 403, 29 N. E. 312; *Southerland v. Goldsboro*, 96 N. C. 49, 1 S. E. 760; *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873; *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883; *State ex rel. Little v. Langlie*, 5 N.

D. 594, 32 L. R. A. 723, 67 N. W. 958; *State ex rel. Durkheimer v. Grace*, 20 Or. 154, 25 Pac. 382; *Cooke v. Gooch*, 5 Heisk. 294; *Bouldin v. Lockhart*, 3 Baxt. 262; *Braden v. Stumph*, 16 Lea, 581; *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839; *Gillespie v. Palmer*, 20 Wis. 544; *St. Joseph Twp. v. Rogers*, 16 Wall. 644, 21 L. ed. 328; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 96, 13 Sup. Ct. Rep. 267; *Armour Bros. Bkg. Co. v. Finney County Commrs.* 41 Fed. Rep. 321. In the great majority of these cases the principles that control us in our holding in the present case are distinctly recognized. For example: In *County-Seat of Linn County*, the phrase "a majority of the electors of the county" was considered in connection with the returns of a special election at which the particular question was the only matter to be voted upon. Mr. Justice Brewer, speaking for the court, said: "We do not doubt the restricting power of the constitutional provision; and whenever, by any of the ordinary or prescribed means of ascertaining the fact, it appears that a majority of the electors have not consented to the change, no change can be had. . . ." In "cases where two or more questions are submitted at the same election, and more votes are cast upon one question than upon another . . . the highest number of votes cast upon any one question is clear evidence of the number of voters, which may not, in view of any such constitutional restriction as above quoted, be disregarded in any contest arising as to the decision of the other questions." There may be a few cases that cannot be reconciled with the great weight of the decided law, but they probably all belong to the class of which *Gillespie v. Palmer* may be taken as illustrative. In that case the Constitution provided that the legislature might extend the right of suffrage, but that the law should not go into effect until "submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election." The court was called upon to decide whether or not a law extending the right of suffrage to negroes had been ratified. More votes were cast for the law than against it, but it did not receive a majority of all the votes cast at the election on other matters. The court held that the law had been ratified. In the later case of *Sawyer v. Dodge County Mut. Ins. Co.* 37 Wis. 524, the court said of the *Gillespie Case* that it "has been subjected to the criticism that the court decided it in accordance with 'the logic of the war' rather than 'the logic of the law.'" And in *Bound v. Wisconsin C. R. Co.* 45 Wis. 579, Chief Justice Ryan classed *Gillespie v. Palmer* as being one of several cases "which have long been made a reproach to the court, as judgments proceeding upon policy rather than upon principle."

Judgment reversed, with directions to re-
51 L. R. A.

state the conclusion of law in consonance with this decision.

Hadley, J., concurring:

I rest my concurrence in the result upon the fact that the amendment involved in this appeal did not receive a majority of the votes cast upon the subject of the amendments, and cast for and against amendment No. 1.

Jordan, J., dissenting:

I dissent from both the reasoning and the conclusions in the prevailing opinion in this case, for the reasons herein given.

The general assembly of 1897 proposed two amendments to the state's Constitution, one of which was to amend § 2, art. 7; and the other (being the one here involved) proposed to change or amend § 21 of the same article by substituting or inserting in lieu of that section as originally adopted the following provision: "The general assembly shall by law prescribe what qualifications shall be necessary for admission to practise law in all courts of justice." These two amendments, after being agreed to by the general assembly of 1897, were by that body referred to the general assembly of the state to be chosen at the next general election. The amendments mentioned were both considered and agreed to by the general assembly of 1899, and that body, in obedience to the requirements of the Constitution, passed an act whereby these amendments were submitted to the electors of the state for their ratification or rejection. See Acts 1899, p. 560. Section 1 of this statute provided that a vote should be taken by the people of the state on the adoption or rejection of the proposed amendments at the next general election to be held on the 1st Tuesday after the 1st Monday in November, 1900, and further provided that the clerks of circuit courts throughout the state should cause ballots to be prepared of white paper, upon which the proposed amendments should be printed, and be designated as numbers 1 and 2, respectively. Section 1 further provided as follows: "There shall be printed on the ballots to the left of each separate amendment the words 'For the amendment,' and underneath the words 'Against the amendment,' and the voter shall make a cross with a blue pencil in the square to the left of whichever set of words he desires to vote. Said ballots shall be delivered to the election precincts in the same manner as ballots for voting for district and county officers are now delivered, and they shall be delivered to the voters before entering the election booth in the manner now provided by law for delivering the ballots to the voters; and the election board will count out such ballots in the same manner as they count out the votes given for district and county officers, and the election shall be held and in all respects governed by the laws governing elections, except as hereinafter provided." Section 2 of the act reads as follows: "And after the returns are tabulated and counted, the clerk of the circuit

court shall certify under the seal of his office to the secretary of state the total vote given for each amendment, and the total vote cast against each amendment, and when the secretary of state shall have tabulated the same from all the counties of the state, the said secretary of state shall certify to the governor the total vote for and against each amendment. If it shall appear that a majority of all the votes cast at such election were given in favor of the adoption of either or both of said proposed constitutional amendments, the governor shall make proclamation, and it or they shall then become part of the Constitution of the state of Indiana." On November 30, 1900, the governor of the state, in pursuance of § 2 of the above statute, issued a proclamation whereby he announced and proclaimed the whole number of votes cast for and against each of said amendments at the election at which they had been submitted for ratification or rejection, as certified to him by the secretary of state. The number of votes cast for and against the amendment designated as No. 2, as disclosed by the governor's proclamation, is the same number as that which is stated in the court's special finding. The provisions of §§ 1 and 2 of article 16 of our Constitution, which relate to the method of proposing and adopting an amendment or amendments thereto, are as follows:

"Section 1. Any amendment or amendments to this Constitution may be proposed in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if in the general assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

"Sec. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

The solution of the question presented depends upon the interpretation to be given to the following clause in § 1, art. 16: "And if a majority of said electors shall ratify the same," etc. (Our Italics.) The contention of counsel for appellant is that the amendment in controversy can be held to be ratified only upon receiving a majority of all the votes cast at the general election held on the same day upon which a vote, as provided by the statute, was taken on ratifying or rejecting said amendment. This is asserted to be the test, whether such votes were cast upon the question of ratifying and rejecting the amendment, or were cast for the several

candidates for governor or other state officials whose names were printed upon the state ballots which were voted by the electors at the said general November election. Counsel insists that the difficulty which confronts us in determining the question herein involved is not one of construction, but is one of evidence, and the argument is advanced that the rule to be enforced is this: "It being impossible to ascertain accurately the number of electors, the court will accept the testimony of the ballot box as conclusive, but in doing so will recognize that every person who has put in the box a ballot for any purpose whatsoever has thereby proved himself an elector, and must be counted as one of the electors." In support of this proposition he refers to the following decisions which relate to the adoption of constitutional amendments: *State ex rel. Stevenson v. Babcock*, 17 Neb. 188, 22 N. W. 372; *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779; *State ex rel. Cope v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L. R. A. 652, 27 So. 927; *State v. Swift*, 69 Ind. 505. The following cases, which did not involve the adoption of constitutional amendments, are also relied upon to further sustain the proposition: *People v. Berkeley*, 102 Cal. 298, 23 L. R. A. 838, 36 Pac. 591; *People ex rel. Wheaton v. Wiant*, 48 Ill. 263; *Stebbins v. Grand Rapids Super. Judge*, 108 Mich. 693, 66 N. W. 594; *Bayard v. Klinge*, 16 Minn. 249 (Gil. 221); *State v. Winkelmeier*, 35 Mo. 103; *State ex rel. Lilson v. McGowan*, 138 Mo. 187, 39 S. W. 771; *Enyart v. Hanover Twp.* 25 Ohio St. 618. An examination of these cases, however, discloses that in the main, at least, they cannot be accepted as influential or helpful authorities in aiding us to solve the question presented by this appeal, for the reason that the provisions of the particular constitutions or statutes therein involved are materially different from the provisions of our own Constitution in regard to the method of adopting proposed constitutional amendments.

Section 1 of article 15 of the Constitution of Nebraska, after providing that either branch of the legislature may propose amendments to the Constitution, and, if the same are agreed to by the legislature, then provided that they shall be published in the manner designated "for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution." In the case of *State ex rel. Stevenson v. Babcock*, 17 Neb. 188, 22 N. E. 372, it appears that a proposed amendment to the Constitution, under the above provision, was submitted at the general election held in that state in November, 1884, for the election of a governor, senators, and representatives. While the amendment in question received a majority of the total vote cast at such election for and against its

adoption, still it did not receive a majority of the total vote cast at said election for senators and representatives. A majority of the court in that case held that under the plain provisions of the Constitution the amendment was required to be submitted to the electors of the state for their approval or rejection at the next election of senators and representatives, and was also further required to receive a vote in favor of its adoption equal to a majority of all who voted at said election for senators and representatives in order to secure its adoption, and, as such a result had not been attained in respect to the amendment in controversy, therefore it had not been adopted as required by the Constitution. The holding of the same court in the appeal of *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779, which involved an amendment to the Constitution, is to the same effect. It is held, however, in this latter case, that the vote cast throughout the state for senators and representatives is not to be accepted as the sole criterion; that, while it was true that the amendment must be submitted to the electors at a general election for senators and representatives, nevertheless the following constitutional provision, "if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution," must be interpreted to mean that in order to secure the adoption of a proposed amendment "it is necessary that the favorable votes be in excess of one half of the highest aggregate number of votes cast at said election, whether such highest number be for the selection of an officer or upon the adoption of a proposition." The provisions of the Constitutions of Ohio and Nebraska in regard to the adoption of proposed amendments are virtually alike, except the period of publication prior to the submission of the amendments to the electors, under the Constitution of Ohio, is fixed at six instead of three months "preceding the next election of senators and representatives at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution." Consequently, in the case of *State ex rel. Cope v. Foraker*, 40 Ohio St. 677, 6 L. R. A. 422, 23 N. E. 491, the supreme court of that state, under this provision of its Constitution, held that, before an amendment could be considered as adopted, it must receive a majority of the votes of all electors voting at the election for senators and representatives at which election the amendment was required to be submitted. In the case of *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L. R. A. 652, 27 So. 927, the Constitution of Mississippi, as held by the supreme court in that appeal, seems to have contained the following provision in respect to the adoption of constitutional amendments: "If it shall appear that a majority of the qualified electors voting for members of the legislature shall have voted for the proposed amendments." This 51 L. R. A.

the court held to be the criterion, and hence it was affirmed that the proposed amendments must receive a majority of all the votes cast at such election for any purpose, before it could become a part of the Constitution; that a majority of all who voted on the adoption and rejection of the amendment was not sufficient. It is certainly evident that these decisions of Nebraska, Ohio, and Mississippi courts involved constitutional provisions so unlike or different from the one contained in the Constitution of this state that they virtually afford no aid in arriving at a correct interpretation of the clause or provision in controversy.

The case of *State v. Swift*, 69 Ind. 505, may be said to fully sustain the contention of counsel for appellant, and the reasoning and conclusion of the majority opinion herein. That case, however, was decided by a bare majority of this court as then constituted; Judges Niblack and Scott dissenting. The amendments therein involved were by an act of the legislature submitted to a vote of the electors at an election held on the 1st Monday in April, 1880; that day being the one upon which an election was held throughout the state for choosing township officers. The election in respect to the amendments involved was the only one which required a state canvass of the votes cast, and they, as it appears, received a favorable majority of over 17,000 of the total vote cast at said election upon the question of their ratification and rejection. Notwithstanding this fact, however, the court held, in effect, that the amendments had not been ratified, because it did not affirmatively appear that the majority so received by them was equal to a majority of all the votes cast at said election for other purposes. It was also further affirmed by the court that the act of the legislature whereby the amendments in dispute were submitted to the electors was defective in not providing for a count of the aggregate number of votes cast at the said April election at which the proposed amendments were submitted. Judges Niblack and Scott, the dissenting members of the court, each filed forcible dissenting opinions, in which they affirmed the well-settled rule that a majority of all the votes cast upon a proposition is sufficient for its adoption, in the absence of some constitutional or statutory provision to the contrary. The supreme court of Nebraska, in *State ex rel. Stevenson v. Babcock*, 17 Neb. 188, 22 N. W. 372, criticizes the *Swift Case*, and expressly disapproves the reasoning by which the final conclusion therein was reached. The doctrine enunciated in the *Swift Case*, under the facts therein, is certainly incompatible with the later holding of this court in *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986. It will be readily observed that the Constitution of this state is silent in reference to the particular election at which the amendment shall be submitted by the legislature to the electors for their ratification or rejection. It is equally silent in regard to what shall be the criterion or standard by which the required majority shall be measured. It would there-

fore reasonably appear that our Constitution does not profess to control such matters, but has left them to the sound discretion of the legislature. In *State ex rel. Stevenson v. Babcock*, 17 Neb. 188, 22 N. W. 372, relied upon by appellant, the court, in respect to the constitutional requirements of that state, said: "The submission must be at an election when senators and representatives are to be elected, and a majority of those voting at such election are required to vote in favor of the proposition to adopt the same. . . . In the absence of a statute or constitutional provision requiring a majority of all the votes cast to be in favor of a proposition, there is no doubt that a majority voting upon that question would be sufficient. In such case, no doubt, the failure of a party to vote upon the question may be considered as a tacit assent to the will of the majority of those voting thereon; but such a rule cannot apply where a majority of the electors of the state voting at the election are required to vote in favor of a proposition to secure its adoption."

In determining the question at issue in the case at bar the court was not confronted with any such express provision of the Constitution of this state as was embraced in that of the state of Nebraska. In the case of *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986, the question involved related to the interpretation of the provisions of the statute of this state which control the consolidation or union of an incorporated town and an incorporated city. See Burns's Rev. Stat. 1894, §§ 4208-4217 (Rev. Stat. 1881, §§ 3233-3242; Horner's Rev. Stat. 1897, §§ 3233-3242). Section 6 of this statute (Burns's Rev. Stat. 1894, § 4213; Rev. Stat. 1881, § 3238; Horner's Rev. Stat. 1897, § 3238), among other things, provided, "If a majority of the votes given in the town, as well as a majority of the votes given in the city, are in favor of union or annexation," then and in that event the trustees of the town and the common council of the city are required to meet, and by resolution declare the town and city united. An election for the union of the town of Myler and the city of South Bend was fixed for the 3d day of May, 1892; the same being the day provided by law for holding general city elections in South Bend and other cities of the same class throughout the state for the election of city officers. At the election 1,750 votes were cast in said city in favor of the proposed union, and 237 votes against it. In the town of Myler 39 votes were cast in favor of the proposition, and 6 against. The whole number of votes cast in the city of South Bend at said election for candidates for city offices was over 5,000. The question presented in that appeal was whether the proposition for annexation required a majority only of the votes for and against, or whether it was required to receive an affirmative vote of a majority of all persons who voted at the general city election held at the same time. This court in that case held that a majority of the votes cast for and against the proposition to consol-

idate was sufficient, although not equal to a majority of all the votes cast for candidates in the city of South Bend at the general election held on the same day. The court, in a well-considered opinion by Dailey, J., reviewed a great many of the authorities bearing upon the question, and in the course of its opinion, on page 536, 138 Ind., and page 993, 37 N. E., said: "We think it clearly appears that four leading principles may be considered as fully established, namely: First. Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote. Second. Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question. Third. Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law under which it is submitted to the contrary. Fourth. Where a legislative body provides that a proposition shall be submitted to the voters; that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote; and that a 'majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved." The court further said: "From an examination of the authorities bearing upon the question, we deduce the following rule: If, from the language of the statute, it is intended that a special vote shall be cast upon a proposition, and the law does not expressly require the majority of the votes cast at the general or regular election to adopt the measure, then it matters not whether the votes are cast at the same poll as is used for the election of officers. All that is necessary in such case is that the measure should receive a majority of the votes cast for or against it, and they can be separated from the rest of the votes cast at such election, and the result declared from the votes cast on the proposition." McCrary, Elections, § 208, states the rule as follows: "Where a statute requires a question to be decided or an officer to be chosen by the votes of 'a majority of the voters of a county,' this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by the majority of the votes cast, provided always that there is a fair election and an equal opportunity for all to participate. In such a case the only proper test of the number of persons entitled to vote is the result of the

election as determined by the ballot box, and the courts will not go outside of that to inquire whether there were other persons entitled to vote who did not do so. The 'voters of the county' referred to by all such statutes are necessarily the voters who vote at the election, since the result in each case must be determined by a count of the ballots cast, and not by an inquiry as to the number not cast. This doctrine is well settled by the authorities."

Section 1 of article 14 of the Constitution of Minnesota, relating to proposed amendments thereto, provides: "If it shall appear, in a manner to be provided by law, that a majority of voters present and voting shall have ratified such alterations and amendments, the same shall be valid to all intents and purposes as a part of this Constitution." In the case of *Dayton v. St. Paul*, 22 Minn. 400, it appears that a proposed amendment had been submitted under the above provision to the voters of that state at a general state election held for governor and other officials. The question presented in that appeal was as to whether, under the said provisions of the Constitution, a majority of the votes cast for and against an amendment would suffice to secure its adoption, or, in the event it was submitted at a general election when a vote was to be taken for the election of state officers or the adoption of other propositions, must it receive a majority equal to that of all the votes cast at such general election for state officers or other propositions? It appears in that case that 26,636 votes were cast in favor of the ratification of the amendment involved, and 2,560 votes against it. The aggregate vote cast at the same election for governor was more than double the entire vote for and against the amendment, and, while the latter received a majority of the votes cast for and against its ratification, still it did not receive a majority of all the votes cast at said election for governor. The court held, however, that the amendment had been ratified in accordance with the provisions of the Constitution. In the course of the opinion the court, speaking through its chief justice, said: "The precise meaning of the words, 'that a majority of the voters present and voting shall have ratified such alterations or amendments' is not very clear. The doubt is as to what is intended by the words, 'voters present and voting.' Do they mean the voters present and voting upon the proposed amendment, or do they mean, in case the amendment shall be submitted (as the legislature may submit it) at an election for other purposes, the voters who may be present and take part in the election for such other purposes? We are of the opinion that the words refer to the voters who are present and vote upon the proposition submitted to the electors, without respect to those who may be present and vote for other purposes at any election which may be held at the same time and place at which the proposition may, for reasons of convenience or other reasons, be submitted, and that those who may at such time and place come

51 L. R. A.

and vote for other purposes only are not to be regarded as present and voting, so far as respects the proposed amendment. It is the general rule in affairs of government that an election or a voting, whenever called for, is to be determined by the votes of those who vote to fill the office which is to be filled, or for or against the proposition which is to be adopted or rejected, and not by counting on either side those who do not vote at all. To take a case out of this general rule requires a clearly manifested intention to apply a different one."

The Constitution of the state of Idaho in relation to proposed amendments requires that they shall be submitted "to the electors, of the state at the next general election, . . . and, if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution. If two or more amendments are proposed, they shall be submitted in such manner that the elector shall vote for or against each of them separately." [art. 20, §§ 1, 2.] In *Green v. State Bd. of Canvassers* (Idaho) 47 Pac. 259, an amendment to extend the right of suffrage to women was submitted for ratification at a general election. It received 12,126 votes in favor of its ratification while 6,282 were adverse. It further appears that there were some 10,000 or more electors who voted for state officers at said election, who did not vote upon the said amendment. In construing the provisions of the Constitution quoted, the supreme court of Idaho held that a majority of the electors who voted for and against the adoption of the amendment was sufficient, within the meaning of that provision, to secure the ratification of the amendment, although the same was not a majority of the electors who voted at said election for state officials. In that case it is said: "Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and above all upon a question of an amendment of the Constitution; and it is equally difficult to ascertain the actual number of electors at any given time. . . . While it is true that some 10,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were—must have been—fully advised as to the importance of the question submitted; and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? We hold that the amendment under discussion is adopted, and has become a part of the Constitution of the state of Idaho." Chief Justice Morgan, in a concurring opinion, after reviewing many authorities, said: "Here, then, are a number of decisions which declare that, when a constitution or statute declares that a proposition requires a majority or two thirds of

all the voters of a given locality, such provision is satisfied if the proposition receives a majority or two thirds, as the case may be, of all those voting, taking no account whatever of those, be the number large or small, who fail to vote. It is admitted that if a special election was authorized and held on this question, and it appeared that 3,000 votes or a less number were cast for the proposition, and 1,500 against it, it would be legally adopted. This is a distinction without a difference, as in this case the amendment is voted on separately, precisely the same as it would be if no other question was presented or no officers were to be elected, and the vote taken and reported to the canvassers separately in the same way it would have been had this been the only question before the electors for their decision."

An act of Congress approved February 22, 1889, known as the "enabling act," under which North and South Dakota, Montana, and Washington became states, directed the people in the territory of what is now the state of North Dakota to elect delegates to a convention to formulate a Constitution to be submitted to the qualified electors for their adoption, and provided for the submission at the same time of separate articles or ordinances, and required the adoption of the latter by a "majority of the legal votes cast." Article 20 of the proposed Constitution, relating to prohibition of intoxicating liquors, was separately submitted. At the same election state officers were elected, and the article in question, it appears, received a majority of all the votes cast for and against it, and also a majority of the votes cast for and against the ratification of the state's Constitution submitted at the same election; yet it did not receive a majority of the votes cast for governor at that election. Under these facts the supreme court of North Dakota in the case of *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883, held that the article of the Constitution in controversy had been legally adopted. It was urged by counsel in that appeal that a "majority of the votes cast," within the meaning of the act of Congress in question, was not in favor of the adoption of said articles. We quote the following from the court's opinion: "Where, in this section, Congress spoke of the votes cast, it had reference to votes cast upon the particular objects which it directed should be submitted to a vote of the qualified electors. Congress had no knowledge that any candidates for offices would be voted for at that same election, and the matter of electing officers was left under the exclusive control of the constitutional convention; and further, it was the vote upon the Constitution and the articles, if any, separately submitted, that was to be certified to the President; and if, by the use of the words 'majority of legal votes cast,' Congress meant votes cast upon any subject other than those directed to be certified to the President, it would be obviously impossible for that official ever to determine whether or not the Constitution had been legally adopted, and yet under the act the duty devolved upon

him to determine that question at once. These considerations seem to us to conclusively establish that, when Congress used the words 'majority of legal votes cast,' it meant votes cast for or against the adoption of the Constitution, or of the articles separately submitted."

Article 3, § 1, of the Constitution of Wisconsin, after declaring who are qualified electors of that state, contains the following proviso: "Provided, that the legislature may at any time extend by law the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election." In *Gillespie v. Palmer*, 20 Wis. 544, the approval of an act of the legislature extending the right of suffrage under said proviso was involved. The act in question was submitted to the electors of that state for their approval at a general election, and received a majority of all the votes cast upon that question, but failed to receive a majority of all votes cast at the same election for state officers. The question presented to the court in that appeal for determination related to the meaning of the clause, "*approved by a majority of all the votes cast at such election.*" (My italics.) It was insisted in that case, as it is in this, that the act in controversy was required to be approved by a majority of the votes cast upon all propositions and for all officers at such general election. This contention, however, the court denied, and held that the act of the legislature had been approved as required by the Constitution, and in the course of the opinion it is said: "The candidates for governor at such election may not receive the votes of all the voters voting at such election, though they may receive more than the candidates for any other office. For there may be voters who, from want of confidence or private pique or ill will, will not vote for any of the candidates for governor, who will vote for the candidates for other officers; and there may be those who for the same reasons would not vote for the candidates for secretary of state, who would vote for the candidates for governor, state treasurer, and other offices; and the same may be true in relation to the votes given for the candidates for the respective offices; so that all the candidates for any one office may not receive the votes of all the voters voting at such election by several hundreds, and perhaps thousands. And yet the construction contended for requires that the extension of suffrage, to be carried, should receive a majority of the votes of all the voters voting at such election for any and all candidates,—should receive more votes than is required to elect a governor or any other officer, or to carry any other measure. Is it reasonable to suppose that this was the intention of the convention? Under the provisions of our Constitution, as well as of other constitutions, persons are elected to a particular office who have a majority of the votes cast,—not for the candi-

dates for some other office, but for the candidates for that office. Measures or laws are also declared adopted or rejected according as they receive or fail to receive each a majority of the votes cast for or against it. . . . We do not see how any other construction can reasonably be given to the clause. The words added by this construction are words which, whenever the same or similar language is used in reference to a vote on any measure or for any office, are generally understood."

The Constitution of New Jersey provides in respect to the submission of proposed amendments to a vote of the people as follows: "If the people at a special election to be held for that purpose only shall approve and ratify such amendment or amendments, or any of them, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments so approved and ratified shall become part of the Constitution." Article 9. At a special election held in 1897 proposed amendments to the Constitution of that state were submitted and received 70,443 votes in their favor, while 69,642 votes were adverse. It appears that 961 votes cast at this election were rejected upon various grounds. The question of their approval upon the part of the people at said election was presented to the supreme court and also to the court of errors and appeals of New Jersey in *Bott v. Secretary of State*, 62 N. J. L. 107, 40 Atl. 740; *Id.*, 63 N. J. L. 289, 45 L. R. A. 251, 43 Atl. 744, 881. It was contended that the amendments had not been adopted because they had not received "the vote of a majority of the electors qualified to vote for members of the legislature voting thereon." The supreme court held the amendments adopted; that the ballots returned as rejected must be considered as properly rejected, and consequently must be excluded from the count and regarded as nullities. This judgment of the supreme court was brought for review before the court of errors and appeals by a writ of error, and was there affirmed. The latter court, on page 300, 63 N. J. L., page 748, 43 Atl., and page 256, 45 L. R. A., in denying the contention of the prosecutors of the writ, to the effect that a majority of all the votes, as shown by the names on the poll lists, or at least a majority of all who cast ballots whether the same were for or against any of the amendments or were rejected, was necessary to secure the adoption of the amendment involved, said: "By the words, 'electors voting thereon,' are intended the electors who exercise the right of suffrage in such manner that their votes should, under the law, be counted for or against the proposition submitted; and although the number of names on the poll lists may represent the number of qualified electors who attempted to vote, and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted, in the constitutional sense, and that the rejected ballots were not votes. If, for ex-

ample, an elector presented to the election officer, and the officer deposited in the ballot box, two or more official ballots, rolled or folded together, and in canvassing the votes the ballots were so found, those ballots would, under the law, be null and void, and the elector would not have voted on any of the amendments."

The cases pro and con to which I have referred upon the question in issue may be said to be in the main, at least, all in which constitutional amendments were involved. We are cited, however, in addition to decisions upon the adoption of constitutional amendments, to numerous other cases where constitutional or statutory provisions in regard to the submission to the voters of certain localities of propositions of various character have been construed. These cases are both of service and force for the reason, as said in *Potter's Dwarria on Statutes*, "there is a striking analogy and generally an entire harmony between the rules of interpretation of constitutions and those of statutes." An examination of these cases discloses that they fall within some one of the four classes enumerated in *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986. The rule affirmed by this court in the latter case, as we have seen in the first classification, is to the effect that where a proposition is submitted to the electors of a district or state, and its adoption is made to depend on the vote of the majority, those who do not vote are deemed as having acquiesced in the result reached by the votes cast thereon, although the latter may be a minority of those entitled to vote on the proposition. The following cases, among others, support this rule: *St. Joseph Turp. v. Rogers*, 16 Wall. 644, 21 L. ed. 328; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 410; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 908; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Knox County v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. ed. 90, 13 Sup. Ct. Rep. 267; *Mobile Nar. Bank v. Oktibbeha County Supers.* 22 Fed. Rep. 580, 24 Fed. Rep. 110; *Madison County v. Priestly*, 42 Fed. Rep. 817; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 637, 62 Am. Dec. 452; *State ex rel. Lanier v. Padgett*, 19 Fla. 539; *Dunmoran v. Green*, 57 Ill. 67; *People ex rel. Gilman, C. & S. R. Co. v. Hurrp*, 67 Ill. 62; *Taylor v. McFadden*, 84 Iowa, 260, 50 N. W. 1070; *De Soto Parish Citizens & Taxpayers v. Williams*, 49 La. Ann. 437, 37 L. R. A. 768, 21 So. 647; *Taylor v. Taylor*, 10 Minn. 107, Gil. 81; *Reiger v. Beaufort Comrs.* 70 N. C. 319; *Alley v. Denson*, 8 Tex. 297; *State ex rel. Bassett v. Renick*, 37 Mo. 272; *State v. Binder*, 38 Mo. 455; *Metcalfe v. Seattle*, 1 Wash. 297, 25 Pac. 1010; *Yealer v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *Sanford v. Prentice*, 28 Wis. 358. The third classification in the *South Bend Case*, to the effect that when, at a general election, a proposition or measure is submitted, its adoption or rejection will be determined by the votes cast thereon, in the absence of some constitutional or statutory provision to the contrary, is supported by

the following cases, in addition to those to which I have already referred: *Howland v. San Joaquin County Supers.* 109 Cal. 152, 41 Pac. 864; *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773; *State ex rel. Little v. Langhe*, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958; *Marion County Comrs. v. Winkley*, 29 Kan. 36; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523.

The Constitution of California forbids any county to incur any indebtedness to a certain extent "without the assent of two thirds of the qualified electors thereof voting at an election to be held for that purpose." Art. 11, § 18. In the appeal of *Howland v. San Joaquin County Supers.* 109 Cal. 152, 41 Pac. 864, a proposition had been submitted at a general election to the electors of a county in regard to incurring certain indebtedness. At said general election 6,500 votes were cast in the county, but only 3,880 of said voters voted in favor of incurring the indebtedness, while 1,006 voted against it. The court in the latter case held that two thirds of the qualified electors of the county had by their votes assented thereto, within the meaning of the Constitution. The court in that appeal said: "If there had been no general election held at the same time this bond election was held, there would be no question but that two thirds of the qualified electors of the county voting assented thereto; and the fact that the county, by its board of supervisors, embraced the privilege extended to it by the legislature by the act of 1891, and held the election upon the day and at the same place as the general election, we think wholly immaterial. . . . The election was called by proclamation of the board of supervisors of San Joaquin county for a single, definite purpose, and *ex necessitate* was a special election, and the votes cast for and against the issuance of bonds were all the votes cast at that election."

The Constitution of Kentucky prohibits, under certain conditions, the incurring of indebtedness upon the part of a county "without the assent of two thirds of the voters thereof voting at an election to be held for that purpose." Section 157. In the appeal of *Montgomery County Fiscal Ct. v. Trimble*, 20 Ky. L. Rep. 827, 42 L. R. A. 738, 47 S. W. 773, it appears that there had been submitted to the voters of Montgomery county at the general November election of 1897 a proposition to issue certain bonds as obligations of that county. At said general election 1,920 votes were cast for the proposition, and 185 against it; and there were also cast at said general election in that county for state and county officers, in the aggregate, 3,000 votes. The court of appeals held that the proposition to issue the bonds in question had been assented to by the required two thirds majority, although by less than two thirds of the electors who voted at the general election at which the measure had been submitted. In the course of the opinion it is said: "It is a fundamental principle in our system of govern-

ment that its affairs are controlled by the consent of the governed, and to that end it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall by the expression of their opinion direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose. . . . The fact that the election was held for the purpose of obtaining the necessary assent of two thirds of the voters to the proposition on the day of the general election to fill offices does not change the rule of interpretation; nor, if so required to be held, does it show a purpose to require the assent of two thirds of those who vote for officers and on other questions at the election."

In the case of *Marion County Comrs. v. Winkley*, 29 Kan. 36, a law of that state which provided for bounties to be given by counties to encourage the growing of hedges was involved. The proposition to award such bounties was directed by the statute to be submitted to the people of the county at an election to be held at the same time provided for holding general elections for the election of county officers. It was provided, "If a majority of the votes are for the bounty," then the law was to be in full force and effect. I quote from the opinion in that case: "Within the terms of the statute, we think the bounty proposition is to be declared adopted or rejected according as it receives or fails to receive a majority of the votes cast for or against it. The votes cast for the township officers at the election of April, 1873, are not to be considered upon the bounty proposition. The electors of Marion county were invited by the proclamation of the county commissioners to vote for or against the bounty. A majority of the votes cast upon that particular proposition were for the bounty. This result having been obtained, it was the duty of the county commissioners of the county to declare the act to encourage the growing of hedges to be in full force and effect in that county. The electors who were present at the polls at the called election, and, while voting for township officers, did not vote upon the

bounty proposition, are presumed to assent to the expressed will of the majority of those voting thereon,"—citing authorities.

The Constitution of Missouri forbids the legislature from authorizing "any county, city, or town to become a stockholder in or to loan its credit to any company," etc., "unless two thirds of the qualified voters of such county, city, or town at a regular or special election to be held therein shall assent thereto." Const. 1865, art. 11, § 14. Under an act of the legislature of that state known as the "township aid act," a certain township of Cass county voted, by a two thirds vote, to issue township bonds to a railroad company, which were accordingly issued. In an action against Cass county, as trustees of the township, to recover interest overdue upon one of the bonds, the question was raised that, although more than two thirds voted at the election, two thirds of the qualified voters of the township did not vote in favor of issuing the bonds. The case ultimately reached the Supreme Court of the United States. *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416. That court, after citing and reviewing many authorities relating to the general subject announced its conclusion as follows: "This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary: All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed."

A statute of the state of Maryland authorizing the sale of spirituous liquors provided that on the day of the regular or general election in 1886 the voters of Washington county, of that state, "shall determine by ballot whether or not the provisions of this act shall go into effect in said county. Those favoring the act will cast their ballots with the words printed or written thereon, 'For the high-license law,' and those opposing the act will cast their ballots with the words printed or written thereon, 'Against the high-license law.'" The act also provided that, "if a majority of the voters of said county shall determine by their ballots in favor of the high-license law and the clerk of said county shall so proclaim to the people of said county, the provisions of this act shall take effect." At the general election on that day fixed, the aggregate number of votes cast for the several candidates for Congress in said county was 8,680. The number of votes cast in favor of the high license was 4,314, and against it 3,825. In the appeal of *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711, the supreme court, in holding that the license act had been ratified and was in full force and effect, said: "It thus appears, and in fact it is conceded, that the number of votes cast in favor of the high-license law was not equal to the majority of

all the votes cast at the same election for the several candidates for Congress, though the votes actually cast in favor of this law constituted a majority of all the votes polled on that particular subject. The single question, therefore, presented by this appeal, is whether under these circumstances the act became operative and effective, or, stated in other words, did the adoption of the act depend upon its receiving in its favor a majority of all the votes cast at that election upon some other subject or subjects, or upon its receiving a majority of the votes cast specifically for and against its adoption? It has been settled, both in England and in this country, by an almost, if not quite, unbroken current of judicial decisions, from the time of Lord Mansfield to the present day, that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote. . . . Conceding this to be true with respect to a special election held for the purpose of submitting a single question to the popular vote, it is insisted on the part of the appellant that a different principle should prevail in a case like this, where at a general election the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject. Hence, as we have already stated, the sole ground upon which it is claimed that the act in question failed to become effective is that, at the general election when the subject was voted on, less than a majority of those who voted for the congressional candidates cast their ballots 'For the high-license law,' and not that a majority of those who voted on this subject did not vote in favor of it. This objection to the adoption of the act is founded exclusively upon the construction which is sought to be placed upon the words of the 8th section,—"a majority of the voters of said county,"—taken in connection with the evidence furnished by the vote on the congressional canvass that there were more votes in the county than the number who voted upon this measure. If this construction, which confines the language to what is alleged to be its literal import, without reference to the provisions of the preceding section, is to prevail, it would be, it seems to us, as applicable in the case of a special election, where but one subject is submitted, as it is claimed that it is in the case of a general election where several subjects or persons are to be voted for; the only difference between the two instances being in respect to the evidence which might be adduced to ascertain the actual number of the voters of the county. In regard to a general election it is urged that the highest aggregate vote cast furnishes the evidence as to the number of voters of the county. At a special election

it is not improbable that only a minority of the voters, well known to be an unmistakable minority, may vote. This fact might be susceptible of proof,—might be in reality self-evident. Yet in the latter instance those who absent themselves from the polls, and those who, being present, abstain from voting, are regarded as assenting to the result declared by those who do vote. Upon what principle would it be incompetent to apply the same presumption to those who, though attending a general election and voting on other subjects, abstain from voting upon one particular matter, like the act in question? The very concession that a minority may elect necessarily implies that there is a larger number of voters who do not vote, of whom that minority is merely a fraction."

In the case of *Smith v. Proctor*, 130 N. Y. 319, 14 L. R. A. 403, 29 N. E. 312, the question arose under a statute in respect to the issuing of bonds by a school district when authorized by "a majority of all the inhabitants of any school district entitled to vote," to be ascertained by the ayes and noes of "such inhabitants attending at any annual, special, or adjourned school district meeting." At an adjourned meeting of the inhabitants of the district in question, 115 entitled to vote were present. The resolution in dispute in that case received at this meeting for its adoption 34 votes, while 33 were cast against it; only 67 of the 115 having voted upon the question. The insistence in that appeal was that the resolution had not received a majority of all the inhabitants entitled to vote who attended the meeting. The court, however, held that the resolution had been adopted pursuant to the provisions of the statute, and announced in its opinion that those who had not voted at all could not be considered as voting "No" on the proposition, "because they did not vote 'No,' and to so record them would falsify the record."

In *May v. Bermel*, 20 App. Div. 53, 46 N. Y. Supp. 622, the question arose upon the adoption of a proposition by the voters of the town of Newton to issue certain bonds. The statute involved in that case (Laws 1896, c. 178, § 69) provided that "a vote of the majority of the electors of any such town or towns voting at an annual town meeting or special town meeting" must be first obtained to authorize such town or towns to borrow money. The proposition to borrow money was submitted to the electors at an annual town election, or meeting held for the election of town officials, and it received a majority of all the votes of those who voted thereon, but did not receive a majority of all the electors who voted at said election for town officers. In holding that the proposition to issue the bonds was to be considered as a separate matter, and the vote thereon as a separate election, the court said: "If there had been a special town meeting called for this purpose, it could not be contended but that a majority of those who voted would control, even though a majority of the electors of the 51 L. R. A.

town did not attend or vote, or if a majority of the electors who attended such meeting did not vote upon the question, or that more blank ballots were cast than affirmative votes. If this would be true as to the special election, it is somewhat difficult to find a substantial reason why it would not be equally true of an annual town meeting. It is a fundamental proposition in our theory of government that the majority shall control, and the usual way in which such majority is evidenced is by giving all an opportunity to vote, and then counting such as vote affirmatively and such as vote negatively; the difference between the two constituting the majority. Those who fail to vote and those who cast blank ballots are not considered in determining the result, in the absence of some statutory authority which provides a different method, or commands the determination of a majority based upon the whole number entitled to vote. Such was the rule at common law." The rule of the common law as declared by Lord Mansfield in *Oldknow v. Wainwright*, 2 Burr. 1017, 1021, and by Lord Denman in *Gosling v. Veley*, 7 Q. B. 406, 456, is to the effect that, whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do; that a vote by a majority of a meeting means a majority of those who choose to take part in the proceedings of such an assembly. This rule is universally affirmed in England and this country by many decisions of the higher courts, and is adhered to and affirmed by this court in the following cases: *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315, 23 N. E. 72; *State ex rel. Drummond v. Dillon*, 125 Ind. 65, 25 N. E. 136; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *State ex rel. Walden v. Vanosdal*, 131 Ind. 388, 15 L. R. A. 832, 31 N. E. 79; *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986; *Pittsburgh. C. & St. L. R. Co. v. Harden*, 137 Ind. 480, 37 N. E. 324. In this latter case a township tax levy under the statute in aid of a railroad company was in issue. It is there said: "When a majority of those voting on the question have determined in favor of the burden, it is taken as the voice of the whole community; and not only those who do not or who cannot vote upon the proposition, but even those who vote against it, are equally held bound by the result." In the case of *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13, the rule is forcibly asserted. The question presented in that appeal related to the amendment of a constitution of an ecclesiastical society. The constitution of the latter provided, "There shall be no alteration of the foregoing constitution unless by request of two thirds of the whole society." An amended constitution was submitted for approval to the votes of the organization, the membership of which at the time was 204-517. The total number of votes cast upon the various alterations proposed to be made in the constitution was 54,360, the same being far less than two thirds of the members constituting said society. It was contended

before this court in that case that the vote cast did not amount to a request to alter the constitution by two thirds of the whole society, as required. It was held in that appeal that the organic law could not be changed in any other mode than that prescribed by the instrument itself. Coffey, J., speaking for the court, said: "The question is fairly presented as to whether the vote in favor of the amended constitution is to be regarded as a compliance with the constitutional requirements relating to amendments, and this involves to some extent the legal mode of ascertaining the number of legal voters at a given election." After quoting with approval the section wherein the rule is asserted by McCrary in his work on Elections, to which I previously referred, the court concludes as follows: "But we are of the opinion that the number of votes cast at the election is to be considered, for the purposes of this case, as constituting the number of legal voters belonging to the church. Any other rule would be impracticable, and would lead to endless confusion and contention." In the case of *Schlichter v. Keiter*, 156 Pa. 119, 22 L. R. A. 161, 27 Atl. 45, the same question arose in respect to the alteration or change in the constitution of an organization known as the "Church of the United Brethren in Christ." The provision of the constitution of this church or society was substantially the same as the provision involved in *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13. The supreme court of Pennsylvania held that a majority of the whole number of persons voting was sufficient to adopt the new constitution therein involved; that it must be assumed that those who did not vote were either favorable or indifferent to the proposed change. The court said in the course of its opinion: "In all elections the nonvoting must be counted as willing to be bound by the action of the majority of those who vote. Any other rule would lead to interminable trouble. . . . A majority consists of more than one half of those who vote at a given election, not of those who might have voted, but did not vote." The same question, virtually, was before the supreme court of Illinois in *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343; and the rule asserted in *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13, and in *Schlichter v. Keiter*, 156 Pa. 119, 22 L. R. A. 161, 27 Atl. 45, was approved and followed. There are many other cases cited of like import of those hereinbefore reviewed, but I do not deem it essential to further extend this opinion by giving them special attention.

The contention, among others, of the attorney general, is that the clause of the Constitution under consideration comes within both the third and fourth classifications made by this court in *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986, and hence only a majority of the votes cast upon each separate amendment is necessary to secure its adoption. In *Bishop v. State ex rel. Griner*, 149 Ind. 223, 39 L. R. A. 278, 48 N. E. 1038, on page 230, 149 Ind., page 280, 39 L. R. A., 51 L. R. A.

and page 1040, 48 N. E., it is said: "It is a rule generally asserted that words or terms used in a Constitution which is dependent upon a ratification by the people must be interpreted in a sense most obvious to the common understanding at the time of its adoption, in the belief that such was the sense or meaning designed." The intention or meaning of the people who adopted our Constitution is to be sought in the instrument itself, and the apparent meaning of the words or language employed is to be taken as expressing such meaning, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction. Black, Stat. Constr. & Interpretation of Laws, 15. Tested by the rule, what may be said to be the meaning of the clause immediately following the declaration that "it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state," namely, "if a majority of said electors shall ratify the same?" Can this clause be interpreted to mean a majority of those voting for and against a proposed amendment, or must it be considered as extending beyond this criterion, and providing some other or different standard or mode for ascertaining what is "a majority of said electors?" As an aid in the search for the meaning or intent thereof, I am referred to the debates of the convention which framed the Constitution. While these can have no controlling effect upon the interpretation of that instrument, still they may be said to be of importance where they tend to support a construction which its own language or terms would indicate. An examination of the acts of the framers of our fundamental law, in convention assembled, discloses that the original article in relation to future amendments reported by the committee to the convention, and its adoption recommended, required that such proposed amendments be submitted to the people at the next general election, and further provided: "If a majority of all of the electors voting at said election for members of the house of representatives shall vote for such amendment or amendments the same shall become a part of the Constitution." Mr. Owens subsequently presented a substitute for the article recommended by the committee, which, with the exception of some verbal changes made by the committee on phraseology, is substantially the same as § 1 of article 16 of the Constitution as finally adopted. Debates of Constitutional Convention, pp. 1914, 1918. It will be seen that the substitute of Mr. Owens differs from § 2 of the original article, especially in this; that it does not require amendments to be submitted at the next general election, nor does it require that "a majority of all the electors voting at said election for members of the house of representatives" shall be necessary to their ratification. It simply required "a majority of said electors" to ratify the same. When the matter came up again in the convention for a third reading, Mr. Pettit moved to recommit it with instructions to insert the following provision: "No amend-

ments shall be made to the Constitution unless the same shall have been called for and approved of by a majority of all the voters of the state." A vote being taken on Mr. Pettit's motion, it was lost by a vote of 27 to 93, and the section was thereupon passed by a vote of 77 to 45. Debates of Constitutional Convention, p. 1940. Thereafter the 2d section of article 16 was added, providing that the amendment or amendments should be so submitted "that the electors shall vote for or against each of said amendments separately." An examination of these debates apparently discloses that it was the affirmative sense or meaning of the convention to fix or provide no particular time for an election at which proposed amendments should be submitted to the people. Neither does it appear that it was intended to fix or provide, aside from the usual and ordinary one, any particular method or criterion for ascertaining the majority of the electors voting at an election called, in pursuance of an act of the legislature, for the submission of proposed amendments. As indicated by the Constitution itself, as well as by the debates and action of those who framed it, it would certainly seem that the question, both as to the time when the amendment or amendments were to be submitted, and likewise as to the standard or method by which the required majority should be tested, was, as previously asserted, left by the Constitution to the consideration of the legislature in submitting proposed amendments. In this view I am supported by the holding in *Bott v. Secretary of State*, 63 N. J. L. 289, 45 L. R. A. 251, 43 Atl. 744, 881, heretofore considered, wherein, on page 299, 63 N. J. L., page 256, 45 L. R. A., and page 748, 43 Atl., it is said: "The Constitution being silent as to the mode of ascertaining the result of the voting, and of determining whether the proposed amendments had been adopted, it was within the ordinary functions of the legislature to create a tribunal for those purposes, and to clothe it with appropriate powers."

It is a fundamental principle under our government, as the authorities assert, which must have been understood by the framers and ratifiers of our Constitution, that a majority of those who exercise the right of suffrage shall control in its affairs. It must be further presumed that they also knew and understood that the usual and ordinary mode of ascertaining or evidencing such majority is by giving all legally entitled to vote on a proposition an opportunity to do so, and then counting such persons as choose to exercise the right of suffrage by casting an affirmative and negative vote on the given proposition; the difference between the two votes constituting the majority essential to its adoption or approval. I may also indulge in the presumption that the men who framed the Constitution, and the people who ratified their work, must have understood that the great body of electors of the state is composed of a changing, uncertain, or indefinite number, which it is difficult at any given time to actually ascertain. They also

presumably knew that there are thousands comprising that body who, by reason of religious or conscientious views or indifference, or from other reasons, decline, when the opportunity is presented, to exercise the right of suffrage; that, while many do not vote at all, others will vote only for some particular proposition or officer, and will fail or decline to vote for others; and that therefore the most feasible and simplest method was the one universally recognized in the eye of the law long before the adoption of our Constitution, namely, to give all entitled to vote an opportunity to exercise this privilege, and then combine or aggregate the whole number of votes upon a given proposition or measure submitted to the electors of a district or locality; such combined vote to be taken or accepted upon any given proposition, for all practicable purposes, as comprising the whole number of the electors of the particular district or locality. This method of measuring the whole number is the one, as the authorities disclose, generally adopted, except where a different one is expressly prescribed. In such cases the non-voting must be counted as willing to be bound by the action of the majority who did vote upon the particular proposition, or, in other words, they may be considered as tacitly assenting to the result of those voting; and in this manner or by this method all of the electors of the district or state, as the case may be, are taken into account. Mr. Cushing, in his Treatise on Law & Pr. of Legislative Assemblies, in paragraphs 117 and 120, in speaking in relation to the law of elections, says: "The term 'majority,' that is, the greater number, is understood in this country in two significations. In its broadest sense, it denotes the greatest of any number of unequal divisions of the whole body; in its strictest, the greater of any two unequal divisions of the whole body. In the popular elections of this country, both these principles are practically applied; the first being known as the principle of plurality; the other only as that of a majority. . . . In order to determine the result of an election, on the principle of an absolute majority, it is necessary, in the first place, to ascertain the whole number of persons who have voted, which, if the suffrages are taken orally, is effected by counting the names on the poll book, or, if the voting is by ballot, by counting the number of ballots." The method which I have indicated must, in reason, be the one which the Constitution contemplates shall be adopted or provided by the legislature in submitting proposed amendments for ratification; and the test by which the majority necessary for ratification shall be determined is to consider alone the majority of the combined or aggregate vote cast for and against the ratification of each amendment. In this view I am supported by § 2 of article 16, which requires that the amendment or amendments shall be submitted in such a manner that the electors shall vote for or against each amendment separately. This provision would seem to be a positive com-

mand that the electors exercising the right to vote thereon shall vote for or against each of them separately and distinct from the others. Why was this required, if the whole number of the electors was not to be tested by the combined affirmative and negative votes cast separately on each amendment, but, as contended, must be ascertained by the highest number of votes cast at the same time upon some other proposition? This method for determining the whole number of the electors of the state is virtually conceded in *State v. Swift*, 69 Ind., on page 526, where it is said: "The opinion, therefore, of this court, is that it requires a majority of the electors of the state to ratify an amendment to the Constitution, but that the whole number of votes cast at the election at which the amendment is submitted may be taken as the number of electors of the state." Or, in other words, the court fairly concedes that, in the event the amendment is submitted at a special election, the whole number of votes cast thereon may be taken or accepted as comprising the entire number of the electors of the state. In my opinion, there can be no sufficient reason advanced for asserting that those who molded and ratified the Constitution of this state intended by the provision in question to change the well-settled policy or mode so universally recognized, by allowing electors who, from indifference or otherwise, decline to express any choice upon the ratification or rejection of an amendment to the Constitution, to be counted, the same as those who took an interest therein, and evinced such interest by voting pro or con thereon. The Constitution surely does not contemplate that the silent, passive, or non-voting electors upon a proposed amendment shall be counted or considered in estimating the number of electors or the majority essential to its ratification. Evidently the clause, "a majority of said electors," was intended to mean such electors as saw proper to exercise the right of suffrage, and actually cast their votes for or against a proposed amendment.

It is insisted that the election at which the amendment was submitted was a general election, and that it was submitted to the electors of the state to be voted upon at, and as a part of, said general November election, and hence the returns of the votes cast thereon cannot alone be accepted, but that the court must go beyond, and look to the returns in respect to said general election; and thereby, it is asserted, it will be shown that a majority voting at the general election for governor or other candidates on the state ballot did not vote upon the proposition of ratifying or rejecting the amendment. It, however, cannot be successfully asserted that the amendment was submitted to the people to be voted upon at, and as a part of, the general election of 1900. It was submitted under a special act of the legislature enacted solely for that purpose, and the votes cast for and against it cannot be said to have been cast at a general election. The proposition to ratify the amendment was upon

neither the state nor the local ballots used for voting at the general election, but was, as provided by the act of 1899, printed upon ballots which were separate and distinct from all other ballots used at said general election. To all intents and purposes the vote directed by the act of 1899 to be taken upon the adoption or rejection of the proposed amendments was, under that law, a special election,—as much so as though the act had fixed the 7th day of November, 1900, the day following the general election, for a vote to be taken on their adoption or rejection, and had further provided that it should be held at the same precincts and by the same election officers who held the general election on the previous day. Had the legislature intended that the amendment should be submitted at a general election and as a part thereof, it would have provided that it be submitted under that section of our general election law in respect to constitutional amendments, which is as follows: "Whenever any constitutional amendment or other question is required by law to be submitted to popular vote, if all the electors of the state are entitled to vote on such question, the state board of election commissioners shall cause a brief statement of the same to be printed on the state ballots, and the words 'Yes' and 'No' under the same, so that the elector may indicate his preference by stamping [marking] at the place designated in front of either word. . . . In case any elector shall not indicate his preference by stamping [marking] in front of either word, the ballot as to such question shall be void and shall not be counted." Burns's Rev. Stat. 1894, § 6258. The act of 1899, under which the amendments were submitted, among other things, provided that they should be printed on ballots of white paper, and should be designated as "Amendment No. 1" and "Amendment No. 2," and on the ballot, to the left of each separate amendment, should be the words, "For the amendment," and underneath the words, "Against the amendment," and directed that "the voter shall make a cross with a blue pencil in the square to the left of whichever set of words he desires to vote." One of these ballots, as the act directed, was to be delivered to each of the electors before entering the election booth, in the manner now provided by law. The act further provides that the election shall be governed by the laws controlling elections, "except as hereinafter provided." Section 2, after providing for the returns to the secretary of state of the total vote given for and against each amendment, etc., provides, "If it shall appear that a majority of all the votes cast at such election were given in favor of the adoption of either or both of said proposed constitutional amendments, the governor shall make proclamation, and it or they shall then become part of the Constitution of the state of Indiana." It must be assumed that the election officers faithfully discharged their duties in compliance with the statute under which the amendments were submitted, and also in compliance with the provisions of the

general election law which were to govern the election in question, so far as applicable. By the express provisions of the act, every elector present at the general election, upon entering the election room, and before entering the booth to prepare his ballots for voting, was supplied by the election officers with one of these official ballots for voting separately upon each amendment submitted. After indicating his choice upon the ballot as the law directed, or after attempting to do so, or after declining to express any choice whatever, we may assume that upon leaving the booth each elector handed the ballot so furnished to him, whether properly marked or not, to the election inspector, who deposited the same in the proper ballot box; for by the provisions of the general election law it is declared to be unlawful for any voter to attempt to leave the election room with a ballot in his possession, and it is made the express duty of the election officers not to permit any voter to whom a ballot has been delivered to leave such room without either voting the ballot or returning the same to the poll clerk. It is apparent that under the law all the qualified electors of the state were called upon to vote for or against each one of the proposed amendments at the time designated for a vote to be taken thereon. All who attended at the general election were afforded an opportunity to do so, by having the necessary ballot to be used for that purpose placed in their hands by the election officials. If they did not, under the circumstances, avail themselves of the right to vote or exercise a choice in the manner provided by law, it must be considered, when tested by the rule herein asserted, that those who did not express a choice upon the amendments, or expressed a choice only as to one and not as to the other amendment, must by their action be deemed to have affirmatively declined to do so, and in effect may be said to have thereby declared that they were willing to assent to the expressed will of the majority who voted upon each amendment. Whatever the difference existing between the total vote cast for governor at the general election and that cast upon either one of the amendments may be, or whatever the difference may be between the total vote cast upon amendment No. 1 and amendment No. 2, in the absence of any evidence to the contrary, it must be presumed to be due to or to result from the fact that a number of the ballots upon the amendments which were placed in the ballot box by the inspector of the election were rejected upon the count by the election board, and not counted, upon legal grounds. It will be seen from an examination of that section of our general election law heretofore set out, that it is declared therein that in case any elector "shall not indicate his preference by stamping [marking] in front of either word, the ballot as to such question shall be void and shall not be counted." It may, then, be presumed, nothing to the contrary appearing, that what ballots were rejected by the various election boards throughout the state were,

under the law, rightfully rejected, and not counted, for legal cause, and hence cannot be considered as votes for or against either amendment. Such ballots the statute declares, in effect, to be mere nullities, and they are not entitled to be taken into the count of the votes cast upon either amendment, and are virtually of no force, under the law, for any purpose in connection with the question herein involved. The statute of 1899, like the statute of 1873, which submitted to the electors the constitutional amendment in respect to the Wabash & Erie Canal stock, required no other count or return than that of the aggregate vote cast on each amendment. The act in question provides, in effect, that, if it shall appear that "a majority of all the votes cast at such election" upon either amendment was in its favor, it shall then become a part of the Constitution. That is the usual and ordinary test or criterion, as I have shown, and the one which the legislature had the power to provide, and that is the test or evidence of the ratification of the amendment by which this court in this case should be controlled. It appearing that the amendment in controversy received a majority of all the votes cast for and against it at the time designated by the statute for a vote to be taken thereon, it was therefore duly ratified by the electors of the state, and has become a part of the Constitution of the state of Indiana.

The extreme views and conclusions announced in the prevailing opinion of the court in respect to the interpretation to be placed upon the particular clause of the Constitution are, in my opinion, not in harmony with its meaning; neither are they justified by the canons which control the construction of constitutional law. The decision is to be regretted, as it will materially hinder, or render it an extremely difficult matter in the future to make, needed changes in our fundamental law. The holding therein to the effect that, although the amendments had each received a large majority of the votes cast thereon, still they must be considered as rejected, and hence cannot be resubmitted, for the reason that they did not receive a majority of all the votes cast at the general election for governor, is not warranted by the Constitution, and militates against sound reason. The decision in this respect goes beyond the holding in *State v. Swift*, 69 Ind. 505, as it was there held that the amendment involved was ineffectual for want of the constitutional majority, but that the legislature might resubmit it to the electors of the state. The Constitution does not limit the submission to any particular legislature, but simply declares that it shall be the duty of the general assembly to submit, etc. The power is a continuing one in the legislature, and, while it may be said that it is the duty of the legislature which has finally agreed to the amendment to submit it, still, if not properly submitted, or if the people neither ratify nor expressly reject it by their votes cast thereon, it may be resubmitted. I conclude that the judgment ought to be affirmed.

RICHMOND NATURAL GAS COMPANY,

App't.,

v.

Charles H. CLAWSON.

(.....Ind.....)

1. A natural gas company which has been given by ordinance the right to exercise the power of eminent domain, and to lay under the streets and alleys of the city its gas pipes and mains for the supplying of natural gas to the city and its inhabitants, is engaged in a business affected with a public interest requiring it to serve impartially, on equal terms, all who apply for service.
2. A rule of a gas company requiring those who use natural gas both for fuel and lights to pay 20 cents per 1,000 feet for all that is used, without respect to the quantity used for either purpose, while the gas is supplied for 12½ cents per 1,000 feet to those who use it for fuel alone, as it has for some years been furnished to all who used it for any purpose, is unreasonable and invalid as an unjust and arbitrary discrimination.

(December 21, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Wayne County in favor of plaintiff in a suit to enjoin defendant from shutting off plaintiff's supply of natural gas. *Affirmed.*

The facts are stated in the opinion.

Messrs. John F. Robbins and Thomas J. Study for appellant.

Mr. A. C. Lindemuth for appellee.

Jordan, J., delivered the opinion of the court:

Appellee successfully prosecuted this action in the lower court to enjoin appellant from shutting off his supply of natural gas from his residence situated in the city of Richmond. The errors assigned are based upon overruling appellant's demurrer to the complaint, denying its motion for a new trial, and upon exceptions reserved to the several conclusions of law stated by the court upon its special finding of facts. The special finding of facts discloses substantially the following: The Richmond Natural Gas Company was incorporated on the 5th of March, 1886, under the laws of this state, and obtained a franchise or privilege from the city of Richmond, Wayne county, Indiana, granting the said company the right to lay under its streets, alleys, and avenues, etc., its gas pipes and mains for the supply of natural gas to said city and the citizens thereof, subject to the conditions and regulations in the ordinance set out and provided. One of the objects for which said company seems to have been incorporated was to supply consumers of the city of Richmond and in the

vicinity with natural gas. Section 1 of the ordinance of the city under which the franchise was granted to appellant gas company reads as follows: "Be it ordained by the common council of the city of Richmond, that the Richmond Natural Gas Company of said city be, and is hereby, granted the right to lay under the surface of such of the streets, alleys, lanes, avenues, and thoroughfares in said city as may be necessary therefor gas pipes and mains for the supply of natural gas to said city and the citizens thereof, subject to the conditions and regulations hereinafter set out and provided."

Section 9 of the same ordinance is as follows: "Any and all residents of said city shall have the absolute right to use the gas along the lines, mains, and pipes laid by said company hereunder, and no regulations respecting tapping or connections with said mains or pipes by citizens shall be made which do not apply alike to all citizens. And in case said company shall not make and publish reasonable regulations permitting any and all citizens to tap their mains and pipes for the purpose of taking gas therefrom for the use of said person or company, then and in any such case the common council of said city shall have power and authority thereunder to authorize any such person company, or corporation, on application to said council, to tap said pipes under the supervision and direction of the civil engineer of said city. All right of tapping mains and pipes hereunder shall be subject to the payment by the person, company, or corporation tapping the same, of such rates as are fixed by said company for the general use of such gas, or by agreement of such person and said company." Appellant duly accepted in writing the provisions and conditions of the ordinance heretofore mentioned, on the 15th day of March, 1886, and thereafter, in the month of December, 1888, began to supply natural gas to the consumers of the city of Richmond, and from that time on it has continued to furnish, and is still furnishing, natural gas to consumers of that city. For the first two years from the time appellant began to furnish natural gas to consumers in the city of Richmond, it furnished the same through mixers, but thereafter the company put in meters, and supplied its consumers, when requested, with gas by meter measurement, and has so continued; and it now has from 1,200 to 1,300 patrons who pay for the natural gas consumed by meter measurement at so much per 1,000 cubic feet. In the year 1893, and up to the date of the commencement of this action, appellant was notified by divers of its patrons in said city at the time they applied to it for meters that they desired to and intended to use natural gas, for illuminating purposes as well as for heating their houses, and with a full knowledge and notice of such fact appellant supplied and put in the meters so requested, and the consumers thereafter used and consumed natural gas both for illuminating and heating purposes continuously, and appellant received and accepted pay from its patrons for gas which had been consumed for both heat-

NOTE.—As to compulsory service by gas company, see *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321, and *note*; also later cases in the series as follows: *Portland Natural Gas & Oil Co. v. State ex rel. Keen* (Ind.) 21 L. R. A. 839; *Coy v. Indianapolis Gas Co.* (Ind.) 36 L. R. A. 535. 51 L. R. A.

ing and light. The rate of gas so consumed up to the 1st day of October, 1897, was fixed by the gas company at the uniform rate of 12½ cents per 1,000 cubic feet. Appellant received payment at such rates from its consumers with the knowledge that gas had been consumed for both heating and illuminating purposes; and appellant, with such knowledge, took no steps or action to prevent the use of such natural gas by its patrons for illuminating purposes. The price charged by appellant for gas supplied by it to any and all of its consumers, other than manufacturers, by meter measurement, after it adopted, as heretofore stated, that method, up to the 1st day of October, was 12½ cents per 1,000 cubic feet, whether said gas was used for heating alone or for both heat and light. Consumers which were classed as domestic included all residences, stores, etc. On the 1st day of September, 1897, appellant company adopted and promulgated the following notice, to wit:

Notice to Consumers of Natural Gas.

Beginning October 1st, 1897, the rate for natural gas, when used for fuel and light, will be 20 cents per 1,000 cubic feet. When used for fuel only, the rate will be the same as heretofore, 12½ cents per 1,000 cubic feet.

Richmond Natural Gas Company.

Appellee, Clawson, is now, and has been for more than twenty-five years last past, a bona fide resident of the city of Richmond, Wayne county, Indiana, and has occupied, and still occupies, for more than five years last past, a dwelling house and residence situated in said city, No. 42 North Seventh street, with his family, consisting of himself, his wife, and two children. Prior to the time appellee began using natural gas supplied by the defendant by meter measurement, he had been one of appellant's patrons, and had used and consumed its gas for heating purposes through mixers. In September, 1896, he fitted and caused to be fitted by an experienced plumber his house with necessary gas pipes, fixtures, and Welsbach burners for the purpose of using and consuming the said natural gas of the defendant for illuminating purposes in his said house, as well as for heating the same. A short time before piping his said residence and fitting the same up for the use of natural gas for both heating and light, appellant furnished appellee with a meter, and placed the same in his residence, and made the proper connections for consuming its gas by meter measurement, for which meter appellee paid appellant the sum of \$15. Thereafter appellee consumed and used the gas supplied to him by appellant for both heating and lighting purposes in his residence, consuming the same for heating purposes in two stoves and one grate, and for lighting in three rooms by single jets, which were furnished with Welsbach burners; and thereafter appellee paid appellant monthly the uniform rate of 12½ cents for each 1,000 feet of natural gas used and consumed by him for heating and lighting, as shown by said meter. On the 1st

day of September, 1897, appellee received from appellant the notice adopted by it, as heretofore set out, in respect to the change in the rate of gas when used for both fuel and illuminating purposes. About the 1st day of October, 1897, appellee called at the office of appellant in the said city of Richmond, and notified it that he was using gas for both heating and lighting in his residence by meter measurement, and that he desired to continue to use gas for such purposes; stating that he was willing to pay 20 cents per 1,000 cubic feet for gas for lighting purposes and 12½ cents per 1,000 feet for heating purposes, but that he objected and refused to pay 20 cents per 1,000 feet for such gas when used for both heat and light. Appellee at that time demanded of appellant that it furnish him with a separate meter with which to measure the gas used and consumed by him for light, to be measured separate and apart from that used by him for heat, and tendered to appellee the sum of \$15, the same being the price charged by it for meters. Appellant refused this request of appellee, and thereupon the latter asked the permission and consent of appellant to put in such separate meter for himself, which permission appellant refused to give. Appellee thereafter continued to use and consume natural gas furnished him by appellant for both heat and light during the said month of October, 1897. On the 1st day of November, 1897, he received from appellant a statement of gas consumed by him during said month of October, and was charged therefor at the rate of 20 cents per 1,000 cubic feet; making a total of \$3.80. On the 2d or 3d day of November, 1897, appellee called at the office of appellant, and tendered to it the sum of \$2.38, the same being at the rate of 12½ cents per 1,000 cubic feet for the gas which he had consumed during the said month of October, which sum appellant refused to accept, and appellee was informed by its proper officers that, if he put in a separate meter without the company's consent, or refused to pay the gas bills demanded by the company at the rate of 20 cents per 1,000 feet, they would shut off his gas. Appellee had previously at all times paid appellant all gas bills, and had complied with its reasonable rules and regulations, and was still willing to do so. Appellant, at the time of the commencement of this action, was threatening to enforce the rule which is hereinbefore referred to against appellee, and to charge both him and all other domestic consumers who used its natural gas for heating and illuminating purposes the sum of 20 cents per 1,000 cubic feet, but would permit all other domestic consumers who used said gas for fuel alone, to do so at the uniform rate of 12½ cents per 1,000 cubic feet. Appellant has enforced the rule since the 1st day of October, 1897. Appellee has fitted up and plumbed his house for the use of said natural gas, and his stoves and grates are fitted with the necessary and proper burners for the use of natural gas for heating purposes, and in doing so he has been subjected to considerable ex-

pense; and his residence, at the time of the commencement of this action, was not fitted or adapted to the use of any other fuel or gas for heating and illuminating purposes. In the event the supply of gas was shut off, and he was deprived of the use thereof by appellant, he would be required to remove the burners from his stoves and grates, and to adapt and change his house, at considerable expense, in order to successfully use other fuel for heating and lighting purposes; and he and his family would thereby be liable to suffer great loss and injury. It is disclosed by the special finding that, at the time appellant began to furnish its natural gas to the citizens of the city of Richmond, there was located within that city, and ever since has been, an incorporated artificial gas company engaged in the business of furnishing artificial gas for the lighting of dwellings, stores, shops, and houses generally of the citizens of the city, which were all properly adapted for illuminating; which artificial gas company, as the court finds, is now, and for many years last past has been, charging and receiving, as its price for its gas so furnished, \$1.50 per 1,000 cubic feet, or \$1.20 in the event the bill for gas is paid within ten days after each month's gas bill has become due. Neither the articles of incorporation of the defendant nor the ordinance under which it obtained its franchise from the city specifies or indicates the manner or purpose for which natural gas was to be supplied to consumers of the city of Richmond; nor was any price fixed thereunder for which natural gas should be furnished to such consumers. The only place in the ordinance where the use of natural gas supplied by appellant is referred to is contained in §§ 1 and 9 of the ordinance, as heretofore set out.

On the foregoing facts the court stated four conclusions of law, of which the fourth is as follows: "The rule promulgated by the defendant on the 1st day of September, 1897, fixing the price of gas to consumers at 12½ cents per 1,000 cubic feet when used for fuel purposes only, and when used by consumers for both fuel and illuminating purposes at 20 cents per 1,000 cubic feet for both purposes, unjustly discriminates against those consumers who use gas for both purposes, as far as the use of such gas for fuel purposes is concerned, and cannot be enforced against them in their use of such gas for such purpose." The last conclusion of law is the one of which appellant more especially complains. The principal contentions of its counsel are: First, that the complaint is not sufficient on demurrer; second, that the special finding of facts does not warrant the fourth conclusion; third, that the evidence does not sustain the finding. It is insisted that appellant had the lawful right, as it did, to divide its domestic consumers into two classes by the rule adopted and published under the notice given, such classification including: First, those who used gas under the meter system for fuel only; second, those who consumed it under the same system for both heating and illuminating purposes. It is contended that

appellant had the right to exact from the latter class a greater price or rate per 1,000 cubic feet for the gas consumed for such purposes than was charged to and paid by consumers constituting the first class. Such a classification, it is contended, under the circumstances in this case, is not an unjust or unlawful discrimination upon the part of appellant in fixing the price to be charged for the gas which it furnished, for the reason that the classification in question applied alike, under similar circumstances or conditions, to all the consumers of appellant's gas.

On the part of counsel for appellee it is insisted: First, that the company was required to furnish natural gas to consumers, not only for fuel, but also, if desired by them, for illuminating purposes; second, that a discrimination, under the rule adopted, whereby one domestic consumer was charged 12½ cents per 1,000 cubic feet for gas used for fuel only, and another was charged 20 cents for the same amount, solely because he consumed an additional quantity for light, is an arbitrary and unlawful discrimination.

The rule of the common law so universally recognized and enforced declares that persons, either artificial or natural, engaged in conducting a business which is public in its character or nature, or which is impressed with a public interest, cannot arbitrarily select their patrons, but must serve impartially, or on equal terms and at reasonable rates, all who apply for service. It is true that this rule cannot be interpreted as requiring absolute uniformity of rates or prices, nor as prohibiting, under any and all circumstances, a discrimination by performing services for one person at a price or rate lower than that exacted of others. This doctrine is more frequently enforced in respect to railroad companies and other common carriers, and, while the latter cannot arbitrarily select their patrons, still they are not prohibited from undertaking the transportation of wares or goods of one patron at an unreasonably low rate, or from conferring upon him other practical advantages in respect to such transportation not extended to his competitors or to the public in general.

It is disclosed that the ordinance adopted by the common council of the city of Richmond granted to appellant the right to lay its pipes and mains under the streets, alleys, and thoroughfares of that city "*for the supply of natural gas to said city and the citizens thereof.*" (Our italics.) Appellant is in its nature a public corporation, and the business which it was organized to carry on by virtue of the statutes by which it was created is impressed with a public interest, which fact was recognized by the legislature when it conferred upon it and other companies of like character the right of eminent domain. Acts 1889, p. 22 (Burns's Rev. Stat. 1894, § 5103). It is the creature of the law, and the rights and privileges conferred upon it by the state, in theory at least, were granted, not only for its own pri-

vate benefit, but also for the benefit and good of the public; and in accepting them it impliedly, at least, agreed to carry out the purposes or objects of its creation, and assumed a duty or obligation towards the public which it will, under the law, be required to discharge. *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 N. E. 1089. The duty which corporations like appellant owe to the public has been repeatedly stated and declared by the decisions of this court. *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 439, 34 N. E. 818; *Westfield Gas & Mill Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Central U. Teleph. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 804; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 N. E. 1089.

In the case last cited the appellee therein had been granted the right or privilege by the city of Portland to lay its pipes and mains under the public streets of that city for the purpose of supplying the inhabitants thereof with natural gas for light and fuel. In considering in that appeal the duty of a gas company to the public, we said: "Its duty towards the citizens of the city of Portland, and their duty towards it, may be said to be somewhat reciprocal, and any dealings, rules, or regulations between it and them which do not secure the just rights of both parties cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially, as far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it, and complied with the company's reasonable regulations and conditions,"—citing authorities.

Counsel for appellant seemingly contend that it is not shown that natural gas for illuminating purposes is of less value than the same is for fuel, or that such gas, when used for both light and fuel, is not reasonably worth 20 cents per 1,000 cubic feet; and hence it is asserted that it does not appear that appellant, under this rule, has unjustly or injuriously discriminated against appellee; second, that it is not disclosed how many feet of gas he consumed for fuel and how much for light. Consequently it is insisted that it cannot be claimed that there has been any discrimination so far as he is concerned. These contentions, in our opinion, are not impressed with merit. Counsel for appellee concedes, and properly so, we think, that companies engaged in furnishing gas and water, etc., to the public may make classifications in respect to their patrons or customers, and adopt reasonable rules and regulations for the control of such classes, but that the classification must be reasonable and impartial, and not arbitrary, or of 51 L. R. A.

an unjust, discriminating character, but that due regard must be had to the rights of the citizens of the town or city depending upon such companies for their supply of water or gas, as the case may be, and that all occupying similar or like positions must be treated impartially. *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 439, 34 N. E. 818; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 N. E. 1089 and cases cited; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Young v. Boston*, 104 Mass. 95. See cases collected in note to *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321.

Appellant, during the nine years of its operation, and prior to the adoption of the rule in dispute, seems to have recognized but two classes of consumers, namely, manufacturers and domestic. To the latter class appellee belonged. For a period of about four years and over, he, along with other consumers, used appellant's gas for both fuel and light; the amount so consumed for such purpose being ascertained by means of meters. Of this fact appellant had full knowledge, and accepted pay for the gas so consumed at the rate of 12½ cents per 1,000 cubic feet. In 1897, as shown, it adopted the rule in question, requiring its patrons who used gas for both fuel and light to pay the increased price of 20 cents per 1,000 feet. The rate or price as to all others who used gas for fuel only remained, as previously fixed, at 12½ cents per 1,000 feet. Under this rule appellant did not profess to have any regard or consideration for the amount consumed for light. If any patron using gas for heating his dwelling also employed one jet about his dwelling house, whereby a small amount of natural gas was consumed each month for light, he was amenable and subject to the rule in like manner as the fuel consumer would be who used many jets about his premises for illuminating purposes. The amount consumed for light does not seem to be a feature of any importance within the meaning of the rule in question. Such a regulation, under the facts in this case, when tested by the principle affirmed and sustained by the authorities, must certainly be held unreasonable, arbitrary, and unjust. That this is so is evident, we think, without further comment.

Counsel for appellant refer us to *Philadelphia Co. v. Park Bros.* 138 Pa. 346, 22 Atl. 86. The holding in that appeal, however, lends no support to their contention upon the question here involved. The rule there affirmed was to the effect that a manufacturing company supplied by a gas company with natural gas, under a contract that it was to be used for fuel only, by using gas from the gas mains for illuminating purposes will be held liable to pay, for gas consumed for such latter purpose, the reasonable value thereof at the usual market price. The special finding in the case at bar is in

harmony with and supports the complaint, and warrants the fourth conclusion of law, and the evidence sustains the finding. Under the facts, appellee established a case which entitled him to the equitable relief demanded and secured by the judgment of the lower court. None of appellant's assignments of error is sustained, and the judgment is therefore affirmed.

Timothy T. OVERSHINER, Appt.,

v.

STATE of Indiana.

(.....Ind.....)

1. The appointment of some of the members of a board of dental examiners by the state dental association under the provisions of Acts 1890, p. 479, is not void for want of authority in the legislature to confer such powers upon a private corporation, since the office is not one for which the Constitution provides, but is within the provisions of Const. art. 15, § 1, for the appointment of officers not otherwise provided for in the Constitution, in such manner as may be prescribed by law.
2. The contention that the legislature cannot bestow police powers upon a private corporation is not valid as against the appointment of some of the members of a board of dental examiners by the state dental association in conformity to Acts 1890, p. 479, as there is no reason why such an organization of practising dentists for the promotion of scientific knowledge and skill in their profession should not be as safe a repository of such power as an individual.

(February 15, 1901.)

APPEAL by defendant from a judgment of the Circuit Court for Grant County convicting defendant of practising dentistry without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. John A. Kersey, for appellant:

Messrs. Merrill Moores and Cassius C. Hadley, with **Mr. William L. Taylor**, Attorney General, for the State:

However appointed, the members of the dentistry board were *de facto* officers, and appellant was bound to recognize them as such.

Parker v. State ex rel. Powell, 133 Ind. 200, 18 L. R. A. 575, 32 N. E. 836, 33 N. E. 119; *State ex rel. Bishop v. Crowe*, 150 Ind. 462, 50 N. E. 471.

Proceedings in quo warranto are the only proper proceedings for questioning the title to office.

Gribbel v. State ex rel. Niezer, 111 Ind. 369, 12 N. E. 700; *Mannix v. State ex rel. Mitchell*, 115 Ind. 250, 17 N. E. 565; *People ex rel. Bolt v. Riordan*, 73 Mich. 516, 41 N. W. 482; *Mechem*, Pub. Off. § 478.

NOTE.—As to regulation of right to practise dentistry, see cases in note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 581; also the case of *State v. Knowles* (Md.) 49 L. R. A. 695.

51 L. R. A.

Courts will not listen to those who are not aggrieved by an invalid law.

Wagner v. Garrett, 118 Ind. 116, 20 N. E. 706; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 13, 49 N. E. 582; *Gustavel v. State*, 153 Ind. 616, 54 N. E. 123; *Gallup v. Schmidt*, 154 Ind. 201, 56 N. E. 443; *Airy v. People*, 21 Colo. 155, 40 Pac. 362; *Newman v. People*, 23 Colo. 313, 47 Pac. 278; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *State v. Snow*, 3 R. I. 75; *McKinney v. State*, 3 Wyo. 726, 16 L. R. A. 710, 30 Pac. 296; *Jones v. Black*, 48 Ala. 540; *Smith v. Inge*, 80 Ala. 286; *Burnside v. Lincoln County Ct.* 86 Ky. 430, 6 S. W. 276; *Smith v. McCarthy*, 56 Pa. 361; *Autoni v. Wright*, 22 Gratt. 857.

A statute creating an office and providing an unconstitutional method of filling it is not wholly void; the office is created, but it must be filled as the Constitution provides.

Clayton v. Utah Territory, 132 U. S. 632, 33 L. ed. 455, 10 Sup. Ct. Rep. 190; *McCornick v. Thatcher*, 8 Utah, 294, 17 L. R. A. 243, 30 Pac. 1001; *State ex rel. Worrell v. Peelle*, 121 Ind. 495, 22 N. E. 654.

The legislative right to regulate the practice of dentistry comes within the police power, and is well settled.

Wilkins v. State, 113 Ind. 514, 10 N. E. 192; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *State v. Creditor*, 44 Kan. 505, 24 Pac. 346; *Knowles v. State*, 87 Md. 204, 39 Atl. 619; *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789; *State v. Hinman*, 65 N. H. 103, 18 Atl. 194.

The sound construction of the Constitution must allow to the legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

McCulloch v. Maryland, 4 Wheat. 421, 4 L. ed. 605; *Slaughter-House Cases*, 16 Wall. 30, 21 L. ed. 394; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

The legislature may exclude individuals from the privilege of making insurance contracts, and limit the privilege to corporations, as it does the exercise of the right of eminent domain.

Com. v. Vrooman, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217.

From the earliest times legislatures have delegated to private institutions of learning and learned bodies the duty of examining and licensing applicants for admission to the learned professions; and the recognition of diplomas from private educational institutions is to-day almost universal.

College of Physicians Case (1543) Littleton, 168, 212, 349; *Hewitt v. Charier*, 16 Pick. 353; *People ex rel. Gray v. Erie County Medical Soc.* 24 Barb. 570; *Re Smith*, 10

Wend. 449; *Regents of the University v. Williams*, 9 Gill & J. 385, 31 Am. Dec. 72; *Gage v. New Hampshire Eclectic Medical Soc.* 63 N. H. 92, 56 Am. Rep. 492; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

This practice has been followed in Indiana ever since the admission of the state; and such laws have repeatedly received the approval of this court.

Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *State ex rel. Rhodes v. Indiana Bd. of Pharmacy* (Ind.) 58 N. E. 531; *Hewitt v. Charier*, 16 Pick. 355; *Regents of the University v. Williams*, 9 Gill & J. 385, 31 Am. Dec. 80; *Scholle v. State*, 90 Md. 741, 50 L. R. A. 411, 46 Atl. 326; *Re Bulger*, 45 Cal. 550; *Sturgis v. Spofford*, 45 N. Y. 449; *Allopathic State Bd. of Medical Examiners v. Fowler*, 50 La. Ann. 1374, 24 So. 800; *People ex rel. Waterman v. Freeman*, 80 Cal. 233, 22 Pac. 173; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 227.

Hadley, J., delivered the opinion of the court:

Appellant was convicted of practising dentistry without a license, or certificate of registration, in violation of the provisions of the act of 1899 approved March 6, 1899 (Acts 1899, p. 479). The section involved is in these words: "Sec. 2. A board of examiners consisting of five reputable practising dentists shall be appointed on or before the last Tuesday of June, 1899, and biennially thereafter, one by the governor, one by the state board of health, and three by the Indiana state dental association, said board to serve for the term of two years from the date of such appointment. When convened, said board shall examine all applications, issue certificates thereon, and also may examine all applicants for certificates of qualification, and issue such certificates to all such applicants as shall pass a satisfactory examination." Appellant assails the judgment upon the ground that the statute upon which it rests is violative of § 1, art. 3, § 1, art. 5, § 18, art. 5, and § 3, art. 6, of the state Constitution, and the 14th Amendment of the Federal Constitution. Appellant admits that he practised dentistry without the license required by the statute under which he is prosecuted, and that the judgment is right if the statute is constitutional.

A statute upon the same subject, and in all material respects the same as the one before us (Acts 1887, § 2, p. 58; *Burns' Rev. Stat.* 1804, § 5596), was held to be constitutional in *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. In that case the point was made against the act, that the authority to appoint three members of the board of examiners was an enlargement of the corporate powers of the state dental association by special law, in contravention of the Constitution. Again, the same statute was held to

be in harmony with § 23, art. 1, of the Constitution, forbidding the granting of privileges which shall not, upon the same terms, equally belong to all citizens. *Ferner v. State*, 151 Ind. 247, 51 N. E. 360. It is here asserted that the statute is bad for being in conflict with the various provisions of the Constitution above set out, the contention being that the appointment by the state dental association of three members of the board of examiners was void for want of authority in the legislature to confer the power of appointment upon a private corporation, or individual outside the executive department.

The power of the general assembly to enact laws is subject to no restrictions save those imposed by the state and Federal Constitutions. *Hovey v. State ex rel. Carson*, 119 Ind. 395, 21 N. E. 21; *Lowe v. White County Comrs.* (Ind.) 59 N. E. 466. Its laws are presumed to be valid, and they are to be upheld by the courts, not only when clearly authorized, but in all cases of doubt, and until it is made to clearly appear that they contravene some constitutional provision. Courts will not, therefore, search the Constitution for express sanction, nor for reasonable implication, to sustain a legislative enactment, but the successful assailant must be able to point out the particular provision that has been violated, and the ground upon which it has been unequivocally infringed. *Robinson v. Schenck*, 102 Ind. 307, 319, 1 N. E. 698; *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47; *French v. State ex rel. Hawley*, 141 Ind. 618, 639, 29 L. R. A. 113, 41 N. E. 2. We concede in fullest terms appellant's contention that our state government is composed of three distinct and co-ordinate branches, namely, the legislative, executive (including the administrative), and judicial, and that the powers committed by the people to one branch cannot be exercised by those performing duties in another, without express authority to do so, or the exercise of such power becomes essential or appropriate to the effective discharge of the duties imposed upon such branch. And while it has been many times decided by this and other courts that, as a general rule, the power of appointment to office is an appropriate executive prerogative, yet, as said by Mitchell, J., in *Hovey v. State ex rel. Carson*, 119 Ind. 401, 21 N. E. 21, "It is a fundamental error, however, to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the executive." In the distribution of governmental power the people had the undoubted right to lodge any part of it where it pleased them, and, when expressly placed, the court will suffer no encroachment upon it by those acting in another department; but where the Constitution is silent, and the question is one of public policy, or relates to the best means or agency for the attainment of some governmental end, it must be presumed that the framers of the Constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and benefi-

cial to the public. In *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 93, 9 Am. Rep. 103, Cooley, J., says: "The legislature, in prescribing new rules, have necessarily a large discretion as to whether the agencies for putting them in force shall be named by themselves or left to the selection of the executive." The eminent expounder of constitutional law, Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat., on page 421, 4 L. ed. 605, says with respect to the Federal Constitution: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." Relating to the same subject, the celebrated author and jurist already quoted cites approvingly: "When the Constitution contains no negative words to limit the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution." Cooley, Const. Lim. 6th ed. p. 134, note. The Constitution is silent upon the subject of general appointments to office. It is provided by § 1, art. 5, "that the executive powers of the state shall be vested in the governor;" and by § 18, art. 5, "when at any time a vacancy shall have occurred in any other state office [except appointment vested in the general assembly] or in the office of judge of any court, the governor shall fill said office by appointment, which shall expire when a successor shall have been elected and qualified;" and by § 1, art. 15, that "all officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be prescribed by law." Three things are clearly apparent from these provisions: (1) The power of appointment to some offices is committed to the general assembly; (2) the power to make temporary appointments to fill vacancies in any state office, or in the office of judge, until such officer can be regularly chosen as provided by law, and thus to avoid a suspension of the functions of such office, is conferred upon the governor; and (3) all other officers whose appointments are not specially provided for in the Constitution shall be chosen in such manner as the legislature may deem expedient. It cannot be contended that the appointment to the office of state dental examiner is fixed by the Constitution, for no such office was in existence when the Constitution was adopted. The appointments to that of-

fice, therefore, come within the purview of § 1, art. 15, and shall be made "in such manner as may be hereafter prescribed by law." The "manner prescribed by law" is that the state board of dental examiners shall consist of five members, one to be appointed by the governor, one by the board of health, and three by the state dental association.

It is claimed that the statute must fail for the reason that the legislature has no constitutional warrant for bestowing police powers upon a private corporation, to be by it exercised upon the citizens of the state. We perceive no reason why a corporation, such as the one complained of, may not prove itself a repository of power as safe and salutary as an individual. The corporation is composed of practising dentists, organized for the promotion of scientific knowledge and skill in the practice of the profession of dentistry, and which association thus stands in an intimate and well-informed relation to the subject, and possessed of a peculiar interest in the successful administration of the law. It is difficult to conceive of an appointing power with higher qualifications, or likely to be swayed by more laudable motives; and that it is an organization of persons mutually interested in the enforcement and proper administration of the law surely furnishes no reason for its condemnation. Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat. 421, 4 L. ed. 605, further adds: "That a corporation must be considered as a means not less usual, not of higher dignity, nor more requiring a particular specification than other means, has been sufficiently proved. . . . We find no reason to suppose that a Constitution omitting, and wisely omitting to enumerate all the means for carrying into execution the great powers vested in government ought to have specified this. . . . But, being considered merely as a means to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it." In the case known as the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, the legislature of Louisiana had granted a corporation the exclusive right for twenty-five years to maintain slaughter houses, landings for cattle, and cattle yards within certain parishes of the state, including the city of New Orleans, requiring all animals offered for sale or slaughter to be brought to the yards of the corporation, authorizing the corporation to charge fees, and prohibiting all other persons from maintaining such places within said territory. In holding that the legislature had constitutional authority, within its police powers, to confer these public duties upon the corporation, the court, by Justice Miller, uses this language: "It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter houses and large and offensive collections of animals necessarily incident to the slaughtering business of a

large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges,—privileges which it is said constitute a monopoly,—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation, and on the public, would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate." See also *Louisville Gas Co. v. Citizens' Gas-light Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217. For many years state officers, or officers performing state functions, have been chosen by private corporations under legislative authority without question. Some of these are: Three members of the board of trustees of Purdue University, two by the state board of agriculture and one by the state board of horticulture (Acts 1875, p. 120; Burns' Rev. Stat. 1894, § 6176); grain inspector of the board of trade or other commercial body of the county (Acts 1875, p. 172; Burns' Rev. Stat. 1894, § 8718); sextons of churches, and officers of fairs, who, *ex officio*, are made by law peace officers (Acts 1881, p. 174; Burns' Rev. Stat. 1894, § 2074); the state chemist, by Purdue University board (Acts 1881, p. 511; Burns' Rev. Stat. 1894, § 6618); the state live-stock sanitary commission, by the state board of agriculture (Acts 1889, p. 380; Burns' Rev. Stat. 1894, § 2871); the superintendents of schools of three of the largest cities of the state, with the governor and presidents of the higher state schools, shall constitute the state board of education, with power to grant state certificates of qualification to teachers (Acts 1875, p. 130; Burns' Rev. Stat. 1894, § 5849). We hold, therefore, that the general assembly, in conferring upon the state dental association power to appoint three members of the state board of dental examiners, did not transcend its constitutional power, and that appointments to said board of examiners by said association are valid.

Judgment affirmed.

51 L. R. A.

James M. HATFIELD, Appt.,
v.
Joshua W. DE LONG *et al.*

(.....Ind.....)

1. All remedies within the church must be exhausted by a member before the secular courts will interfere, if they have a right to interfere at all, with the action of an ecclesiastical tribunal against him.
2. The expulsion from his church connection of a member, by reason of which he is deprived of the privilege of sitting as a delegate to a representative assembly to which he has been elected, does not involve a property or civil right so as to entitle him to appeal to the civil tribunals, although as delegate he would be entitled to compensation.
3. The inquiry whether or not a church tribunal that undertakes to decide as to the expulsion of a member has been organized in conformity with the constitution of the church is not ecclesiastical within the exclusive jurisdiction of the ecclesiastical tribunals, but is within the jurisdiction of the civil courts, although the decision of such ecclesiastical tribunal, if it were properly constituted, would be conclusive on the courts.
4. An injunction is the proper remedy to protect a person's standing in the community and prevent an injury, for which there is no adequate remedy at law, by an attempt of a tribunal without jurisdiction to expel him from a church.

(February 19, 1901.)

A PPEAL by complainant from a judgment of the Circuit Court for Huntington County sustaining a demurrer to a complaint filed to enjoin defendants from proceeding to cause an illegal tribunal to try complainant upon charges preferred against him for the purpose of expelling him from the church. *Reversed.*

The facts are stated in the opinion.

Messrs. J. T. Alexander and Spencer & Branyan for appellant:

The right of membership is a valuable privilege of which no one should be debarred except for adequate cause shown, either by the rules of the society, or, upon a fair examination of the charges, after due notice.

Jones v. State, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658.

While the civil courts will studiously give full effect to the judgment of an ecclesiastical court when matters ecclesiastical only are involved, when civil rights as to property are involved the civil courts will insist that an accusation be made, that notice be given, and an opportunity to produce witnesses and defend be afforded, before they will give effect to an expulsion or suspension of the kind here attempted.

West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24; *Hoffman*,

NOTE.—As to conclusiveness of decision of church tribunal. see cases in note to *Ryan v. Cudahy* (Ill.) 49 L. R. A. on page 354; also the case of *Travers v. Abbey* (Tenn.) 51 L. R. A. 260.

Church Law, pp. 276, 277; 20 Am. & Eng. Enc. Law, p. 700; *Schwoeiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; *Jennings v. Soarborough*, 56 N. J. L. 401, 28 Atl. 559.

There were rules prescribed in the constitution of the church, but appellees were acting in open defiance of them, and such a stage in the proceedings had been reached that if appellees were permitted to act further a result would have been reached from which no appeal could be taken under the law of the church. The court should intervene to protect the civil rights of appellant.

Pounder v. Ashe, 36 Neb. 564, 54 N. W. 847; *East Norway L. N. Evangelical Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 603; *Mason v. Supreme Court of Equitable League*, 77 Md. 483, 27 Atl. 171; *Hookney v. Vawter*, 39 Kan. 615, 18 Pac. 699.

Messrs. John Q. Oline and James C. Brannan, for appellees:

When the civil courts came to construe the constitutional provisions they saw that the state should not, and could not, interfere with the church in its management of its own internal affairs, and they wisely left the ecclesiastical government of the individual to the church alone. Full scope and effect could not be given to these provisions if civil courts should attempt to invade the jurisdiction of the church tribunals.

Shannon v. Frost, 3 B. Mon. 253; *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. St. 282; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Chase v. Cheney*, 58 Ill. 509; *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462; *Fitzgerald v. Robinson*, 112 Mass. 371.

No civil court will interfere with the proceedings of the church, and tell it just when and how to proceed.

The right to the compensation is too small a matter for courts to take notice of when another court has exclusive jurisdiction of all matters connected therewith.

The right to receive it depends upon whether appellant acts as a delegate, and the right to act as a delegate depends upon his continuing to be a member of the church in good standing.

The ecclesiastical court can only inquire into the conduct of the appellant as a member of the society to which he belongs, and it cannot, and does not presume to, take jurisdiction of any property rights that he may have.

O'Donovan v. Chatard, 97 Ind. 421, 49 Am. Rep. 462; *Connitt v. Reformed Protestant Dutch Church*, 4 Lans. 339; *Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457.

Messrs. Kenner & Lesh also for appellees.

Baker, J., delivered the opinion of the court:

A demurrer for want of facts was sustained to appellant's complaint. On his refusal to plead further, the judgment was entered from which this appeal was taken. 51 L. R. A.

The material facts alleged are these: Appellant is, and has been for twenty years, a member of a religious organization whose highest governing body, according to the organic law of the society, is the general conference that meets each quadrennium, whose next highest governing body is the annual conference of subdivisions of the church, whose next highest governing body is the quarterly conference of the subdivisions of the annual conference, and whose lowest governing body is the local congregation. Appellant was a member of the local congregation at Huntington, Indiana. One of the appellees was the pastor, one the presiding elder, and certain others were members of the same congregation. Appellant had a large acquaintance and high standing throughout the membership of the society, and was elected a lay delegate from his annual conference to the general conference of 1893, at which he was chosen chairman of the lay delegates. The election of delegates to the general conference of 1897 was held in November, 1896. Appellant was again a candidate for election as a lay delegate by his annual conference. His pastor was opposed to his candidacy, and gave out in speeches that appellant should not sit if elected, because charges would be preferred against him and he would be expelled from the church before the general conference would meet. Appellant was elected by the highest vote given any candidate. As soon as the result was known, the pastor caused appellant to be summoned for trial. The trial resulted in a judgment of expulsion. The complaint sets forth a number of alleged irregularities in the proceedings, which it is unnecessary to notice here, for reasons subsequently stated. From this judgment appellant took an appeal to the next quarterly conference. The organic law of the society authorizes an appeal to the quarterly conference, but no higher. It is provided that on appeal the trial shall be had before a tribunal of five, two to be chosen by the accused, two by the quarterly conference, and the fifth by the four; that no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial; that a decision of a majority of the appellate tribunal shall be final; and that any member who refuses to abide by such decision shall be expelled without further trial. Appellees constitute the quarterly conference. Appellant chose two competent persons to act as members of the appellate tribunal. Appellees, with the fraudulent purpose of depriving appellant of the benefits of his appeal, selected two of their number to act as members of the appellate tribunal who had sat in judgment at the original trial. These two refused to consider the selection of any one as the fifth member of the appellate tribunal except a certain person who is in the conspiracy to deprive appellant of the benefits of an appeal, and whose purpose is to join the other two in denying appellant a fair hearing. The office of lay delegate is one of trust and profit, to which a compensation of \$50 is attached. Appellant has done nothing for which he

may properly be disciplined or expelled. The quarterly conference has no judicial functions in connection with appeals. Its only duty is to select two eligible members of the appellate tribunal. There were and are many competent persons to choose from, but appellees persist in upholding the unlawful selections already made. The prayer is that the two ineligible persons be enjoined from sitting on the appellate tribunal, and that all the appellees be enjoined from acting in the premises until two competent persons have been selected by the quarterly conference.

It is immaterial what irregularities were committed at the original trial; for, if secular courts will interfere at all, they will not do so until the complaining party has exhausted his remedies within the church. *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. St. 282. If property rights are involved in the decision of an ecclesiastical judicatory, the secular courts may be generally called upon to determine the controversy. *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838, 33 N. E. 777, 44 N. E. 363. But no property rights are directly involved in this appeal. If civil rights, as contradistinguished from ecclesiastical questions, are passed upon by a church tribunal, the secular courts will, as a general rule, decide the merits of the case for themselves. For example, if a pastor's salary is stopped, not as an incident or indirect result of his expulsion from the church, but by a direct breach of a contract lawfully entered into, a civil right is involved, which a secular court may intervene to protect. *Jennings v. Scarborough*, 58 N. J. L. 401, 23 Atl. 559; *O'Hara v. Stack*, 90 Pa. 477; *Wallace v. United Presby. Church*, 194 Pa. 178, 45 Atl. 84. But in the present case no civil rights are directly affected. If appellant loses the office of lay delegate to the general conference, and the pecuniary emoluments thereto attached, he will lose them as an incident or indirect result of his excision from the body of the society, and not by the breach of a civil contract. The allegations of the complaint with respect to the office and compensation of delegate will therefore be disregarded. If only ecclesiastical questions, such as those of doctrine and discipline, are in issue, the decision of the spiritual court is final, and will be accepted as conclusive by the secular courts. *Grimes v. Harmon*, 35 Ind. 198, 254, 9 Am. Rep. 690; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462; *Shannon v. Frost*, 3 B. Mon. 253; *Fitzgerald v. Robinson*, 112 Mass. 371; *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. St. 282; *Travers v. Abbey*, 104 Tenn. 665, 51 L. R. A. 260, 58 S. W. 247. The allegations of the complaint that appellant has not offended against the faith and teachings of the church present, therefore, a question that is not cognizable here.

The foregoing considerations, however, do
51 L. R. A.

not dispose of this appeal. The cases that have been spoken of presupposed the existence of an ecclesiastical judicatory in accordance with the organic law of the church. The member, by joining, agrees that the church shall be the exclusive judge of his right to continue. For the purpose of trying a member on charges of having violated the rules of the church or the laws of God, the church is the tribunal created by the organic law. The member has consented that for all spiritual offenses he will abide the judgment of the highest tribunal organized under the constitution of the church. But he has not consented to submit to usurpation. As Mr. Justice McCabe said in *Smith v. Pedigo*, 145 Ind., on page 407, 32 L. R. A. on page 843, 44 N. E. 368, "It must be the act of the church, and not the act of persons who are not the church." In this case it is disclosed that appellant has proceeded as far as he can within the church. He was compelled either to submit his appeal to a tribunal organized in defiance of the constitution of the church, or to appeal to the secular courts. If the secular courts are without jurisdiction to grant relief, it is apparent that, on the facts alleged in the complaint, the question of appellant's guilt or innocence of a spiritual offense will be determined by an unconstitutional tribunal. This court will have nothing to do with the charge of a spiritual offense. That is an ecclesiastical question purely. But the inquiry whether or not the tribunal has been organized in conformity with the constitution of the church is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association, such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law. *Bouldin v. Alexander*, 15 Wall. 131, 139, 140, 21 L. ed. 69, 71; opinion of Lawrence, Ch. J., and Sheldon, J., in *Chase v. Cheney*, 58 Ill. 541; *Schweiker v. Husser*, 146 Ill. 399, 435, 436, 34 N. E. 1022; *Fitzgerald v. Robinson*, 112 Mass. 371, 379; *Jones v. State*, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 558; *Pounder v. Ashe*, 36 Neb. 564, 54 N. W. 847; *Walker v. Wainwright*, 16 Barb. 486; *Loubat v. Le Roy*, 40 Hun, 546; *Heaton v. Hull*, 28 Misc. 97, 59 N. Y. Supp. 281; *Brown v. Cure*, L. R. 6 P. C. 157; *McMillan v. Free Church*, 23 Sess. Cas. 1314, 1334; note to *Hiss v. Bartlett* (Mass.) 63 Am. Dec. 772, 776; note to *Kearns v. Howley* (Pa.) 68 Am. St. Rep. 856; note to *Nance v. Busby* (Tenn.) 15 L. R. A. 801.

It is suggested that appellant might not have been convicted by the tribunal complained of, and that therefore he is not entitled to the injunction prayed for. If a conviction by that tribunal would be illegal, so also would be an acquittal. The decision, right or wrong, of a proper tribunal will not be reviewed by the secular courts, but they

will determine whether or not an alleged tribunal has been constitutionally organized; and the proper time to do so, on an application for injunction, is before it takes action. As an unlawful expulsion would affect appellant's standing in his community, and ac-

complish an injury for which there is no adequate remedy at law, injunction is the proper remedy.

Judgment reversed, with directions to overrule the demurrer to the complaint.

VERMONT SUPREME COURT.

Vivian BARRETT

v.

F. L. FISH, *Appt.*

(.....Vt.....)

An injunction against the publication of letters by producing them in evidence will not be granted in favor of one by whom and to whom they were written, against a person who has them in possession and intends to use them as evidence in the prosecution of a joint information against the writers of the letters for adultery although the letters were obtained by a breach of trust on the part of one to whom they were delivered by the complainant, with instructions to burn them.

(August 31, 1899.)

NOTE.—Injunction against documentary evidence.

Questions pertaining to the admissibility in evidence of documents over the objection that they were obtained by force, fraud, or a breach of trust and confidence, or by the violation of the constitutional right of the citizen to be secure from unreasonable search and seizure in his home, person, and papers; or of admitting private writings in evidence over the objection that to do so would in effect be compelling the objector to be a witness against himself; cases where actions or proceedings at law generally have been stayed or restrained by courts of equity; and cases where the power of chancery has been invoked to prevent generally the disclosure or publication of confidential communications,—are not discussed in this note.

Considering the frequency of injunctions against the publication of letters, use of written memoranda of trade secrets, and the like, there is a surprising paucity of cases wherein an injunction has been sought, or even alluded to, against using such writings in evidence in judicial proceedings.

In *Gee v. Pritchard*, 2 Swanst. 402, Lord Eldon, in enjoining the publication of private letters, in spite of the claim that it was necessary to vindicate the character of the recipient, said that, for the purposes of public justice, publicly administered according to the established institutions of the country, letters must always be produced. And his language is adopted by Judge Story in his *Equity Jurisprudence*, § 948.

Hopkinson v. Burghley, L. R. 2 Ch. 447, 36 L. J. Ch. N. S. 504, was a controversy between a member and his club, wherein the club objected to producing two letters written by a stranger to its secretary, and marked private and confidential, on the ground that the writer refused to assent to their disclosure, and the Master of the Rolls refused to order their production; but on appeal his decision was reversed. *Turner, L. J.*, was of the opinion that these letters must be produced. The writer of a

A PPEAL by defendant from a *pro forma* decree of the Addison County Chancery Court enjoining the publication of certain letters belonging to complainant of which defendant had obtained possession. *Reversed.*

Plaintiff was in 1897 employed at White River Junction. Her sister having died under suspicious circumstances, complainant suddenly left the place leaving some clothing and papers in a valise which was locked in a closet, opening out of the room which she had occupied. She wrote to her employer to take the papers out of the valise and burn them. He proceeded to carry out the instruction, but was interrupted by state officers who were investigating the matter of

letter trusts the receiver with it, and must take the consequences of its being in his possession. If the sender of a letter wishes to restrain the receiver from showing it to any other person he must file a bill for that purpose. Unless that is done the property is in the receiver. There must, however, be an undertaking not to use the documents for any collateral object. And Lord Cairns was of the same opinion. The question in all these cases is, What was the purpose or object in the mind of the person sending the letter. The writer is supposed to intend that the receiver may use it for any lawful purpose. It has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used, it is the production of it in a court of justice for the furtherance of the ends of justice.

The case of *Richardson v. Hastings*, 7 Beav. 354, was a similar club case to the same effect.

There is a *dictum* by Judge Story, in *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901, when, speaking of the right of the writer to prevent the publication of letters, it is said that consistently with this right the persons to whom they are addressed may have, nay must by implication possess, the right to publish any letters addressed to them upon such occasions as require or justify the publication or public use of them: but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish in a suit at law or in equity such letters as are necessary and proper to establish his right to maintain the suit or defend the same.

And in *Woolsey v. Judd*, 4 Duer, 379, it is also said: The proposition which we hold to have been settled as law for more than a century is that which was laid down by Sir Samuel Romilly and affirmed by the decision of Lord Eldon, in *Gee v. Pritchard*, 2 Swanst. 402. It is that the writer of letters, though written without any purpose of publication or profit, or any idea of literary property, possesses such a right of property in them that they can never be published without his consent, unless the pur-

the sister's death, and the papers were turned over to such officers.

Further facts appear in the opinion.

Mr. F. L. Fish, in propria persona:

Courts of law will take no notice of how letters are obtained, for the purpose of their admission in evidence, whether lawfully or unlawfully; they will not form an issue to determine that question.

State v. Mathers, 64 Vt. 101, 15 L. R. A. 268, 23 Atl. 590, 1 Greenl. Ev. § 254a; 1 Taylor, Ev. § 922; 1 Wharton, Ev. § 586; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Legatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, 2 Strange, 1122; *Caddy v. Barlow*, 1 Mann. & R. 275; *Stockfleth v. DeTastet*, 4 Campb. 10; *Robson v. Alexander*, 1 Moore & P. 448; *Com. v. Dana*, 2 Met. 329; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Niebert v. People*, 143 Ill. 571, 32 N. E. 431;

State v. Atkinson, 40 S. C. 363, 18 S. E. 1021; *Shields v. State*, 104 Ala. 35, 16 So. 85; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002; *State v. Griswold*, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624.

The court's chief concern is that the evidence be truthful, and it ought to be received in all cases where it can be believed.

1 Bishop, New Crim. Proc. § 1155, and note, § 1226, and note.

While it is true that the publication of letters will be restrained by injunction in some cases, yet this rule is subject to the exception that they may be published for the purposes of justice.

3 Waite, Act. & Def. 195; 2 Story, Eq. Jur. § 948.

poses of justice, civil or criminal, require the publication.

Lloyd v. Mostyn, 10 Mees. & W. 478, 2 Dowl. & S. 476, 6 Jur. 794, was a suit on a bond which was proved by a copy made when the original was exhibited on the taking of depositions after a notice and refusal to produce upon claim of privilege in hands of a solicitor, the main controversy being over the sufficiency of the notice. Referring to this case afterwards, Baron Parke, in *Cleave v. Jones*, 8 Eng. L. & Eq. Rep. 556, 21 L. J. Exch. N. S. 103, 7 Exch. 421, said: Surely if an attorney had improperly handed over a document to a third party that party might give it in evidence. That part of the case of *Lloyd v. Mostyn* which asserts the contrary has been questioned.

In *Lewis v. Smith*, 1 Macn. & G. 417, the bill prayed that certain defendants, who were solicitors, might be restrained from communicating or disclosing to their codefendant, or to any person, except on examination as witnesses in a judicial proceeding, any facts, matters, or documents, etc., and an injunction as prayed was decreed and upheld on appeal.

In *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712, the court in adjudging the defendant in contempt for disobeying an injunction against publishing a private letter, reviewed the law of that state in a learned opinion, and concluded that the position taken by the prosecuting counsel, that the law so much abhors the violation of a man's correspondence that it prefers a failure of justice, was sound. The court cited French authorities approvingly to the effect that writings intended to be confidential could not be put in evidence, and that who so attempted to procure testimony by intercepting a letter or betraying a confidence should be punished, for it is a crime to disturb such correspondence, which all nations agree in considering as sacred. (*Pigeau, 1 Procédure du Châtelet*, 225) and, according to *Denismart*, that letters written with mystery and containing confidences cannot be brought to light without crime, and the court in such cases has uniformly ordered that the letter should be restored to the writer whatever relation it might have to the object in dispute. And he adds, that, if a party produced such a letter in a court of justice for the discovery of truth and the attainment of his legal rights, the judge would indignantly repel the proffer, and asks: Is it possible to believe that the law should respect the sacredness of a man's correspondence so far as to disallow its violation for a just purpose, the discovery of truth in the attainment of justice, and yet allow the same for the purpose of wanton

injury? And he declares that such was the law of France when Louisiana was French territory, and that no change has been wrought in it either by the Spaniards or Americans.

An exhaustive search has disclosed but two cases, aside from the main one, in which direct applications for injunctions against evidence were passed upon. The first is:

Beer v. Ward, Jac. 77, where a motion was made that a solicitor be restrained from disclosing, by the giving of evidence in judicial proceedings or otherwise, any facts, circumstances, or matters, which he had acquired knowledge of in virtue of his prior professional relation to the plaintiff. In denying the motion, Lord Eldon said: With respect to many facts that come to his knowledge as solicitor, if he were examined as a witness, the court would insist upon his deposing to them; and if I ordered him not to disclose anything that he learned in that manner the court of King's bench might perhaps commit him for refusing. It would be the duty of the court to stop him if he was about to disclose confidential matters. If he had received papers or deeds from his client, no doubt the court would prevent him from delivering them to anyone but his client. But tho' I might order him to deliver them to his client, which would have the effect of preventing him from giving them in evidence, yet I doubt whether I should compel him, while they are in his hands, not to give them in evidence; for the propriety of that must depend on all the circumstances. If he voluntarily makes communications of what has come to his knowledge confidentially it is a great breach of duty, but there is a difference between ordering him not to communicate to an individual and ordering him not to communicate to a court of justice by giving evidence, for the court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly and claim that privilege; if he does not, that the court will make him claim it. And again: I do not see my way to grant a motion so extensive as this. It desires of me that I will not permit this gentleman to give evidence in other courts; which is, that I will not trust them with the consideration of whether he ought or ought not to answer a question to be put to him, as to which question I know nothing. It is stated that he has given up papers placed in his hands by the plaintiffs; and if a motion were made on that subject it would be quite a different case from that before me. If the papers came into his hands confidentially he could not give them to anyone but his client, and if a motion were brought forward properly

It should be borne in mind that the state is an interested party in this cause, and to withhold the evidence would prevent the state from prosecuting its criminal offenses.

Pitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

Messrs. Button & Button and H. C. Shurtleff, for appellee:

The publication of the letters can be enjoined.

Papers given over to the bailee for some particular purpose are still under the control of the bailor, and they can be used for no other purpose than that for which the bailment was created.

he might perhaps be ordered to give them up again. It would be a different question whether I could say if he could not be compelled to give them up to the client that no court of justice could compel him to give them in evidence. That must depend on other circumstances.

And the second is *Callender v. Callender*, 53 How. Pr. 364, wherein Van Brunt, J., at special term of the New York supreme court, overruled a demurrer to a complaint in equity by a wife against her husband to procure an injunction restraining him from putting in evidence in a divorce suit he had brought against her, a written confession of her adultery, which she asserted was false, and had been obtained by fraud and duress. The learned court is unable to cite precedents for his decision, but pointedly says: The point made by defendant in support of the demurrer is, that no case can be found in which a court of equity—since equitable defenses have been allowed in courts of law—has ever entertained a bill to restrain the introduction of any particular evidence in another action. I feel fully the force of the argument in support of the position claimed, and my attention has not been called to any case which establishes the right of the court to entertain this action: but the dismissal of the complaint would enable the defendant to perpetrate so gross an injustice under the guise of the forms of law, that it seems to me that any court which would refuse [the wife] protection from the frauds which have been practised upon her (if we are to assume as true the allegations of the complaint, and which we must do upon demurrer) by her husband would cease to be entitled to be called a court of equity. As I have said, although no precedent can be found for the maintenance of this action, it would be so great an injustice to allow the defendant to use as evidence a confession obtained under the circumstances stated in the complaint that a court of equity must interfere.

This question was involved, to some extent, in a Canadian case recently decided, where a firm of solicitors sought to prevent the publication of draught copies or notes of sundry letters and documents dictated by them to their stenographer, and by him surreptitiously retained after he had left their employment. Opposition was made on the ground that they were to be used as evidence in criminal proceedings and a parliamentary inquiry. The court, nevertheless, granted a perpetual injunction, saying, however, that if the documents in question afforded any evidence to sustain the criminal charges it might well be that their use for such purpose should not be enjoined, but those in the case at bar furnished no such evidence; they merely showed that the writers had knowledge of incriminating facts, and the testimony of the authors was the best evidence, the only use 51 L. R. A.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; *Barllett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1076; *Folsom v. Marsh*, 2 Story, 110, Fed. Cas. No. 4,901; *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst, 402; Pom. Eq. Jur. 1340, note 4, and 1353.

Not only has their publication by printing and discourse been enjoined, but their disclosure in evidence in a court of law has been enjoined.

Lewis v. Smith, 1 Macn. & G. 417.

If the court would then protect a person from having such evidence, rightfully acquired by the defendant, used against him, will the same protection not be afforded the orator where the evidence is obtained by vio-

of the letters in such case would be to confront the writers with them in case of testimony at variance with their contents and such a collateral use did not justify a refusal of the injunction. *Laldaw v. Lear*, 30 Ont. Rep. 26.

A case in point arose on a bill in equity filed in the United States circuit court (Massachusetts) by the president of the Maverick Nat. Bank of Boston, against the receiver. It was averred by complainant that certain private papers of his were in a trunk of which he held the key in the bank vaults, and that the receiver had possession of and refused to surrender it. Further, that the complainant was charged with violations of law in connection with the failure of the bank, and the district attorney was about to summon the receiver before the grand jury with the papers in question. The relief prayed was a decree for the delivery of the papers, and an injunction against using them before the grand jury. The district attorney, against the objection of the complainant and on his own motion, intervened in behalf of the government, and was made a party defendant. The court in the first instance made an order that the key of the trunk be delivered to the clerk, and that the papers be examined by a special master, and that such as were private and not the property of the bank, or such as related to the transactions of the bank and were necessary and material for his defense, be returned to the complainant; that such others as were the property of the bank be returned to the receiver; and lastly that the remainder be brought into court for use by the district attorney in the presentment of the government case. This decree was reversed on appeal as a clear invasion of the complainant's constitutional rights, and in its opinion the court said: So far as shown by the record the title of the complainant to the trunk and its contents is clear, and no facts were proved which suggest the contrary, or which are sufficient to authorize the court to defeat at the outset his presumed purpose to obtain the trunk and its contents free from public or private inspection as is his right if the same are his property. But forasmuch as it appeared that a witness who had by complainant's consent seen the contents of the trunk had not been allowed to testify, the court was unable to decree for the complainant, and so remanded the cause for further hearing. *Potter v. Beal*, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. Rep. 860.

Scanty as are the materials from which to deduce a general principle, it is safe, perhaps, to say, that a court of equity will not interfere by injunction to prevent one having lawful custody of a privileged writing from putting it in evidence in a court of justice, but will leave the question of its admissibility to be decided by the trial tribunal; and it is, perhaps, unsafe to go farther.

J. B. G.

lation of those laws which it is here sought to enforce?

Woolsey v. Judd, 4 Duer, 379.

This is not a suit against the state, and the defendant, as state's attorney, may be enjoined from publishing the letters.

Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. Rep. 860; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Rollston v. Missouri Fund Comrs.* 120 U. S. 390, sub nom. *Rollston v. Crittenden*, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Louisiana Bd. of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 023; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

On motion to dissolve injunction.

These letters cannot be used in evidence.

Ex parte Hurn, 92 Ala. 102, 13 L. R. A. 12, 9 So. 515; *Glosson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459; *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *Com. v. Dana*, 2 Met. 329; *Entick v. Carrington*, 19 How. St. Tr. 1029; *Legatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, 14 East, 306, note; *State v. Mathers*, 64 Vt. 101, 15 L. R. A. 268, 23 Atl. 590; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Jordan v. Lewis*, 2 Strange, 1122; *Lloyd v. Mostyn*, 10 Mees & W. 478.

The publication of letters may be enjoined.

Woolsey v. Judd, 4 Duer, 379.

Thompson, J., delivered the opinion of the court:

From the agreed statement of facts, the allegations of the bill of the oratrix, and the admissions in the defendant's answer, it appears that the papers in controversy are unsigned letters written by the oratrix to one Poland and by him to her; that they were in her possession until shortly before August 21, 1897, when she committed them to the custody of one Hyde, with directions to burn them; that while they were in his possession he delivered them to F. A. Howland, August 21, 1897, and subsequently, and before the commencement of this suit, Howland delivered them to the defendant, who has ever since retained possession of them, against the will of the oratrix. The defendant admits that he intends to publish the letters by using them as evidence in the prosecution of a joint information against the oratrix and Poland by which they are charged with committing adultery with each other, which criminal proceeding is now pending in Addison county court; that the contents of the letters tend to show that there has been undue familiarity and criminal intimacy between the oratrix and Poland; and that she is privileged from pro-

51 L. R. A.

ducing the letters on trial unless she should be improved as a witness in her own behalf.

Although counsel for the oratrix have argued the case as if the question of an unlawful search and seizure of her private papers were involved, it is sufficient to say that that question is not involved, as the letters were voluntarily delivered to Howland by the agent of the oratrix. That such delivery was a flagrant breach of trust by Hyde cannot make the receiving of the letters by Howland an unlawful search and seizure.

It is not claimed by the defendant that the letters themselves were implements by which the alleged crime was committed. Hence it is unnecessary to discuss or decide in respect to the right of prosecuting officers to seize or to retain such instruments, when they come into their possession, for use as evidence on the trial of the person charged with the crime in the commission of which such instruments were used.

The fact that Howland was the state's attorney of Washington county, and that the defendant was state's attorney of Addison county, at the time the letters were taken by Howland and by him delivered to the defendant, gave neither of them any right to take and hold the letters against the will of the oratrix. Nor does the fact that the defendant is still such state's attorney in any way affect the rights of the parties to this suit. He holds them the same as any other person would hold them under like circumstances. As to the defendant, the oratrix is the owner of the letters. It is clear that a court of law will take no notice, on trial of a respondent, how letters or other papers offered in evidence were obtained, for the purpose of determining their admissibility in evidence. *State v. Mathers*, 64 Vt. 101, 15 L. R. A. 268, 23 Atl. 590; *Jordan v. Lewis*, 2 Strange, 1122; *Stockfleth v. De Tastet*, 4 Campb. 10; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021; *State v. Griswold*, 67 Conn. 290, 33 L. R. A. 227, 34 Atl. 1046; *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624; *Legatt v. Tollervey*, 14 East, 302; 1 Greenl. Ev. § 254a. Consequently the oratrix is remediless at law in the premises, if she is entitled of right not to have the letters published by being read in evidence on her trial for the alleged crime.

A court of equity has jurisdiction to restrain the publication of manuscript writings and the like against the will of the writer or owner. While there is some conflict among the authorities as to whether that court will restrain the publication of private letters by a person not authorized to do so by the writer or owner thereof, the view most consonant with reason, justice, and sound public policy is that which holds that a court of equity will protect the right of property in such letters by enjoining their unauthorized publication by any person who may attempt or intend such publication. Such protection is based solely on the property of the writer or possessor of such letters therein. 2 Story, Eq. Jur. 13th ed. 948,

949; 2 Beach, Inj. § 902; 3 Pom. Eq. Jur. 2d ed. § 1353; *Granard v. Dunkin*, 1 Ball & B. 207; *Lytton v. Devey*, 54 L. J. Ch. N. S. 293; *Gee v. Pritchard*, 2 Swanst. 419; *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901; *Woolsey v. Judd*, 4 Duer, 380; *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509; *Hilliard*, Inj. 2d ed. 478; note to *Hoyt v. Mackenzie* (N. Y.) 49 Am. Dec. 180-184.

One of the exceptions to this rule is that "for the purposes of public justice publicly administered, according to the established institutions of the country," private letters in the hands of a party other than the writer must always be produced unless such letters would tend to criminate the person required by law to produce them. *Gee v. Pritchard*, 2 Swanst. 427; *Hopkinson v. Burghley*, L. R. 2 Ch. 447; 2 Story, Eq. Jur. 6th ed. § 948. In *Hopkinson v. Burghley*, L. R. 2 Ch. 447, the writer of private and confidential letters, relevant to the issue, refused his sanction to their production in court by the person to whom they were written and sent; but the court held that they must be produced "for the furtherance of the ends of justice," although the writer was not a party to the suit. While the letters in question were in the hands of Hyde, the agent of the oratrix, they were not privileged from production in court by him on the trial of the oratrix and Poland; but if

he still held them, and declined to voluntarily produce them, he could be compelled, by a *subpoena duces tecum*, to produce them in court to be used as evidence at their trial. Assuming that the defendant has no better right to the possession of the letters than Hyde would have, were they still in his possession, yet the defendant could be compelled to produce them on trial, if he were unwilling to do so, were they in his possession when summoned legally to produce them. He is willing to do voluntarily for the furtherance of public justice, administered in due course according to law, what he might be compelled to do. No rights of the oratrix have been infringed by an unlawful search and seizure. By her own folly, important evidence against her and Poland was placed in the hands of Hyde, and through his action it has come to the possession of the defendant. It is apparent that the sole purpose of this proceeding is to enable the oratrix to obtain possession of this evidence, that she may suppress or destroy it, so that peradventure the ends of justice may be thwarted. The case falls clearly within the exception stated, and the prayer of the bill cannot be granted.

Pro forma decree reversed, and case remanded, with mandate that the bill be dismissed.

IOWA SUPREME COURT.

GERMAN SAVINGS BANK
v.
DRAKE ROOFING COMPANY *et al.*
and
F. O. DRAKE *et al.*, *Appts.*,
(.....Iowa.....)

1. Notice of acceptance is necessary in order to bind the guarantors on an instrument by which they promise to pay to a certain bank all notes, checks, drafts, and overdrafts of a third person, not exceeding a certain amount, that may accrue within six months from date, waiving demand, notice, and protest on the part of the bank in collecting said sums, as this constitutes a mere offer or proposal.
2. The insolvency of a debtor at the time a guaranty is made to secure future advances to him up to a limited amount, and the continuance of such insolvency, is a sufficient excuse for the failure of the creditor to give notice to the guarantor

NOTE.—As to the necessity of notice of acceptance of guaranty, see also cases in *note* to *National Exch. Bank v. Gay* (Conn.) 4 L. R. A. on page 347; also *Wright v. Griffith* (Ind.) 6 L. R. A. 639; *Nading v. McGregor* (Ind.) 6 L. R. A. 686; and *Lachman v. Block* (La.) 28 L. R. A. 255.

As to necessity of notice of default to bind guarantor, see *Heyman v. Dooley* (Md.) 20 L. R. A. 257, and *note*.
51 L. R. A.

of advancements made or of the state of the account.

(October 15, 1900.)*

APPEAL by defendants *Drake et al.* from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to hold defendants liable on a contract of guaranty. *Reversed*.

Statement by Deemer, J.:

Action at law on a contract of guaranty. Defendants pleaded no notice of the acceptance of the guaranty, of advancements made thereon, or of the default of the principal debtor. They also pleaded extension of time to the principal, and change in the principal contract without their assent. The case was by agreement tried to the court without a jury, resulting in a judgment for plaintiff; and the defendants other than the Drake Roofing Company and J. F. N. Drake appeal.

Messrs. Phillips, Ryan, & Ryan, for appellants:

In order to hold these appellants liable on

*This case was originally decided and an opinion handed down affirming the judgment of the court below, but a rehearing was granted, after which the opinion printed herewith was handed down, which completely supercedes that previously delivered, and makes it of no value.

[Ed.]

the alleged guaranty sued upon herein plaintiff bank was bound to give them notice within a reasonable time of its acceptance by said bank, and that said bank intended to rely upon it.

Brandt, Suretyship & Guaranty, § 79.

There was no reasonable notice, two of these appellants first receiving notice after more than twenty-two months, the other obtaining knowledge after twenty-one and one half months; there was no privity between these parties, no meeting of minds, no contract. Therefore the same is not binding upon these appellants.

Chitty, Contr. 437, note; 2 Parsons, Contr. 5th ed. § 4, pp. 14, 15; Brandt, Suretyship & Guaranty, §§ 157, 159, 161, 162; *Mussey v. Rayner*, 22 Pick. 223; *Davis v. Wells*, 104 U. S. 159, 26 L. ed. 686; *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503; *Adams v. Jones*, 12 Pet. 207, 9 L. ed. 1058; *Allen v. Pike*, 3 Cush. 238; *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N. W. 36; *Farmers' Bank v. Tatnall*, 7 Houst. (Del.) 287, 31 Atl. 879; *Evans v. McCormick*, 167 Pa. 247, 31 Atl. 563; *Wilkins v. Carter*, 84 Tex. 438, 19 S. W. 997; *First Nat. Bank v. Carpenter*, 34 Iowa, 433, 41 Iowa, 518; *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670; *Springer Lithographing Co. v. Graves*, 97 Iowa, 39, 66 N. W. 66.

When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option of the party to whom the application for credit was made, the great weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty.

Brandt, Suretyship & Guaranty, § 157; *Rapclge v. Bailey*, 3 Conn. 438, 8 Am. Dec. 199; *Beckman v. Hale*, 17 Johns. 134.

In order to hold these appellants liable thereon, the plaintiff bank was bound to give them notice, within a reasonable time of its extension of credit to the Drake Roofing Company on the strength of it, and the amount thereof, and that it expected to look to them for payment.

1 Parsons, Contr. 5th ed. § 4; Brandt, Suretyship & Guaranty, § 163; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Babcock v. Bryant*, 12 Pick. 133; *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503; *Clark v. Remington*, 11 Met. 361; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905; *Davis Sewing Mach. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Edmondston v. Drake*, 5 Pet. 624, 8 L. ed. 251; *Kellogg v. Stockton*, 29 Pa. 460.

Though this court should go so far as to hold the instrument in question in this case to be an absolute guaranty, the rule is the same; it is continuing, and notice must be given within a reasonable time of the extension of credit.

Davis Sewing Mach. Co. v. Mills, 55 Iowa, 543, 8 N. W. 356; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905.
51 L. R. A.

By accepting a new contract from the Drake Roofing Company, different from that implied in the alleged guaranty, and by extending the time of payment by the Drake Roofing Company without notice to or consent of these appellants, the plaintiff bank released them from liability on said alleged guaranty if any prior liability existed.

Manning v. Alger, 78 Iowa, 185, 42 N. W. 643, 85 Iowa, 617, 52 N. W. 542; *Springer Lithographing Co. v. Graves*, 97 Iowa, 39, 66 N. W. 66; Brandt, Suretyship & Guaranty, §§ 296, 298, 301, 312, 316; *Roberts v. Richardson*, 39 Iowa, 290; *Hershler v. Reynolds*, 22 Iowa, 152; *Chickasaw County v. Pitcher*, 36 Iowa, 593; *Lambert v. Shitler*, 62 Iowa, 72, 17 N. W. 187.

On petition for rehearing.

The parties must be bound herein by the law of contract, or not at all.

To make a binding contract in this, as in any other, case, a primary essential is that there must be a "meeting of minds;" that the parties actually do contract.

2 Parsons, Contr. 5th ed. § 4, pp. 14, 15; Chitty, Contr. 457, note; Brandt, Suretyship & Guaranty, § 157.

The transaction only amounts to an offer to guarantee until the party making the offer is notified of its acceptance, when the minds of the parties meet and the contract is complete.

Brandt, Suretyship & Guaranty, § 157.

A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except the future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

Davis Sewing Mach. Co. v. Richards, 115 U. S. 527, 29 L. ed. 482, 6 Sup. Ct. Rep. 173; *First Nat. Bank v. Carpenter*, 41 Iowa, 518.

A mere proposal to stand as guarantor for future credit or advances, in order to become binding, must be accepted by the guarantee, and the guarantor notified thereof within a reasonable time.

Deering Harvester Co. v. Sulser, 78 Mo. App. 670; *Barnes Cycle Co. v. Reed*, 84 Fed. Rep. 603; *Ford v. Harris*, 19 Ky. L. Rep. 1236, 43 S. W. 199.

Mr. W. G. Harvison, for appellee:

In construing the contract in suit, technicalities should be avoided, and the reasonable intent of the parties, as it may be gathered from all parts of the contract, should prevail.

Shickle, H. & H. Iron Co. v. Council Bluffs City Waterworks Co. 83 Iowa, 396, 49 N. W. 987.

This contract is a continuing guaranty for the period of six months, to the extent of \$500. If, at any time, within or at the end of six months, it be found that the Drake

Roofing Company is indebted to the bank, then these guarantors are liable upon that indebtedness.

No notice of acceptance of this guaranty, and the extending of credit thereunder, was at all necessary to charge these guarantors.

Case v. Howard, 41 Iowa, 479; *Carman v. Ellodge*, 40 Iowa, 409.

Mere delay will not discharge the guarantors.

Clafin v. Reese, 54 Iowa, 544, 6 N. W. 729; *Rodabaugh v. Pitkin*, 46 Iowa, 544; *Star Wagon Co. v. Swezey*, 52 Iowa, 391, 3 N. W. 421; *Second Nat. Bank v. Gaylord*, 34 Iowa, 246; *Green v. Thompson*, 33 Iowa, 203; *Weller v. Hawes*, 19 Iowa, 443.

On petition for rehearing.

There is a wide difference between the guaranty of an existing debt and the guaranty of a debt to be contracted upon the credit of the guaranty. It is the difference between a past and future consideration. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee implies a request, and a compliance on the part of the latter closes the contract and makes it binding.

Union Bank v. Ooster, 3 N. Y. 204.

Where the guaranty is absolute no notice of acceptance is necessary.

Douglass v. Howland, 24 Wend. 35; *Smith v. Dann*, 6 Hill, 543.

Deemer, J., delivered the opinion of the court:

The Drake Roofing Company was engaged in the business of gravel roofing in the city of Des Moines. Prior to October 2, 1895, it had been doing business with plaintiff, a banking corporation in the same city. Wishing to branch out in its business, the roofing company, through its secretary, J. F. N. Drake, applied to the bank for further accommodations, by way of loans, to enable it to buy materials in larger quantities and at better rates. The secretary did not wish to furnish sureties every time he called for a loan, and a guaranty was agreed upon. The attorney for the bank prepared the instrument, which was as follows, to wit: "For the purpose of inducing the German Savings Bank, of Des Moines, Polk county, Iowa, to extend credit to the Drake Roofing Company, the undersigned, J. F. N. Drake, F. O. Drake, A. P. Cottrell, and R. T. C. Lord, hereby guarantee to the said German Savings Bank payment of all notes, checks, drafts, overdrafts, and other evidences of indebtedness which may accrue from the said Drake Roofing Company to the said German Savings Bank within six months from the date of this guaranty, not to exceed the sum of five hundred dollars, it being the intention of this contract to secure payment to the said German Savings Bank; and the undersigned hereby agree to pay to the said German Savings Bank all notes, checks, drafts, overdrafts, and other evi-

dences of indebtedness from said Drake Roofing Company to said German Savings Bank which may accrue within six months from the date hereof, not to exceed five hundred dollars, waiving demand, notice, and protest on the part of the said German Savings Bank in collecting said sums from said Drake Roofing Company." The secretary took this to the defendants, who signed it, and he (the secretary) returned the same to the bank. A few days after the delivery of the instrument the roofing company was allowed to overdraw its account to the extent of \$509. Thereafter, and about the time the bank's quarterly statement was due, it requested the roofing company to make a note for \$500, to cover that amount of the overdraft. The request was granted, and on the 5th day of November, 1895, the roofing company, through its secretary, executed and delivered a demand note for the sum of \$500, payable to the bank. This note was renewed on February 10, 1896, and again on April 1, 1896,—each time by a demand note bearing 8 per cent interest, and providing for attorney's fees. No notice of the acceptance of the guaranty, or of advances made thereon, was ever given the defendants. At the time of the transactions in question the Drake Roofing Company was insolvent, and, as it failed to pay the last renewal note, this action was brought on that note, and the instrument of guaranty hitherto set out. The defenses have already been stated, and, as they are each and all relied on, they will be considered in the order in which they were set out.

When defendants signed the letter of guaranty, the Drake Roofing Company was not indebted to the plaintiff. The advancements were made by the bank after the delivery of the instrument of guaranty, and the primary question is, Was notice of the acceptance of the guaranty necessary? The authorities relating to this question are in hopeless conflict, and, although some of the rules are fairly well settled, there is a want of harmony in the decisions applying them to special circumstances. When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the decided weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty. But they differ more or less in determining what is a guaranty and what an offer to guarantee. Two very satisfactory and conclusive reasons are given for this general rule. The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed. The second is that the party making the offer is entitled to know whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of

conduct towards the principal debtor that he may not suffer loss. See, as supporting the rule, *Edmondston v. Drake*, 5 Pet. 624, 8 L. ed. 251; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503; *Adams v. Jones*, 12 Pet. 207, 9 L. ed. 1058; *Davis v. Wells*, 104 U. S. 159, 26 L. ed. 686; *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; *Claffin v. Briant*, 58 Ga. 414; *Taylor v. McClung*, 2 Houst. (Del.) 24; *Tuckerman v. French*, 7 Me. 115; *Kellogg v. Stockton*, 29 Pa. 460; *Kincheloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Allen v. Pike*, 3 Cush. 238; *Mussey v. Rayner*, 22 Pick. 223; *Rankin v. Childs*, 9 Mo. 673; *Mayfield v. Wheeler*, 37 Tex. 256; *McCollum v. Cushing*, 22 Ark. 540; *Geiger v. Clark*, 13 Cal. 579; *Cooke v. Orne*, 37 Ill. 186; *Oaks v. Weller*, 13 Vt. 106, 37 Am. Dec. 583; *Steadman v. Guthrie*, 4 Met. (Ky.) 147; *Kay v. Allen*, 9 Pa. 320; *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341. In *Douglass v. Howland*, 24 Wend. 35, Justice Cowen wrote an elaborate opinion entirely repudiating the doctrine of notice as necessary to the consummation of the contract; but that case has not been generally followed, and has been doubted, if not overruled, by *Jackson v. Griswold*, 4 Hill, 522. See also *Beekman v. Hale*, 17 Johns. 140. There are a few cases that seem to hold a guaranty relating to future advances binding, although no notice of acceptance is given the guarantor. These decisions are opposed to the great weight of authority, and we are not inclined to follow them. See *Whitney v. Groot*, 24 Wend. 82; *Wright v. Griffith*, 121 Ind. 478, 6 L. R. A. 639, 23 N. E. 281; *Union Bank v. Coster*, 3 N. Y. 303; *Lonsdale v. Lafayette Bank*, 18 Ohio, 126; *Yancey v. Brown*, 3 Sneed, 89. But even here the conflict is more in the application of principles to particular facts, than in the principles themselves. The difficulty seems to be in distinguishing between an absolute guaranty and a mere offer to, or proposal of, guaranty. In some cases it is held that notice of acceptance must be given the guarantor even though his promise be absolute in terms. Chief Justice Marshall so held in *Russell v. Clarke*, 7 Cranch, 69, 3 L. ed. 271. Judge Story appears to have been of the same opinion. See *Cremor v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3,383. See also *Allen v. Pike*, 3 Cush. 238; *Talbot v. Gay*, 18 Pick. 534; and *Craft v. Isham*, 13 Conn. 28. But New York and some other states hold to the contrary. See cases already cited. But here, again, the conflict seems to be founded primarily on the construction of the contract, and on the divergent views as to what constitutes an absolute guaranty. Conceding for the purposes of the case that no notice of acceptance of an absolute guaranty is required, and holding, as we do, that a mere offer or proposal of guaranty requires notice of acceptance by the other party, we are to determine to which class the instru-

ment in suit belongs. The best statement of the rule we have been able to find is that announced in *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173, where Gray, J., speaking for the court says: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved and the delivery of the guaranty to him, or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." See also, *De Cremer v. Anderson*, 113 Mich. 578, 71 N. W. 1090. The case at bar clearly belongs to the latter class stated by Justice Gray. There is no evidence of any request from plaintiff to defendant guarantors, or of any consideration moving from it, and received or acknowledged by them at the time they signed the guaranty, or that credit was extended the Drake Roofing Company at the time the letter of guaranty was delivered. Indeed, it clearly appears that the guaranty was not signed at the request of plaintiff. It was not present, either by agent or otherwise, at the time the instrument was executed; and there was no consideration for the guaranty, except in the future advances to be made to the roofing company. Plaintiff did not know who was to sign the guaranty until it was delivered, and even after delivery it was not bound to extend credit to the roofing company. We are of opinion that the instrument was, in legal effect, a mere offer of guaranty, requiring notice of acceptance to bind the guarantors. It is conceded by all parties that the guaranty is a collateral, and not an original, promise. Hence we have no occasion to determine any other question than that already decided. If the letter should be construed to be an original promise on the part of the defendants to pay for any goods that might be furnished to the Drake Roofing Company, or to pay any advances that might be made to it, perhaps the delivery of the goods or the furnishing of the money might complete the contract, under the rule announced in *Bishop, Contr.* §§ 330-333. But no such contention is made in the case. The waiver of notice found in the guaranty has no reference to the notice of acceptance.

Appellee contends, however, that we have already committed ourselves to the New York rule, and cites a number of our former decisions in support of its contention.

This claim calls for a review of some of our previous cases. In *Carman v. Elledge*, 40 Iowa, 409, one Hampton had purchased a cow at public sale. Carman, the seller, refused to deliver her on Hampton's credit alone, and a note for the purchase price was drawn up and signed by Hampton. Defendant Elledge made an order on Carman to let Hampton have the cow, stating in the order that he would sign the note with Hampton. Relying on defendant's promise, Carman delivered the cow, but Elledge refused to sign or pay the note. In that case we approved the rule hitherto announced in this opinion, but held that the instrument, if a guaranty at all, was absolute and complete, and not a mere offer or proposal. It will be noticed that the obligation of the principal debtor in that case was complete at the time the order was written, and that the acceptance of the order and the delivery of the animal were contemporaneous. That case is an authority for the rule we have just announced. In *Case v. Howard*, 41 Iowa, 479, plaintiff sold one Hills a bill of goods on the faith and credit of a writing signed by defendant, as follows: "Mr. D. A. Hills . . . wishing to purchase 1 case of tobacco on credit, I hereby agree to see the same paid for in four months, should said purchase be made." Recognizing the rule in the *Carman Case*, we said, speaking through Day, J., "The guaranty in this case is absolute." This is all that is said regarding that point. That it was not regarded as controlling clearly appears from what follows. The opinion then recites that, when Hills returned from making his purchase, he exhibited a bill showing the purchase of the tobacco on credit of four months, and a settlement of the same by note. This was held to be notice to the defendant that the condition on which he had agreed to become liable had been performed. This case is in line with all the authorities which hold that the notice need not be in any particular form, nor need it come from the guarantor himself. Knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion. See *Adams v. Jones*, 12 Pet. 207, 9 L. ed. 1058; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *Bishop v. Eaton*, 161 Mass. 490, 37 N. E. 665; *Oakes v. Weller*, 16 Vt. 63; *First Nat. Bank v. Carpenter*, 41 Iowa, 518. These cases are the only ones on which appellee relies, and we have seen that they do not support the rule contended for by it. There are some other cases to which it is well to call attention. In *Case v. Luse*, 28 Iowa, 527, the rule of *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503, and the statement of the principle in 2 Parsons, Contr. p. 13, note "d," was approved; and although the instrument sued on in that case was held not to be a promise, yet it was said that, if it had been, defendant was not bound, because not notified of its acceptance. In *Farwell v. Sully*, 38 Iowa, 387, the necessity of notice of acceptance of a guaranty and of future ad-

vances was recognized. In *Crittenden v. Steele*, 3 G. Greene, 538, the promise was held original, and not collateral, and it was said that no notice of acceptance was required. But the case really turned on defects in the pleadings. In *First Nat. Bank v. Carpenter*, 41 Iowa, 523,—a case decided the next day after the Howard opinion was filed,—we said: "On this subject of notice of acceptance of a guaranty there is considerable conflict in the authorities, and upon this particular point especially, which, however, we will not undertake to reconcile or determine between the conflicting cases, since it follows that if the course of dealing between the parties immediately following the making of the guaranty, together with all the connecting circumstances, is sufficient to justify a finding that defendants had notice that plaintiff was relying upon the guaranty in making advances," etc. This statement is quite conclusive of the proposition that the court had the day before held in the *Howard Case*,—that no notice was necessary. In *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670, it is held, in effect, that a mere offer of guaranty must be accepted, and notice thereof given the guarantor. We are therefore committed to the rule that a mere offer or proposal of guaranty is not a complete contract until notice of acceptance thereof is given the guarantor. That is the rule we have now reaffirmed, and, applying the rule by which to determine whether or not the promise in this case was absolute, we find that it was a mere offer or proposal, and that, as defendants had no notice or knowledge of its acceptance, it was not binding on them.

2. When a guaranty is continuing, and is unlimited in amount and the amount for which the guarantor may be held responsible is subject to change, notice of advancements made and of the amount due when all the transactions are closed is generally held to be necessary. *Davis Sewing Mach. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905. In the instant case the amount of defendants' liability is fixed by the instrument itself, and the promise is such that notice of advancements made from time to time may well be said to have been waived. But, aside from this, the evidence shows that the Drake Roofing Company was insolvent from the time of the making of the guaranty down to the commencement of this suit. That fact alone is sufficient excuse for not giving notice of the advancements, or of the state of the account at the time the guaranty expired by limitation of time. *Louisville Mfg. Co. v. Welch*, 10 How. 473, 13 L. ed. 497. Demand and notice of non-payment were not essential to recovery. *Olafin v. Reese*, 54 Iowa, 544, 6 N. W. 729; *Rodabaugh v. Pitkin*, 46 Iowa, 544; *Second Nat. Bank v. Gaylord*, 34 Iowa, 246.

For the error pointed out, the judgment of the District Court is reversed.

Granger, Ch. J., not sitting.

**CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.,**

v.

City of OTTUMWA et al.

and

**KEOKUK & DES MOINES RAILWAY
COMPANY, Appt.**

(.....Iowa.....)

1. A railroad right of way alongside a street is not subject to assessment for a street pavement, under Code 1873, § 486, authorizing municipalities to assess the cost of pavements upon lots and parcels of land fronting on the highway, since such railroad right of way is not a lot or parcel of land within the meaning of that statute, but is only an easement which is not benefited by the pavement.
2. An assessment upon a railroad for the cost of paving a street, which is made a paramount lien by Acts 25th Gen. Assem. chap. 7, § 12, is thereby authorized only upon a railroad which occupies a portion of the street, and not upon one which runs along the side of the street, but occupies no portion of it.
3. The authority to assess a railroad right of way that runs along the side of a street without occupying any portion of it, for the expense of paving the street, is not conferred by Code 1873, § 809, providing that railroad real estate shall not be included in the assessment, to individuals, of the adjacent property, since this section relates to taxation for governmental purposes, and not to local assessments.
4. The unconstitutionality of arbitrary assessments per front foot will not be considered when the question has not been presented to the lower court and the assessment complained of is void for other reasons.
5. A lessee of a railroad which has agreed to pay all taxes and assessments is not for that reason personally liable to a municipality or a contractor, neither of which is in privity with the lessee, for the amount of a local assessment.
6. Failure to give notice to the owner of a railroad of an assessment of which notice was given to a lessee only, whose name was placed upon the plat, instead of that of the owner, does not invalidate the assessment under a statute which says that a mere mistake in the name of the owner shall not invalidate the lien, and that the plat must show the names of the owners.

(*Waterman and Ladd, JJ., dissent.*)

(October 23, 1900.)

A PPEAL by plaintiff and defendant railroad company from a judgment of the

NOTE.—On the subject of liability of railroad right of way to assessments for local improvements there is a note in this series with the case of *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.) 23 L. R. A. 249; also the cases of *Lake Shore & M. S. R. Co. v. Grand Rapids* (Mich.) 29 L. R. A. 195; and *Philadelphia v. Philadelphia & R. R. Co.* (Pa.) 34 L. R. A. 564.

As to liability of street railway for paying assessments, see *Shreveport v. Prescott* (La.) 16 L. R. A. 193, and *note*.

As to liability of elevated railway for paying assessment, see the case of *Lake Street Elev. R. Co. v. Chicago* (Ill.) 47 L. R. A. 624. 51 L. R. A.

District Court for Wapello County confirming an assessment for a street improvement upon the railroad property in a proceeding brought to enjoin the collection of such assessment. *Reversed.*

Statement by **Deemer, J.:**

Suit in equity to restrain the collection of a special assessment made by the city against the right of way of the Keokuk & Des Moines Railway for paving and curbing a street on which the right of way abuts. Plaintiff is using the right of way under lease from the Keokuk & Des Moines Railway Company, and the latter company was made a party defendant after a demurrer was sustained to the petition, grounded on the proposition that it was a necessary party. The trial court dismissed the petition, and gave judgment against both railway companies for the amount of the assessment; and these companies appeal.

Messrs. Carroll Wright and George W. Seever, for appellants:

The only interest of the Keokuk Company is that of right of way for railroad purposes, acquired by ordinary condemnation proceedings.

The engineer assessed the whole cost of this pavement against the easement, and not a cent against the lots. Clearly, the lots abut on the street.

A mere right of way is an easement.

Brown v. Young, 69 Iowa, 625, 29 N. W. 941.

This easement or right of way of the Keokuk Company is neither a lot nor a parcel of ground. No property or interest in property can be charged with the cost of the improvement, unless it comes within the strict letter of the statute.

A right of way or easement is not subject to special assessment.

Muscatine v. Chicago, R. I. & P. R. Co. 88 Iowa, 201, 55 N. W. 100.

The occupant of the right of way, or the user of the easement, does not own any lot or parcel of ground which is subject to any lien within the meaning of the statute.

Koons v. Lucas, 52 Iowa, 177, 3 N. W. 84; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 500, 28 L. R. A. 249, 62 N. W. 417; *Gus v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *East Alabama R. Co. v. Doe ex dem. Visscher*, 114 U. S. 350, 29 L. ed. 139, 5 Sup. Ct. Rep. 869; *South Park Comrs. v. Chicago, B. & Q. R. Co.* 107 Ill. 105; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 43; *State ex rel. St. Paul City R. Co. v. Ramsey County Dist. Ct.* 31 Minn. 354, 17 N. W. 954; *Mt. Pleasant v. Baltimore & O. R. Co.* 138 Pa. 365, 11 L. R. A. 520, 20 Atl. 1052; *Allegheny City v. West Pennsylvania R. Co.* 138 Pa. 375, 21 Atl. 763; *Ammant v. New Alexandria & P. Turnp. Road Co.* 13 Serg. & R. 210, 15 Am. Dec. 593; *Leedom v. Plymouth R. Co.* 5 Watts & S. 285; *Seymour v. Milford & C. Turnp. Co.* 10 Ohio, 476; *Tippitts v. Walker*, 4 Mass. 596; *Macon & W. R. Co. v. Parker*, 9 Ga. 377.

The statute and ordinance under which

the assessment was made are in violation of the statute of the state of Iowa and the 14th Amendment to the Constitution of the United States.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Cooley*, Taxn. 2d ed. chap. 20; *McCormack v. Patchin*, 53 Mo. 36, 14 Am. Rep. 440; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Barnes v. Dyer*, 56 Vt. 469; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Dill. Mun. Corp.* § 761; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

If the question as to whether or not our right of way was benefited by the paving of the street is open to inquiry, the court must find that no special benefits accrued to it.

Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 70 N. W. 77; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40; *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962; *State, Paterson & H. River R. Co., Prosecutor, v. Passaic*, 37 N. J. L. 137; *State New Jersey R. & Transp. Co. Prosecutor, v. Elisabeth*, 37 N. J. L. 330; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375, 21 Atl. 763; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417.

Neither the city nor the contractor could maintain an action on our promise to the Keokuk Company.

Messenger v. Votaw, 75 Iowa, 225, 38 N. W. 280; *Sinison v. Brown*, 68 N. Y. 361; *Garnsey v. Rogers*, 47 N. Y. 240, 7 Am. Rep. 440; *German State Bank v. Northwestern Water & Light Co.* 104 Iowa, 717, 74 N. W. 685.

The Keokuk Company could not be bound by the assessment.

It had no notice of the assessment proceedings.

Gatch v. Des Moines, 63 Iowa, 718, 18 N. W. 310.

Mr. Robert Mather also for appellants. **Messrs. McNett & Tisdale, W. H. O. Jaques, and E. M. Sharon**, for appellees:

The right of the railroad companies in and to the lands abutting on the street improved is something more than a mere license to cross these lands.

Appellants, in claiming that the city of Ottumwa should have gone beyond its right of way to the remnants of the lots which such right of way separated from Main street, ask for something that the law and the decisions of this court both deny.

Amery v. Keokuk, 72 Iowa, 701, 30 N. W. 780; *Eagle Mfg. Co. v. Davenport*, 101 Iowa, 493, 38 L. R. A. 480, 70 N. W. 707.

The injustice of assessing any portion of the cost of any such improvement to the 5' L. R. A.

original owner of the lots, whose property was taken by the railway company and used for nearly forty years, is so apparent, even in the absence of the statute, that it requires no argument.

Muscatine v. Chicago, R. I. & P. R. Co. 79 Iowa, 645, 44 N. W. 909.

By the condemnation proceedings a corporation acquires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual.

Hollingsworth v. Des Moines & St. L. R. Co. 63 Iowa, 443, 19 N. W. 325; *Cummins v. Des Moines & St. L. R. Co.* 63 Iowa, 397, 19 N. W. 268; *Clayton v. Chicago, I. & D. R. Co.* 67 Iowa, 238, 25 N. W. 150; *Burlington & M. River R. Co. v. Spearman*, 12 Iowa, 112.

The right of way of a railroad is taxable for local improvements. Even where such assessments are based on "special benefits," that is determined by law as to location, or by the arbitrary determination of municipal authorities.

Illinois C. R. Co. v. Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077.

Where a railway is contiguous to the proposed street improvement it falls within the designation of property that may be specially taxed for the making of the local improvement.

Jacksonville R. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478; *Chicago & N. W. R. Co. v. People ex rel. Scip*, 120 Ill. 104, 11 N. E. 418; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Illinois C. R. Co. v. Mattoon*, 141 Ill. 32, 30 N. E. 773; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 164; *New York, L. E. & W. R. Co. v. Dunkirk*, 65 Hun. 494, 20 N. Y. Supp. 596; *State, Paterson & H. River R. Co., Prosecutor, v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Illinois C. R. Co. v. East Lake Fork Special Drainage Dist. Comrs.* 129 Ill. 417, 21 N. E. 925; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 430, 9 Am. Rep. 399; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499; *Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073.

When the name of the owner of any real estate is unknown, it shall be lawful to assess such real estate without connecting therewith any name.

Corning Town Co. v. Davis, 44 Iowa, 622; *Blackwell, Tax Titles*, 2d ed. 145.

The defendant city, on the plat provided for in § 11 of the act, gave the name of the owner "as far as practicable," and under § 18 a mistake, if one was made, in the name, does not affect the liability of the railroad companies.

Meyer v. Dubuque County, 49 Iowa, 193; *Kendig v. Knight*, 60 Iowa, 29, 14 N. W. 78; *Blackie v. Hudson*, 117 Mass. 181; *Whiting v. Townsend*, 57 Cal. 515.

The plaintiff is liable under the lease with the Keokuk & Des Moines Railway Company.

Cassady v. Hammer, 62 Iowa, 359, 17 N. W. 588; *Blake v. Baker*, 115 Mass. 188; *Amery v. Keokuk*, 72 Iowa, 704, 30 N. W. 780; *Burlington v. Quick*, 47 Iowa, 222; *Chariton v. Holliday*, 60 Iowa, 391, 14 N. W. 775; *Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895; *Tuttle v. Polk*, 92 Iowa, 447, 60 N. W. 733.

On petition for rehearing.

The opinion of the majority in this case impairs the obligation of every contract that the law has made in this state, between the man whose property was taken for public use and the corporation to which the state has granted the power of taking it. This opinion absolutely changes the measure of damages to be observed by every sheriff's jury that appraises land in condemnation proceedings.

Henry v. Dubuque & P. R. Co. 2 Iowa, 288; *Smith v. Hull*, 103 Iowa, 95, 72 N. W. 427.

The rule is different between a "penal" statute and a "remedial" statute, as illustrated in the Federal revenue acts, the violation of which is criminal, and revenue laws for the creation of a fund to pay for an improvement that a municipality is given the right to order.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; *United States v. Olney*, 1 Abb. (U. S.) 275, Fed. Cas. No. 15,918.

A revenue law is not to be strictly construed, but rather the contrary, so as to attain the ends for which it was enacted.

United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; *Cooley*, Taxn. 2d ed. 271; *Philadelphia v. Ridge Ave. Pass. R. Co.* 102 Pa. 190; *Cornwall v. Todd*, 38 Conn. 447; *Hubbard v. Brainard*, 35 Conn. 563; *Big Black Creek Improv. Co. v. Oom*. 94 Pa. 450; *Hudler v. Golden*, 36 N. Y. 447; *Eckhard v. Donohue*, 9 Daly, 214; *Weed v. Tucker*, 19 N. Y. 422; 3 Parsons, Contr. 287.

The easement enjoyed by a railway company in a road or a public street may be assessed and taxed as real estate.

Baltimore City Appeal Tax Ct. v. Western Maryland R. Co. 50 Md. 275; *People ex rel. Dunkirk & F. R. Co. v. Cassity*, 46 N. Y. 46; *Providence Gas Co. v. Thurber*, 2 R. I. 21; *Providence & W. R. Co. v. Wright*, 2 R. I. 459; *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54; *Chicago v. Baer*, 41 Ill. 306; *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866; *West Chicago Street R. Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112; *Indianapolis & V. R. Co. v. Capitol Pav. & Constr. Co.* 24 Ind. App. 114, 54 N. E. 1076; *State, New Jersey R. & Transp. Co., Prosecutor, v. Newark*, 27 N. J. L. 185; 12 Am. & Eng. Enc. Law, 1st ed. 655.

By the term "land," as used in the statute, must be meant the ground, with such improvements as there are upon it at the time of the execution of the mortgage.

Croskey v. Northwestern Mfg. Co. 48 Ill. 481.

The word "land," in the statute, will be construed to include an easement if such construction is necessary.

struction appears to be in accordance with the intention of the legislature.

Great Western R. Co. v. Swindon & C. Extension R. Co. 52 L. J. Ch. N. S. 306; *Monmouth County Freeholders v. Red Bank & H. Turnp. Co.* 18 N. J. Eq. 91; *State ex rel. Brower v. Tichenor*, 41 N. J. L. 345; *State ex rel. New Haven & D. R. Co. v. Railroad Comrs.* 50 Conn. 308, 15 Atl. 756; *Burlington & M. River R. Co. v. Spearman*, 12 Iowa, 112.

The city is not obliged to look into the relations of those owning different estates in the property which comes within the designation prescribed by the statute as abutting property. It might be assessed against both the tenant and the landlord, against the owner of the life estate and the reversion, against one of the tenants in common, against the owner of the dower interest and the heirs, or against the estate of their decedent.

Meyer v. Dubuque County, 49 Iowa, 193; *Whiting v. Townsend*, 57 Cal. 515; *Kendig v. Knight*, 60 Iowa, 29, 14 N. W. 78; *Wheeler v. Anthony*, 10 Wend. 346; *Covington v. Boyle*, 6 Bush, 204.

Mr. W. W. Epps also for appellees.

Deemer, J., delivered the opinion of the court:

The case was tried on an agreed statement of facts, from which we gather the following: The Keokuk & Des Moines Railway Company acquired by condemnation proceedings a right of way across certain lots in the city of Ottumwa, abutting on Main street. This right of way was used by the Chicago, Rock Island, & Pacific Railway Company at the time the assessment in question was levied, under a lease from the Keokuk & Des Moines Company, terminating December 19, 1923, by the terms of which the Rock Island Company agreed to pay "all lawful taxes and assessments of value made of the property after the commencement of the lease." In the year 1894 the city council of the city of Ottumwa, by resolution, ordered the paving and curbing of East Main street, and in 1895 a contract therefor was entered into by the city with the defendant the Edward Walsh Company. The paving and curbing was to extend along Main street, and adjacent to the right of way, 716½ feet, and was to be 33 feet in width between the curbs. The right of way was 3 or 4 feet from the south curb, and extended for the entire distance named. The property on the north side of the street was divided into lots and blocks, and was owned by various persons. By the terms of the contract the construction company undertook to keep the improvement in repair for the term of seven years. Pursuant to contract the Walsh Company made the improvement, and after the completion of the work the city engineer made a plat thereof, in which he assessed the cost of 7 feet in width to a street-railway company that occupied the south side of the street, not far from the curb, with its track, and of 13 feet in width for the entire distance to the Rock Island Railway Company

and the right of way. The balance of 13 feet was assessed against the property lying on the north side of the street under the front-foot rule. Nothing was allowed the railway company for street intersections. No notice was given the Rock Island Company of the intent to assess any portion of the cost of the improvement against it, save that its name was included on the plat made by the city engineer, and no notice of any kind was given the Keokuk Company. On June 25, 1895, the Rock Island Company served the city and the contractor with notice to the effect that it would contest the right of either to charge any portion of the cost against the right of way occupied by it. July 15th the city council accepted the work, and approved the assessment made by the city engineer. Thereafter notice was given directed generally to property holders, and referring to the engineer's plat, as follows: "Take notice that there is now on file in the office of the city clerk at the city hall in the city of Ottumwa, Iowa, a plat of paving districts Nos. 12 and 49. Paving district No. twelve (12) consists of East Main street from the east side of Birch street to the west side of Ash street. Paving district No. forty-nine (49) consists of that portion of Fifth street from the east line of Court street to the west line of Jefferson street, in Ottumwa, Iowa. Said plat, among other things, shows the separate lots and parcels of ground abutting thereon subject to assessment of said improvement, the number of front feet abutting thereon, the owners thereof, the amount of assessment proposed to be made against each of the said lots and parcels of ground, and the owner thereof." On August 5th, and before final ratification and approval of the assessment, the Rock Island Company filed a protest against the same, stating its reasons therefor. Thereafter the council approved the assessment, ordered it certified to the county auditor, and later issued certificates of assessment to the construction company. Plaintiff then brought this suit to restrain the collection of the assessment. The Keokuk & Des Moines Company was made a party defendant, as heretofore stated. The trial court dismissed the petition, and rendered judgment against both companies for the amount of the assessment, with 10 per cent interest, and costs of collection, and made the same a lien on the right of way of the Keokuk Company.

There was but a single railway track located on the right of way, and this is in a cut of from 3 to 7 feet below the street level. The strip of ground between the south curb and the north line of the right of way, of 3 or 4 feet in width, is so occupied with telegraph electric-railway poles, etc., that a sidewalk cannot be built thereon, and it is not used by foot passengers. Main street does not lead to the freight depot of either railway company, but travelers may take it in going to the passenger depot. The main passenger depot in the city is within half a block of Main street, and there is no other street between it and the depot. Main street is, however, one of the principal streets in

the defendant city. These facts are recited at this time in view of the contention made by the railway companies to the effect that the paving was of no benefit to them, or to their right of way or property, and that the assessment was without authority of law. The main points contended for are: First, that the right of way is not subject to special assessment; second, that no lien can be established against a right of way secured by condemnation proceedings, and that no sale thereof can be made on judicial process; third, that the statute and ordinances charging the cost of the improvement under the front-foot rule, and without regard to benefits, are unconstitutional; fourth, that no benefits were conferred by the improvement; fifth, that plaintiff company is not liable for the cost of the improvement, because it is a mere lessee of the right of way; sixth, that because no notice was ever given the Keokuk Company of the assessment against its property, or of the proceedings connected therewith, no judgment can be rendered against it; seventh, that the court cannot cure any errors in the assessment, and had no power to enter judgment against anyone not a party to the original proceedings; and, eighth, that the allowance of interest and collection charges was erroneous. Such of these points as fairly arise on the record we will consider in the order stated.

The first and most important—aside from the constitutional—question relates to the right of a city to assess the cost of paving and curbing against the right of way of a railway company acquired by condemnation proceedings. No citation of authorities is needed in support of the fundamental principle that the right of a municipality to levy special assessments depends on statutory enactment, and that it has no existence unless there be a valid statute conferring it. But see *Polk County Sav. Bank v. State*, 69 Iowa, 24, 28 N. W. 416; *Re Second Ave. M. E. Church*, 60 N. Y. 395; *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797. General authority to levy taxes for municipal purposes is insufficient to confer the power, and a statute conferring such power is strictly construed in favor of the person against whom the assessment is levied. See cases last above cited and *Hager v. Burlington*, 42 Iowa, 661; *Reed v. Toledo*, 18 Ohio, 161; *Starr v. Burlington*, 45 Iowa, 87; *Augusta v. Murphey*, 79 Ga. 101, 3 S. E. 326; *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807. Nevertheless, when express power is given, substantial compliance with the statute is all that is required. *McNamara v. Estes*, 22 Iowa, 246. In the further discussion of the proposition, regard must be had to the essential difference between a tax levied for governmental purposes and a special assessment founded on the theory of benefits conferred. *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Fairfield v. Ratcliff*, 20 Iowa, 386. The foundation of the power to levy special assessments is, no doubt, the general taxing power of the state, and not the police power, or the right

of eminent domain. *Warren v. Henly*, 31 Iowa, 31; *Mots v. Detroit*, 18 Mich. 495; *Allen v. Drew*, 44 Vt. 174; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 693; *Re Centre Street*, 115 Pa. 247, 8 Atl. 56. But the whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255, and cases cited in Judge Elliott's work on Railroads, vol. 2, p. 1100.

With these elementary propositions settled, we now turn to our statute, and find that, at the time the assessment was levied, it authorized cities to pave and curb any highway or alley therein, and to levy a special tax on the "lots and parcels of land fronting on the highway" to pay the expense of such improvement. Code 1873, § 466. See also Acts 23d Gen. Assem. chap. 14, §§ 10, 11, and Acts 25th Gen. Assem. chap. 7. The ordinance passed by the defendant city in virtue of the power thus conferred, so far as material, reads as follows: "The proportion of the cost chargeable to the property owners for such improvements shall be ascertained and assessed by the city council against each owner and lot or parcel of land abutting, fronting upon, or adjacent to said improvement in proportion to the number of front feet. The city engineer shall also report to the council the number of front feet fronting on, or abutting on, or adjacent to such improvement, together with the names of the owners, and the number of front feet owned by each as nearly as can be ascertained, and the amount chargeable to each separate lot or parcel of ground." This was the power conferred by the legislature, and made effective by ordinance; and it was to charge the expense against each owner, and lot or parcel of land abutting on the improvement, with the cost thereof. Is a railroad right of way acquired by condemnation proceedings either a lot or parcel of land subject to assessment? Appellees rely on *Muscatine v. Chicago, R. I. & P. R. Co.* 79 Iowa, 645, 44 N. W. 909, as supporting the affirmative of the proposition; while appellants, with equal confidence, rely on the same cases reported in 88 Iowa, 291, 55 N. W. 100, when it was before this court on a second appeal. The exact question does not seem to have been raised when the case was first before the court. From the statement of facts in the fourth division of the opinion it appears that the railroad company acquired title to the lots and lands occupied by it through a grant from the city, and by purchase; that it had absolute title to a large part of the property, and an easement in the remainder; and that the land was occupied with defendant's railroad track, station houses, turntables, and other improvements. A part of the land had at one time been a public street, but the public had ceased to use it, and right of occupancy was conferred by the city on the defendant railway. The court, through Beck, J., said: "The defendant, the perpetual possessor of the land, is the owner who must respond to all demands made in exercise of the authority of tax-

tion," citing some cases. When the case was before us the second time, the court said, speaking through Robinson, Ch. J.: "That portion of the paving is adjacent to the land concerning which it was held on the former appeal that assessments on account thereof should be paid by the defendant," referring to certain property owned by defendant and used as before stated. The writer of the opinion further emphasizes this thought in the first division of the second opinion. In the third division of that opinion the writer further said: "\$1,746.30 is for paving west of that in front of its property already considered. . . . That portion of the paving to which we now refer was done adjacent to land over which the defendant had the right to lay its track, but to which it did not have title. . . . The charter of the plaintiff authorizes it to require the owner of lots adjacent to a street to pave it, and not the owner of a mere easement in the lots. The general statute is to the same effect;" citing *Koons v. Lucas*, 52 Iowa, 181, 3 N. W. 84. It is apparent that the original case did not decide the point now under consideration, for, if it had, it would have been the law of the case, whether right or wrong, and would have been followed on the second appeal. That the court did not consider the question involved on the first appeal is clear, for in the first division of the second opinion the decision on the first appeal with reference to the property involved therein was held *res judicata*, and to be followed on the second appeal. It must be admitted that *Koons v. Lucas*, 52 Iowa, 181, 3 N. W. 84, cited in support of the second opinion, does not directly sustain it. In that case the railway tracks were laid on the street, and not on a right of way adjacent thereto; but the rule of construction established on the second appeal of the *Muscatine Case* seems to have some support in the *Koons Case*. Of the cases cited in support of the principle announced in the first opinion, *Cummins v. Des Moines & St. L. R. Co.* 63 Iowa, 397, 19 N. W. 268, and *Hollingsworth v. Des Moines & St. L. R. Co.* 63 Iowa, 443, 19 N. W. 325, merely hold that in estimating damages in condemnation proceedings the jury might properly treat the case as if the owner was divested of all his interest in the land, for the reason that the easement created thereby would be presumed to be perpetual. In both cases it is said that the owner retained the fee, and that under certain circumstances it would revert to plaintiff or his grantee. Surely, these cases do not count for much in favor of either party to this contention. In the other case—*Burlington & M. River R. Co. v. Spearman*, 12 Iowa, 112—the railroad company owned certain depot grounds in the city of Mt. Pleasant, that were about to be sold to satisfy a tax levied by the city for the purpose of constructing a sidewalk adjoining said property. It acquired its title from the patent owners for depot purposes, and the property was used for that purpose at the time the tax was levied. This property was held liable for the tax under then existing laws which made "all property in the state be-

longing to any bank or company subject to taxation." By § 15 of the Acts of 1856 the defendant city was given the right to levy taxes on all taxable property within its boundaries, and by § 16 of the same act it was authorized to build sidewalks, and assess the expense on the owners of contiguous lots, "which shall have the effect of a special tax levied on their property." This decision is manifestly in accord with both opinions in the *Muscatine Case*, and it is not an authority for either of the parties to this appeal. There the railroad company was the owner of the lots by purchase, as in the *Muscatine Case*, and the assessment was held properly levied.

From this view of our cases it would seem to follow that the last opinion in the *Muscatine Case* is the only one that is really decisive of the question now under consideration. That expressly holds that it is the owner of the lots or lands adjacent to the street who is subject to the tax, and not the owner of a mere easement in or over the property. Following the general rules heretofore announced, it is difficult to arrive at any other conclusion. The statute must receive a strict construction, and, unless it authorizes the levy of an assessment on mere easements, the right does not exist. The owner of the lots still has the fee title. He has been deprived of the use of 40 feet off the end thereof, in virtue of the condemnation proceedings, but this use may terminate at any time by nonuser or abandonment. A mere easement is "neither a lot nor a parcel of land." The statute provides that "words and phrases are to be construed according to the context and the approved usage of the language." Code 1873, § 2, § 45. It will hardly be claimed that, according to the approved usage of language, the owner of an easement is the owner of a lot or parcel of land. We do not overlook the decisions heretofore cited, holding that the easement is presumed to be permanent and perpetual, and that the landowner has, as a rule, little of value in the land condemned; but no case in this state has ever held that a railway by condemnation proceedings acquired ownership of the land itself. For the purpose of assessing damages it has been so treated in some cases, but for no other purpose (save general taxation), as we understand it. We may well assume that the legislature, in passing the acts in question, did not intend that railways' rights of way should be assessed for paving and curbing, for the reason that such rights, used solely for the laying of tracks, would not, as a general rule, be benefited in any manner whatever by the paving or curbing; and, if any argument were needed to enforce this thought, it is to be found in the facts of this case, which show that it was of no benefit whatever to the right of way. A different question arises where the property is used for depot grounds and other like purposes. On that point we express no opinion, for it does not arise in the instant case.

The new Code, as we understand it, authorizes assessments against rights of way
51 L. R. A.

or easements of railway companies (see § 968); at least special-charter cities are authorized to make such assessments. Appellees contend, however, that the latter part of § 12 of chap. 7 of the Acts of the 25th General Assembly authorizes the levy of the assessment. It reads as follows: "An assessment against any railroad or street railway for the paving of any street shall be a first and paramount lien upon the entire track of said railroad or street railway in the limits of the city making such assessments." That manifestly has reference to railroads and street railways on and over the streets. See §§ 10 and 11 of the same act. They are too long to be set out at length, and we need only say that they authorize an assessment of a certain part of the expense of paving to street railways or railroads "upon the streets" ordered paved. They also rely on § 809 of the Code of 1873, found in the chapter relating to general revenues of the state. It reads as follows: "No real estate used by railway corporations for roadbeds shall be included in the assessment, to individuals, of the adjacent property, but all such real estate shall be deemed to be the property of such companies for the purpose of taxation; nor shall real estate occupied for and used as a public highway be assessed and taxed as part of adjacent lands whence the same was taken for such public purpose." Found in the chapter relating to taxation for governmental purposes, it affords little or no light on the question before us. Indeed, it is almost universally held that general power to levy taxes for municipal purposes is not broad enough to confer the right to levy special assessments for local improvements. *Minnesota Linsced Oil Co. v. Palmer*, 20 Minn. 468, Gil. 424; *Green v. Ward*, 82 Va. 324; *Fairfield v. Ratcliff*, 20 Iowa, 396. Moreover, there is nothing in the section quoted that confers power on a municipality to levy special assessments on such property as is involved in this litigation. The distinction between taxation and the power to levy special assessments, already pointed out, is important when we consider the effect to be given the statute relied upon. In our opinion, it has no bearing on the proposition before us, except it be as an aid in the construction of the statute and ordinance under consideration. That statute uses the words "owner of lot or lots or parcels of land," and there is nothing to show that a mere easement was intended. The second opinion in the *Muscatine Case* seems to be decisive of the main point. Authorities from other states are conflicting. Wisconsin, Michigan, Pennsylvania, Missouri, and Connecticut seem to hold that a railroad right of way cannot be assessed for local improvements. Various reasons are given for these holdings, and the leading case in support of the conclusion is *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41. See also *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63. On the other hand, the supreme courts of Kentucky, New Jersey, Illinois, Ohio, California, and Indiana hold that under the statutes of their re-

spective states such right of way is assessable for local improvements. *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, seems to be the leading case on this side of the proposition. See also *Illinois C. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315. We will not take the time nor space needed to review these authorities. Some of them are based on the peculiar language of the statutes construed, while others proceed on the broad ground that such rights are subject to special assessments. Reconciliation of the cases is utterly impossible, and we content ourselves with arraying the states on either side of the question. There is a valuable note to *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.) 28 L. R. A. 249, to which reference is made. It ought to be said generally, however, that in New Jersey a showing of special benefits must be made, even under a statute authorizing the assessment (see *State, New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth*, 37 N. J. L. 330); and in Indiana the question is left somewhat in doubt by *Louisville, N. A. & O. R. Co. v. State use of Beckman*, 122 Ind. 443, 24 N. E. 350. Nearly all the cases hold that property of a railroad company used for warehouses, depots, and other like purposes is assessable for local improvements; the reason for this being that such property is benefited by the improvement, while the right of way occupied simply by the tracks of the company can receive no benefit from the improvement. It need only be added that the evidence in this case indisputably shows that the right of way received no benefit from the paving and curbing of the street. The question of the right to sell a fragment of the right of way, with its ties and tracks, is one of much difficulty, and it is differently answered by the courts of the country. A majority in point of numbers hold that it cannot be done, and, for that reason, that the lien of an assessment thereon is invalid. See *East Alabama R. Co. v. Doe ex dem. Viesscher*, 114 U. S. 350, 29 L. ed. 139, 5 Sup. Ct. Rep. 369; *Gus v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417; *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 27 N. E. 409. But see also *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 357, and *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159. Holding, as we do, that the statute does not confer the power of assessment on the municipality, we need not pronounce definitely on this point.

2. Further, it is said that the statutes and ordinances under consideration are unconstitutional and void, because of the arbitrary assessment per front foot, and not according to benefits. That question does not seem to have been raised by the pleadings, or presented to the lower court, and we will not consider it.

3. Again, it is said that no benefits resulted to the right of way, or to the corporation owning or occupying the same, and that for this reason the assessment was invalid. If that were the only question in the case, we would be inclined to hold with appellants' 51 L. R. A.

contention that, as there was no benefit whatsoever, the assessment was, for that reason alone, invalid. There are, of course, some objections to this conclusion, and it is best, perhaps, that we express no decided conviction on the subject, for it seems to be held by the courts of high authority that the legislature has power to authorize the assessment of railway rights of way for local improvements. *Hampshire County Comrs., Petitioners*, 143 Mass. 424, 9 N. E. 756. That question is also left open for further consideration when it properly arises.

4. The Rock Island Company was simply a lessee of the property of the Keokuk & Des Moines Railroad, yet a personal judgment was entered against it, and it was the only party notified of the assessment. By the terms of its lease the Rock Island Company agreed to pay all taxes and assessments of value made on the property, and because of this it was held personally liable to the contractor for the assessment. This holding is complained of. Is the promise made in the lease such a one as the city or the contractors may enforce? That interrogatory seems to be answered in the negative by *German State Bank v. Northwestern Water & Light Co.* 104 Iowa, 717, 74 N. W. 685; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126, and *Messinger v. Votaw*, 75 Iowa, 225, 39 N. W. 280. At the time the promise was made there was no indebtedness from the Des Moines Company to any one. The contract was solely for the benefit of the Des Moines Company, and there was no privity between the city or the contractor and the Rock Island Company. As said in the *German State Bank Case*, the principle that one may sue upon a promise made to another for his benefit is therefore confined to cases where the person for whose benefit the promise is made has the sole exclusive interest in its performance. Had the assessment been lawful, the court was not authorized to render judgment against the Rock Island Company.

5. Further, it is contended that, as no notice was given the Des Moines Company, the assessment was invalid. The notice properly described the property, and was directed to the Rock Island Company. No doubt this was because general taxes had been paid by that company. As we understand it, there was nothing more than a mistake in name. The statute under which the assessment was made says that "a mistake in the name of the owner shall not vitiate the lien," and that the plat must show the names (so far as practicable) of the several owners. Sections 478 and 479 of the Code of 1873 also provided, in substance, that the municipality, or the person to whom it has directed payment to be made, is entitled to recover if the trial court is satisfied that the work has been done or material furnished which, according to the true intent of the act, would be chargeable upon the lot or land through or by which the street, alley, or highway improved passed, to the extent of the proper proportion of the value of the work or materials which would be charge-

ble on such lot or land, notwithstanding any informalities, irregularities, or defect in such municipal corporation or any of its officers. *Kenlig v. Knight*, 60 Iowa, 33, 14 N. W. 78; *Amery v. Keokuk*, 72 Iowa, 704, 30 N. W. 780; *Tuttle v. Polk*, 92 Iowa, 447, 60 N. W. 733; and *Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895.—seem to sustain appellees' contention on this point. This is not a re-assessment as contended by appellants.

6. The other points argued need not be considered, as they are not important. There should be a decree enjoining the collection of the tax from the railroad companies, and the cause will be remanded for that purpose.

Reversed.

Waterman, J., dissenting:

The rule that the owner of the fee is liable for a special assessment levied against an abutting railway right of way across his land is so inequitable that I cannot conceive such a result to have been intended by the general assembly. It puts the burden of paying for the improvement on one who has no beneficial interest in the real estate, leaving the present possessor, whose right in the property is practically perpetual, exempt from any liability therefor. Section 1344, Code 1897, which is but a re-enactment of a previous statute, provides: "No real estate used by railway corporations for roadbeds shall be included in the assessment, to individuals, of the adjacent property, but all such real estate shall be the property of the companies, for the purpose of taxation." While this section is found in the chapter relating to ordinary taxes, it announces, as a general principle, that railways are the owners of the land in their rights of way for purposes of taxation. Although the general power to levy taxes does not confer the right to impose special assessments for local improvements, yet a general definition of who shall be deemed the owner of a certain kind of property for purposes of taxation applies to all kinds of taxes. We must look further to find the authority to levy this assessment.

We start, then, with the principle established that the right of way is to be treated as land, and the railway company is deemed its owner; and we next find that the city had authority, as stated by the majority, to levy the cost of this improvement on "the lots and lands fronting on the highway." This power was made effective by the ordinance set out in the foregoing opinion. In the case of *Muscatine v. Chicago, R. I. & P. R. Co.* 79 Iowa, 645, 44 N. W. 909,—being the first appeal of that case,—the facts as stated show that the railway company had a right of way only over a portion of the property sought to be assessed. The company resisted payment of the tax in part on the ground set up in the case at bar, *viz.*, that it was not the owner of the land. On this issue this court said: "If anyone held title to the land upon which defendant acquired the easement, it was valueless, for defendant had the right of the perpetual possession and enjoyment of the land. It would

be absurd to say that the owner of such title is subject to taxation of any character upon the land, and that the owner of the perpetual possession . . . is not. The spirit of our laws will not permit such a thing. The defendant, the perpetual possessor of the land, is the owner, who must respond to all demands made in exercise of the authority of taxation. . . . As the defendant in this case was in the occupancy of the land, with right of perpetual possession, it is to be regarded as the owner, and liable for the taxes thereof." This holding does not seem to have been specially rested upon the statute we have set out, but is announced as a general principle of law, and in support of it the court cites *Burlington & M. River R. Co. v. Spearman*, 12 Iowa, 112; *Cummins v. Des Moines & St. L. R. Co.* 63 Iowa, 398, 19 N. W. 268; *Hollingsworth v. Des Moines & St. L. R. Co.* 63 Iowa, 443, 19 N. W. 325. On the second appeal no attempt was, or properly could have been, made to question this doctrine. It was the same case in every respect, a second time before the court, and, right or wrong, the first opinion announced the law which governed it. *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59, 29 N. W. 804, and cases cited. But I cannot think the rule a wrong one, and I do not understand the majority to overrule the first case.

I may say further that I am unable to comprehend the distinction made on this second appeal, between that part of the right of way of which it is said the railway was the owner (that is, to which it had obtained deeds), and that part in which it is spoken of as having only an easement (that is, which it has condemned). A deed to a railway company of land for a right of way ordinarily conveys only an easement. *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941; *Elliot, Railroads*, § 972. What the railway company in that case held by condemnation, and what it obtained by deed for its right of way, should have been treated alike. All should have been exempt, or all liable. But the opinion holds the company liable on the deeded lands, and exempts it on those condemned. Outside our own state there is ample authority for holding that a railroad right of way is assessable for improvements of this kind. *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *Elliot, Railroads*, § 786; *Illinois C. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 (this case was affirmed on appeal to the Supreme Court of the United States, 147 U. S. 100, 37 L. ed. 132, 13 Sup. Ct. Rep. 293); *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 164; *New York, L. E. & W. R. Co. v. Marion County Comrs.* 48 Ohio St. 249, 27 N. E. 548; *Peru & I. R. Co. v. Hanna*, 68 Ind. 562; *State, Paterson & H. River R. Co., Prosecutor, v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 422, 9 Am. Rep. 399; *Atchison, T. & S. F. R. Co. v. Peterson*, 58 Kan. 818, 51 Pac. 290; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499; *Ludlow v. Cincinnati Southern R. Co.*

78 Ky. 357; *London & N. W. R. Co. v. St. Pancras*, 17 L. T. N. S. 654.

These cases perhaps sufficiently answer the argument of the majority that a right of way is not land, within the meaning of the statute, and that the railway company derived no benefit from the improvement. In the case against Connelly, 10 Ohio St. 164, it is said: "The company, to advance its own interests, has seen fit to appropriate to its use ground within the corporate limits of the city of Toledo, and over which the city had the power of making assessments to defray the expense of local improvements; and why should not the company be held to have taken in *cum onere*? A citizen would scarcely claim exemption because he had devoted his lot to uses which the improvements could not in any way advance, and we see no good reason why a railroad company should be permitted to do so." To escape the result of this reasoning, the majority holds that the fee owner, who has been deprived of possession, control, and all beneficial interest, is liable to defray the expense of the improvement; and it may well be asked, how is he, or how can he be, benefited? Furthermore, I may say the question of benefits was in issue in the trial court, and the fact was found against plaintiff. There is no ground shown for our interference with that finding. So, too, I may add that the authorities generally hold that the land upon which a railway depot is located is benefited by the improvement of an adjacent street. See, for instance, *Elliott, Railroads*, § 785; *Muscatine v. Chicago, R. I. & P. R. Co.* 88 Iowa, 291, 55 N. W. 100. Now, a depot is only useful because of the right of way. Any benefit to defendants' depot property necessarily would affect the value of the right of way. There are many cases to be found holding that the right of way of a railway company is not subject to assessments for street improvements. But in determining this conflict we must take into consideration the statutory provision quoted (Code, § 1344). Aside from this, however, we should be influenced by the demands of manifest justice, rather than by a count of cases. That the right to impose such a tax is just seems to me apparent without argument. The burden borne by other citizens should, under similar circumstances, be shared by the railway companies. I do not accord any weight to the matter of what may be called legislative construction, as embodied in § 968, Code 1897, which authorizes cities under special charters to assess rights of way of railways for street improvements. This but expresses in terms the law that before existed by implication, for the city of Muscatine was under a special charter when the cause of action arose which was involved in the two appeals to which reference has been made. How the lien given the city in this case is to be enforced, I need not inquire. If the right of way cannot be sold, payment may be secured out of other property of the debtors. *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; 51 L. R. A.

Louisville, N. A. & C. R. Co. v. State use of Beckman, 122 Ind. 443, 24 N. E. 350.

2. With reference to the personal judgment against plaintiff the majority holds the trial court was without authority to render it, and the case of *German State Bank v. Northwestern Water & Light Co.* 104 Iowa, 717, 74 N. W. 685, together with two other cases from this court, is relied upon to sustain the position. The *German State Bank Case* was quite different in its facts from the one at bar. There one person promised another, to whom he had sold stock in a corporation, to protect the stock in the purchaser's hands against debts owed by the corporation to third parties. In the case of *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126, also cited, the third person, while benefited by the promise, had no direct interest in it. This is an important distinction. See 7 Am. & Eng. Enc. Law, p. 107. In the third case—*Messenger v. Votaw*—there was a sale of real estate subject to a mortgage upon which the grantee agreed to pay interest, he having received money therefor. The right of the creditor to sue on the agreement, while spoken of, was not in the case. It could not have been meant to hold that a purchaser of mortgaged premises, who agrees with the mortgagor to pay the mortgage debt, is not liable to the mortgage creditor on the promise. The converse of the proposition is elementary, and sustained by so many decisions of this court that I refer to the digest for a citation of cases. In the case at bar the agreement was a part of the contract of lease, and the payment of taxes and assessments was in the nature of rent. I think the case comes clearly within the doctrine announced in the following cases heretofore decided by this court: *Johnson v. Collins*, 14 Iowa, 63; *Johnson v. Knapp*, 36 Iowa, 616; *Rice v. Savery*, 22 Iowa, 470; *Gooden v. Rayl*, 85 Iowa, 592, 52 N. W. 506. The facts involved make this case much akin to those referred to, in which the purchaser of mortgaged real estate assumes and agrees to pay off the encumbrance. The lessor in the present case would have had no right of action under this promise, as against plaintiff, without first paying the assessment, and then his right would have been only to sue for money paid to plaintiff's use. *Cassady v. Hammer*, 62 Iowa, 359, 17 N. W. 588. This being true, the municipality levying the tax or assessment had the sole direct interest in the performance of the promise. I do not wish to be understood as saying that in every case of a promise made for the benefit of a third person the latter will have a right of action thereon. But where a fund is given the promisor, and in consideration thereof he promises to pay out of it some obligation, present or future, of the promisee to a third person, such third person may sue thereon as being directly interested therein. Out of the multiplicity of conflicting cases on this subject I shall content myself with citing but one other in support of the proposition last stated: *Wash-*

burn v. Interstate Investment Co. 26 Or. 436, 36 Pac. 533, 38 Pac. 620. The conclusion I reach is that the judgment of the trial court should be affirmed.

Ladd, J., concurs in this dissent.
Granger, Ch. J., not sitting.

Rehearing denied.

MARYLAND COURT OF APPEALS.

Mary E. SMITH, Appt.,

v.

STATE of Maryland to Use of Michael J. WALSH.

(.....Md.....)

Defects in the condition of leased premises, such as a defective balustrade on a porch, where the landlord has not reserved any part of the premises, do not render the landlord liable to a subtenant who leases from the original lessee, for injury received by the subtenant's child on account of such defect,—especially when it does not appear that the defect existed at the time of the original lease.

(January Term, 1901.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of the infant child of the equitable plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Louis F. Henninghausen and Charles F. Stein, for appellant:

There is no law requiring pickets in the railing of every porch or stairway, to prevent children from crawling through.

Worcester County Comrs. v. Ryckman, 91 Md. 36, 46 Atl. 319.

The appellant is not liable, because the lessee took the premises as he found them, for better or worse, and should have protected himself from any loss or damage arising out of their ruinous condition by a warranty or covenant.

Mumford v. Brown, 6 Cow. 475, 16 Am. Dec. 440; *Taylor, Land. & T.* § 175a; *Underhill, Torts*, § 221; *Buswell, Personal Injuries*, § 82; 1 *Shearm. & Redf. Neg.* § 709, p. 1229; *Thomp. Neg.* § 323; *Ray, Negligence of Imposed Duties*, § 61; 2 *Wood, Land. & T.* 2d ed. § 1292; 6 *Am. L. Rev.* pp. 615, 616, 635, 637, 645; 6 *Lawson, Rights, Rem. & Pr.* § 2829, p. 4619; *Doyle v. Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333; *Schwalbach v. Shinkle, W. & K. Co.* 97 Fed. Rep. 483; *Moynihan v. Allyn*, 162 Mass. 272, 38 N. E. 497; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Cutter v. Hamlen*, 147 Mass. 471, 1 L. R. A. 429, 18 N. E.

397; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117; *Bowce v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *McKenzie v. Cheetham*, 83 Me. 548, 22 Atl. 469; *Hill v. Woodman*, 14 Me. 38; *Scott v. Simons*, 54 N. H. 430; *Railton v. Taylor*, 20 R. I. 279, 39 L. R. A. 246, 38 Atl. 980; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Eduards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770, 23 N. E. 126; *Murray v. Albersson*, 50 N. J. L. 167, 13 Atl. 394; *Mullen v. Rainear*, 45 N. J. L. 523; *Naumberg v. Young*, 44 N. J. L. 332, 43 Am. Rep. 380; *Harlan v. Lehigh Coal & Nav. Co.* 35 Pa. 287; *Hazlett v. Powell*, 30 Pa. 293; *Southern Oil Works v. Bickford*, 14 Lea, 657; *Banks v. White*, 1 Sneed, 614; *Marshall v. Heard*, 59 Tex. 266; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Anderson v. Hayes*, 101 Wis. 543, 77 N. W. 891; *Ward v. Fagin*, 101 Mo. 674, 10 L. R. A. 147, 14 S. W. 738; *Peterson v. Smart*, 70 Mo. 34; *Ploen v. Staff*, 9 Mo. App. 309; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Kahn v. Love*, 3 Or. 207; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Blake v. Ransom*, 25 Ill. App. 488; *Mendel v. Pink*, 8 Ill. App. 381; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Krueger v. Ferrant*, 29 Minn. 387, 43 Am. Rep. 223, 13 N. W. 158; *Gately v. Campbell*, 124 Cal. 520, 57 Pac. 567; *Brewster v. De Fremery*, 33 Cal. 345; *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652; *Fisher v. Lighthall*, 4 Mackey, 82, 54 Am. Rep. 258; *Robbins v. Jones*, 15 C. B. N. S. 221; *Francis v. Cookrell*, L. R. 5 Q. B. 506; *Keates v. Cadogan*, 10 C. B. 591; *Ward v. Hobbs*, L. R. 3 Q. B. Div. 150; *Humphrey v. Wait*, 22 U. C. C. P. 580.

Messrs. Horton S. Smith and William Mellin Ballou, for appellee:

Where the owner of premises lets or leases them, and at the time of such renting they are in an unsafe or defective condition for the use for which they are intended, and the owner knows, or by the exercise of reasonable diligence could know, of their condition, and one who is lawfully upon the premises is injured by reason of said defective condition, the owner is liable for the injury.

Albert v. State use of Ryan, 66 Md. 325, 59

NOTE.—As to the liability of landlord for injury to tenant from defects in premises there is a note in this series with the case of *Hines v. Wilcox* (Tenn.) 84 L. R. A. 824, and 41 L. R. A. 278.

On the subject of landlord's liability to tenant's guest or servant for injury caused by defect in premises there is a note with the case 51 L. R. A.

of *McConnell v. Lemley* (La.) 34 L. R. A. 609; also the cases of *Olson v. Schultz* (Minn.) 36 L. R. A. 790; *Barnam v. Spencer* (Ind.) 44 L. R. A. 815; *Stenberg v. Wilcox* (Tenn.) 34 L. R. A. 615; *Whitmore v. Orono Pulp & Paper Co.* (Me.) 40 L. R. A. 377; *Texas Loan Agency v. Fleming* (Tex.) 44 L. R. A. 279; and *Towne v. Thompson* (N. H.) 46 L. R. A. 748.

Am. Rep. 159, 7 Atl. 697; *State use of Bashe v. Boyce*, 73 Md. 471, 21 Atl. 322; *Owings v. Jones*, 9 Md. 108; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Ahern v. Steele*, 115 N. Y. 210, 5 L. R. A. 449, 22 N. E. 193; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *King v. Pedly*, 1 Ad. & El. 826.

There is no distinction between the law applicable to the demise of a dwelling house and of buildings to be used for public purposes, in these respects.

Edwards v. New York & H. R. Co. 98 N. Y. 249, 50 Am. Rep. 659.

The owner of property would be liable where the premises were a nuisance at the time of the letting, or were likely to become a nuisance in the ordinary and reasonable use of the same for the purposes for which they were constructed, if he failed to repair the same.

Fow v. Roberts, 108 Pa. 491; *Todd v. Flight*, 9 C. B. N. S. 390; *Owings v. Jones*, 9 Md. 108; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659.

Suffering premises to be constructed or to become in a dangerous or defective condition is a nuisance.

Reichenbacher v. Pahmeyer, 8 Ill. App. 217; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697.

Premises defective and insecure when leased, are, for the purposes of this action, *per se* a nuisance when an injury has resulted from their subsequent use as if sound. The effect upon third parties is not the result of their use by the lessee. It is the original and insecure condition which is the cause of the injury.

Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; *Swords v. Edgar*, 59 N. Y. 35, 17 Am. Rep. 295.

For an owner to protect himself from liability arising out of the use of property demised, in the way that it is obviously intended to be used by the tenant, he must, by express covenant, exempt the premises from the use to which it is unsuited.

Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 404; *Godley v. Hagerty*, 20 Pa. 389, 59 Am. Dec. 731; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697.

Third parties or strangers are not bound by any contract or covenant that may exist between the landlord and tenant relative to the repairs or condition of the property.

Edwards v. New York & H. R. Co. 98 N. Y. 248, 50 Am. Rep. 659; *Rosewell v. Prior*, 2 Salk. 400; *King v. Pedly*, 1 Ad. & El. 826; *Pickard v. Collins*, 23 Barb. 444; *Ahern v. Steele*, 115 N. Y. 210, 5 L. R. A. 449, 22 N. E. 193; *Moody v. New York*, 43 Barb. 283; *Reichenbacher v. Pahmeyer*, 8 Ill. App. 219; *Bears v. Ambler*, 9 Pa. 194.

As there was a mutual interest or a *pe-51* L. R. A.

cuniary advantage accruing to both parties, there was an express invitation.

Suceeny v. Old Colony & N. R. Co. 10 Allen, 373, 87 Am. Dec. 644; *Benson v. Baltimore Traction Co.* 77 Md. 541, 20 L. R. A. 714, 26 Atl. 973; *Baltimore & O. R. Co. v. Rose*, 65 Md. 488, 4 Atl. 899.

The defendant's knowledge that visitors and sojourners would come upon the premises, and that they were unsuitable for that purpose, would make her liable at all events.

Whittaker's Smith, Neg. 83, 84; *King v. Pedly*, 1 Ad. & El. 827; *Rosewell v. Prior*, 2 Salk. 459; *Swords v. Edgar*, 59 N. Y. 37, 17 Am. Rep. 295; *Owings v. Jones*, 9 Md. 108; *Albert v. State use of Ryan*, 66 Md. 327, 59 Am. Rep. 159, 7 Atl. 697.

The fact that a child not *sui juris* is found in a dangerous place does not establish a case of negligence against its proper custodian.

Cooley, Torts, 2d ed. p. 821.

This porch, open and of easy access to the room in which the child was, naturally appealed to the childish instincts and propensities of one of its years and intelligence, and was therefore equivalent to an invitation, and under the circumstances the child "must not be viewed as a trespasser," but must be expected to act upon childish instincts and propensities.

Cooley, Torts, 2d ed. 356; Buswell, Personal Injuries, § 148; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Mergenthaler v. Kirby*, 79 Md. 182, 28 Atl. 1065; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 209, 18 Am. Rep. 393; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

As a matter of law a child six years of age cannot be said to be guilty of contributory negligence.

Mackey v. Vicksburg, 64 Miss. 782, 2 So. 178.

Boyd, J., delivered the opinion of the court:

This action was brought for the use of Michael J. Walsh, the father of Sarah Walsh, for loss of the services of his child, who was killed by reason of the alleged negligence of the appellant and Neptune E. Bowden in wilfully and knowingly allowing a balcony on a house owned by the appellant and rented to Bowden, to be in a dangerous condition. Mrs. Smith had owned the house since July, 1893, and some time in 1897 her agent rented it to Mr. Bowden, who continued to hold it, as monthly tenant, until after the accident, which happened on the 20th of August, 1899. She made no agreement to repair it or keep it in repair. Having a housekeeper in charge, the tenant rented one or more rooms to those applying for them. Walsh rented from the housekeeper, on the 19th of August, 1899, a front room on the second floor, and the next day took his child Sadie, who was five years and six months old, to the room. There was a back building along which a porch ran from the second story of the front building. Three

rooms opened on the porch, and there was a stairway leading from the middle of it (between two of the rooms) down to the yard. Mrs. Sheckels, who was an acquaintance of Walsh, occupied the rear room, and in the afternoon of the 20th of August the little girl, with the permission of her father, went to Mrs. Sheckels's room to get some water, which she got and started along the porch towards her father's room. Mr. Scott, who occupied the middle room on the porch, saw her go to Mrs. Sheckels's and just after she passed his window a second time he heard something fall. He then went on to the porch and saw the child lying below on the bricks. The balustrade had several openings in it,—the balusters being out,—the theory of the plaintiff being that the child fell through the one near Mr. Scott's door. He said that opening was about 3 feet wide and the child was lying below it, and a "picket," as he called it, was lying by the child when he found her. She was killed by the fall. The testimony shows that the balustrade was in a bad condition and had been for some time; some of the witnesses thought it had been for some years, judging from the appearance and condition of the wood, but that was a conjecture. Mrs. Sheckels said, however, it was when she went there in December, 1898, and that it got worse,—that the balusters would fall out if you touched them. It was admitted by the plaintiff's witnesses that the floor of the porch was sound. Some question seems to have been raised, in the testimony, as to the right of Walsh to use the porch; but his own evidence, as well as that of some of the other witnesses, was to the effect that it was used by all the occupants. That was the way, and apparently the only convenient way, to get into the yard, unless they went into the front hall. A number of prayers were passed on by the court, but under the view we take of the case it will only be necessary to consider the one which was refused, denying the right of the plaintiff to recover at all against the appellant. The case was dismissed by the plaintiff as to Bowden, and a judgment was obtained against the appellant, from which this appeal was taken.

The theory of the appellee is that at the time the property was rented it was unsafe and in a dangerous condition, which the owner knew, or could by the exercise of reasonable diligence have known, and therefore she was responsible to anyone lawfully on the premises, who was injured by reason of that condition, although the property was in the possession of her tenant when the accident happened. In support of that position he relies upon *Owings v. Jones*, 9 Md. 108; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *State use of Bashe v. Boyce*, 73 Md. 469, 21 Atl. 322, and other cases of a like character. There is no question about the responsibility, to strangers, of a landlord who leases premises which are a nuisance, or must become so by their user, and receives rent, whether he is in possession or not, if injury ensue. Nor do we doubt that he may be liable to strangers if

he rents his property when it is in such condition as will likely produce injury; and if the property be of a public character he cannot with impunity rent it in an unsafe condition, and, if he does, may be required to answer to those who are brought upon it, at the instance of his lessee, for injuries they sustain. Our own cases have determined the liability of the owner in such cases.

The injury complained of in *Owings v. Jones* was received by falling into a vault appurtenant to the property of the defendant and built under the pavement of a public street. The boy who was injured was on a public street at the time, where he and the public had the right to be; and if the owner leased the premises, with the vault appurtenant to it, which was either a nuisance at the time of the demise, or must in the nature of things become so by its user, then he was unquestionably liable, and could not protect himself by proving that at the time of the injury it was no longer in his charge. So in *Albert v. State use of Ryan*, and *State use of Bashe v. Boyce*, the same principles are applied to the owners of public wharves. As was said in *Albert's Case*: "A wharf furnishing the only mode of ingress and egress to a summer resort, where crowds were invited to come, if in an unsafe and dangerous condition, is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition or having by the exercise of any reasonable care the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors." And other cases might be cited, such as *Baltimore & O. R. Co. v. Rose*, 65 Md. 485, 4 Atl. 899; *Irvin v. Sprigg*, 6 Gill, 200 and *Condon v. Sprigg*, 78 Md. 330, 28 Atl. 395, to illustrate the duty of owners of property to protect the public against injury resulting from nuisances on or appurtenant to their premises when the public has a right to be there. But those cases do not reach the question before us, which is: In the absence of fraud or concealment, is the landlord of the original tenant responsible for any injury sustained by a subtenant, by reason of the condition of the premises when rented or afterwards, such as a defective balustrade or a porch?

There is no implied covenant requiring the landlord to make repairs. *Gluck v. Baltimore*, 81 Md. 326, 32 Atl. 515. "There is no implied warranty on a lease of a house, or of land, that it is or shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property. . . . When a lease contains no express contract of warranty that the property is or shall be fit for the purpose for which it may be rented, there is no implied warranty to that effect, and in case the property falls down in consequence of some inherent defect, the lessor is not bound to repair, and yet the

lessee will be compelled to pay the rent." *Hess v. Newcomer*, 7 Md. 337. After fully recognizing the landlord's liability to third persons not claiming under the tenant, it is said in *Taylor, Land. & T. § 175a*, that "the lessor's liability to the lessee is, however, much more restricted. As the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state, for any injury suffered by him during his occupancy by their defective condition, or even faulty construction, he cannot make the lessor answerable, unless there was misrepresentation, active concealment, or perhaps a total inability on the tenant's part to discover the defect before entry." There are many cases to that effect, of which we will mention: *Doyle v. Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333; *Moynihan v. Allyn*, 162 Mass. 272, 38 N. E. 497; *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Peterson v. Smart*, 70 Mo. 34; *Burdiok v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Brewster v. De Fremery*, 33 Cal. 341; *Murray v. Albertson*, 50 N. J. L. 167, 13 Atl. 394; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 20 N. W. 279; *Towne v. Thompson*, 68 N. H. 317, 46 L. R. A. 748, 44 Atl. 492; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 207, 40 L. R. A. 377, 39 Atl. 1032; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438.

The reason of the rule is perfectly apparent. If the lessee knows the condition of the premises, and rents it without requiring the owner to repair it, he takes it as he finds it, and has no right to complain of injuries sustained on account of its condition. The owner not being compelled to keep it in repair, if the tenant desires to require that of him, he should so bind him by contract. In the absence of that, he must protect himself against dangers which are apparent to him. A building may be perfectly safe and suitable if used for certain purposes, while it may not be for others, and if the tenant has had opportunity to inspect it before he rents it, the landlord cannot anticipate that he will use it in a way his intelligence and observation ought to tell him not to use it. If Bowden had been injured by reason of a defect such as is complained of here, he would have had no right to recover against the appellant. The defect was as apparent to him as to his landlady, and if he, with full knowledge of its condition, entered upon the premises, the principle of *caveat emptor* applies. If that were not so, no landlord would be safe in renting premises out of repair, although the tenant agreed to so accept them. As was said in *Robbins v. Jones*, 15 C. B. N. S. 240, "Fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any."

Nor does the plaintiff occupy any better position than Bowden would have done if he had sustained the injury. In *Taylor, Land. & T. § 175a*, the author follows what we have

already quoted by adding: "And the subtenant, servant, employee, or even customer of the lessee, is under the same restriction; because, entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk." This is quoted with approval in *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 20 N. W. 279; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767. See also *Towne v. Thompson*, 68 N. H. 317, 46 L. R. A. 748, 44 Atl. 492; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 207, 40 L. R. A. 377, 39 Atl. 1032; *Robbins v. Jones*, 15 C. B. N. S. 240. In *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, it is said: "The defendant, having leased the premises to Van Duzer, incurred the same liability to his subtenants for the safety and sufficiency of the premises for use for the purposes for which they were intended as they were under to him."

It is not claimed by the appellant's counsel that the obligation to a subtenant is, in this respect, any greater than that to the lessee."

Walsh was a subtenant. He was not there by invitation of the appellant, express or implied, but was there as a tenant of Bowden. There can be no doubt, under the testimony, that he had the privilege of the use of the back porch, but that cannot help his contention. There are cases in which it is held that when the owner of a house rents rooms in it and reserves the hallways and porches to be used in common by the tenants, the landlord will be liable for their condition, but that is because he has kept them under his control and no one tenant is under obligation to keep them in repair. But, without stopping to determine whether Bowden might, under the circumstances, have been responsible for the defective condition of the balustrade, the appellant had not reserved any part of the premises. She had rented the whole property to Bowden, and had not retained control over any part of it. He had been in possession of it for over two years, and there is not the slightest evidence to show, either that the appellant knew of its dangerous condition, or had been called upon or requested to repair it. It is true that some of the plaintiff's witnesses said that from their examination of the wood after the accident they were of opinion that it had been rotten for years. But there is no evidence that the appellant knew, or had any reason to suppose, that it was in such condition. This accident happened so far as can be told from the testimony reflecting on that subject, by the child falling through a hole in the balustrade, caused by some of the balusters falling out. There is no evidence they were out when the property was originally rented, and surely a landlord who rents a house as this was rented is not required to examine each month to see whether there are any balusters out of a balustrade, or any similar defect in the premises,—especially when he is under no legal obligation to make repairs if he finds any needed. But if she had known the balustrade was thus defective,

either when she originally rented or afterwards, she would not have been liable to the tenant or the subtenant, as is shown by the authorities cited above.

If a landlord is to be held responsible for injuries resulting as this did, at the instance of a subtenant who had the same opportunity to know the condition of the premises as any other tenant would, it would be a responsibility that few would care to assume. Walsh had been over the porch the day of the accident and had also lived in the house on a previous occasion,—a few months before the child was killed. He therefore knew, or had the opportunity to know, the condition of the balustrade. Mrs. Smith did not know it, so far as appears from the record; but, according to the contention of the appellee, she is to be held responsible merely because she is the owner, although the house was not in her possession, but was in that of her tenant's tenant. Bowden himself unquestionably could not have recovered for an accident, but Walsh, who only had the right to be there through Bowden, seeks to do so because he claims to be a third party. If that could be done, then, after a landlord has rented his house to a person who took it as he found it, the latter could make him responsible to a half dozen or more persons by simply renting out a room to each, with the use of the halls and porches in common. We do not understand the law to go to that extent. On the contrary, when one goes into possession of premises, or part thereof, with the right to use other parts in common with the other tenants, as a subtenant, he occupies no better position against the owner than the original tenant would, for injuries sustained by reason of the defective condition of the premises, which was equally apparent to all observers. A few nails and a board or two would have remedied this trouble, and certainly in the absence of notice to her the appellant might well have assumed that neither Bowden nor those occupying the rooms would permit the balustrade, or any part of it, to give way or remain away, to the danger of anyone, when it could so easily have been fixed, so as to have avoided such an accident as occurred:

Albert's Case and others of that kind are wholly different from this. Of course, the

law will not permit an owner to rent property of a public character where people in large numbers are likely to gather, if he knows, or ought to know, it is unsafe, and then shelter himself behind a lease. There are a number of cases in which the owners had leased wharves, public halls, piers, or other property of a public nature, and were held liable. Some of them, including *Albert's Case*, are cited in those we have referred to. The public are deemed to be invited in such cases by the owners, and they cannot receive rent for such uses, and permit their tenants to bring, in large numbers, upon their property those who do not have the opportunity to inspect the property, unless they have exercised due care to see that it is safe. Such a place in bad condition is, indeed, "a nuisance of the worst character." So with defects and dangerous places in and about public highways, where the public have the right to be. But such cases can have no controlling effect in one such as we have before us; and, for the reasons we have given, the appellant is not liable. As this suit is for the loss of the services of the child, which was under the care and control of her father, the equitable plaintiff who seeks to recover, it is, of course, unnecessary to discuss it from the standpoint of the child. She was only there at the instance of her father, and as he, by reason of his relation to the property as tenant of Bowden, cannot hold the owner responsible for such defect, he cannot recover against her for the death of his child, even if a member of the family of a tenant could sue for injuries sustained when the tenant could not, which has been decided in the negative in *Moynihan v. Allyn*, 162 Mass. 272, 38 N. E. 497, and elsewhere.

As we are of the opinion that the plaintiff was not entitled to recover, the prayer offered at the end of the case, instructing the jury that there is no evidence legally sufficient to entitle the plaintiff to recover, and that their verdict must be for the defendant, should have been granted. It is therefore unnecessary to discuss any of the other points raised.

Judgment reversed without awarding a new trial, the equitable plaintiff (appellee) to pay the costs.

IOWA SUPREME COURT.

STATE of Iowa, *Appt.*,

v.

William M. BAIR.

(.....Iowa.....)

The discrimination with respect to the right to practise medicine, made by Code, § 2579, allowing persons to practise

medicine only when they have passed an examination before the state board of medical examiners, or have received a certificate from a medical school that is found by the board to be of good standing, or have practised medicine in the state for five years, three of which shall have been in one locality,—is not in violation of Iowa Const. art. 1, § 6, or U. S. Const. 14th Amend., since the classification made is not arbitrary, and the distinc-

NOTE.—As to constitutionality of regulations as to practice of medicine, see some cases in note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 581; also the former cases of *People ex rel. Johnson v. Elcheiroth* (Cal.) 2 L. R. A. 51 L. R. A.

770; *State v. Pennoyer* (N. H.) 5 L. R. A. 709; *State v. Vandersluis* (Minn.) 6 L. R. A. 119; *State v. Randolph* (Or.) 17 L. R. A. 470; *State ex rel. Burroughs v. Webster* (Ind.) 41 L. R. A. 212; and *Scholle v. State* (Md.) 50 L. R. A. 411.

tion upon which it is based is reasonable and apparent.

(December 20, 1900.)

APPEAL by the state from a judgment of the District Court for Audubon County in favor of defendant in a prosecution for practising medicine in violation of the terms of the statute. *Reversed.*

Statement by Ladd, J.:

The defendant was accused in the indictment of practising as an itinerant physician, without first having obtained a license from the state board of medical examiners. The defendant demurred thereto on the ground that certain provisions of the Code with respect to said license are obnoxious to § 6 of article 1 of the Constitution of Iowa and the 14th Amendment to the Constitution of the United States. The demurrer was sustained, and the defendant discharged. The state appeals.

Messrs. Milton Remley, Attorney General, and Charles A. Van Vleet, for appellant:

Laws are of uniform operation if in their operation they apply to all persons in like situation.

Iowa Eclectic Medical College Asso. v. Schrader, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24; *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338.

The right of the state to enact laws for the preservation of the public health has been by every court sustained.

State v. Randolph, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *State v. Dent*, 25 W. Va. 1; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789; *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. 352; *Ex parte Spinney*, 10 Nev. 323.

If the state has power to require by law certain qualifications in order to make it lawful for one to practise a learned profession within the state, then the state undoubtedly has power to prescribe what evidence shall be furnished of such qualification.

The judiciary can only arrest the execution of a statute when it conflicts with the Constitution.

Cooley, Const. Lim. 6th ed. 201.

It is within the power of the legislature to enact laws regulating the practice of medicine.

Hewitt v. Charier, 16 Pick. 353; *State v. Dent*, 25 W. Va. 1.

Every new law put into operation presents instances of iniquity, sometimes of extreme hardship; but it cannot on that account, be claimed that an unconstitutional discrimination is made against the ones who are injuriously affected thereby.

McAunich v. Mississippi & M. R. Co. 20 Iowa, 338.
51 L. R. A.

Messrs. J. H. Mosier and Thomas H. Boylan filed the following argument in the court below for appellee:

Sections 2579 and 2981 of the Code of Iowa are unconstitutional, illegal and void for the reason that they unjustly and unreasonably discriminate against certain individuals belonging to a particular class,—those practising medicine,—and grant certain privileges not granted to others belonging to the same class and practising the same profession.

State v. Hinman, 65 N. H. 103, 18 Atl. 194.

The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality, and subjects them to special rules, or imposes upon them special obligations and burdens, from which others in the same locality or class are exempt.

Cooley, Const. Lim. 391; *State v. Pennoyer*, 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 878.

Ladd, J., delivered the opinion of the court:

Every citizen has the undoubted right to follow any lawful calling, business, or profession he may select, subject only to such restrictions as the government may impose for the welfare and safety of society. This right is one of the distinguishing features of republican institutions. Many of the occupations of life may be followed by persons, irrespective of fitness, without danger to the public health or in detriment to the general welfare. Others demand special knowledge, training, or experience; and the power of the state to prescribe such restrictions and regulations for these as, in its judgment, shall protect the people from the consequences of ignorance or incapacity, as well as of deception and fraud, has never been questioned. *Dent v. West Virginia*, 129 U. S. 122, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *State v. Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201. This is especially true with respect to the practice of medicine. "It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires, not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts and their relation to each other, as well as their influence upon the mind." Nearly everyone, of necessity, consults the physician at some period of life, but few are able to judge his qualifications in point of learning and skill. And because of the importance of the interests committed to his care, involving health and life, chapter 17, title 12, of the Code was enacted, requiring knowledge and capacity commensurate therewith, and upon which the community may rely. Prior to January 1, 1899, this was to be evidenced in three different ways: (1) By examination before the state board of medical examiners; (2) by a genuine certificate of graduation from a medical school found by the board to be of good standing; and (3) by a showing that the physician had "been in practice in this

state for five consecutive years, three years of which time shall have been in one locality." Code, § 2579. The nature and extent of these qualifications were primarily for the determination of the legislature. No objection can be urged because of their severity, if appropriate to the profession and attainable by reasonable study or application. No one is deprived of the right to practise medicine. All that is exacted is that everyone who assumes to do so shall be possessed of the requisite knowledge and skill, and that this be evidenced by a certificate of the board designated by the state to ascertain his fitness. In other words, the real test, applicable to all alike, is that of qualification; and this statute relates to the proof to be furnished in order to establish this as a basis for such certificate. The satisfactory character of a diploma from a reputable medical school, and the disclosures of an examination, as such proof, is not questioned; and statutes which, in addition thereto, treat the practice of the profession within the state for a number of years, or the fact of being in practice at the time of their enactment, as sufficient evidence of qualification, have often been upheld, as invulnerable to the charge of discrimination. *State v. Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *State v. Dent*, 25 W. Va. 1; *Ex parte Spinney*, 10 Nev. 323; *Fox v. Territory*, 2 Wash. Terr. 297, 5 Pac. 603; *State v. Creditor*, 44 Kan. 565, 24 Pac. 346; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789; *State ex rel. Walker v. Green*, 112 Ind. 402, 14 N. E. 352; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888.

But § 2579 not only requires practice of medicine in the state for five consecutive years, as prima facie evidence of qualification, but stipulates that three of these shall have been in one locality; and it is asserted that thereby physicians of five years' residence in the state are divided into two classes,—those who have practised three of the five consecutive years in one place, and those who have not. This may be conceded, as, for the purpose of efficient legislation, it is often necessary to divide the subjects upon which it operates into classes. Such division may not be based on differences which merely serve to definitely separate, but must rest on those of the "situation and circumstances of the subjects placed in the different classes as suggest the necessity or propriety of different legislation with respect to them." If the distinction upon which the classification is grounded is not arbitrary, but reasonable and apparent, relating somewhat to the subject of the enactment, it will justify the application of different rules to the subjects thus separated, and legislation founded thereon is not subject to condemnation as class legislation. *State v. Garbroski* (Iowa) 82 N. W. 959. The statute recognizes that actual experience in the practice of medicine tends to render the physician capable. Success therein denotes the

possession of learning and skill. Continuing in the profession several years in a particular locality indicates a degree of merit not likely to be found in a person moving from place to place. Indeed, it is a matter of general observation that the itinerant doctor, roving about, without remaining in one locality longer than a few days or weeks, is usually wanting in honesty, and too frequently but a charlatan or quack. Besides, such a professional residence affords the opportunity of becoming known by neighbors, and, if lacking in capacity or character, obstacles may be interposed to the issuance of a certificate; for it must not be overlooked that, notwithstanding continuous practice in one place, a certificate may be denied, owing to incompetency or immorality." *State v. Mosher*, 78 Iowa, 321, 43 N. W. 202. In practical operation, the law admits those to practice who have followed the profession at one place long enough to acquire knowledge through experience in the profession, and to become known, unless want of capacity or good character affirmatively appears. Others must be examined or present diplomas. It makes a distinction recognized in all the affairs of life. Will anyone contend for a moment that, everything else being equal, the permanent resident of a locality is not likely to be superior in capacity and morals to him who has no fixed professional abiding place? The old adage, "A rolling stone gathers no moss," is quite as applicable to the acquirement of learning, skill, and the elements that make up good character as to the accumulation of worldly possessions. That there may be and are exceptions is readily conceded, but the legislature was not bound to adopt an absolutely infallible rule. If, within the ordinary experience of men, and as a matter of common observation, physicians of learning, skill, and character are generally permanently located, and seldom change the places where their profession is followed, as appears to be true, we can discover no tenable reason why this circumstance might not be treated by the legislature as evidence of qualification under the statute. For the law does not purport to grant privileges or immunities to any physician or class of physicians. It simply establishes a rule of evidence by which qualification to practise medicine and surgery shall be ascertained. What should be such evidence, if appropriate for that purpose, and bearing somewhat on the matter of fitness, was peculiarly within the discretion of the lawmakers. We think the distinction neither arbitrary nor unreasonable, but in harmony with common knowledge of differences which ordinarily exist between persons following the medical profession who have a permanent *locus in quo*, and those who have not. We are not unmindful of a decision to the contrary, construing a somewhat similar statute, by the supreme court of New Hampshire. *State v. Pennoyer*, 65 N. H. 113, 5 L. R. A. 709, 18 Atl. 879. See also *State v. Hinman*, 65 N. H. 103, 18 Atl. 194. But that court appears to have grounded its

conclusion on the erroneous assumption that permanency in the practice in a locality furnishes no evidence of qualification. This, as we have undertaken to demonstrate, is not warranted.

As the statute is not in contravention of the provision of the Constitution prohibiting unjust discrimination, the demurrer to the indictment should have been overruled.

Reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Inhabitants of ROCKPORT v. ROCKPORT GRANITE COMPANY.

(.....Mass.....)

1. A derrick erected upon land by a licensee, with a guy stretched across a public highway so low as to be dangerous to persons using the road, is a nuisance for which the owner of the land is liable if he permits it to remain, although it may have been placed upon the land before he became the owner.
2. A person who has the privilege of entering upon land merely for the purpose of quarrying rock and working it up into marketable shape, and whose payments for the use of the land are in the nature of "stumpage," being determined by the quantity of paving blocks obtained, is a licensee, and not a tenant.
3. An instruction cannot be complained of on appeal where no objection was taken to it in the lower court.

(January 1, 1901.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to hold defendant liable for damages which plaintiff had been compelled to pay because of personal injuries resulting from a defect in one of its highways. *Overruled.*

Defendant was owner of a tract of land on which stone was quarried. The plant, or "motion," as it was called, was operated successively by different men named Littleback, Seption, and Hill. For the purpose of assisting with the work, a derrick had been erected with guy ropes extending across the highway. While one was so extended, a traveler on the highway, named Lucas, received an injury because of its defective condition. For this injury he brought an action against the town of Rockport, and recovered damages. This action was then brought by the town to hold defendant answerable for the amount.

Further facts appear in the opinion.

Mr. Chas. K. Cobb for defendant.

Messrs. Sumner D. York and Frederick H. Tarr, for plaintiff:

A town which defends an action brought against it to recover for an injury caused by the negligence of a third person in creating

an obstruction upon the highway, and which notifies him of the pendency thereof, and requests him to defend it, may recover, not only the amount of the judgment recovered against it, but also reasonable expenses incurred in defending the same, including counsel fees.

Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 292; *Lindsey v. Parker*, 142 Mass. 585, 8 N. E. 745; *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.* 153 Mass. 72, 10 L. R. A. 423, 26 N. E. 244; *Wheeler v. Hanson*, 161 Mass. 376, 37 N. E. 382; *Richmond v. Ames*, 164 Mass. 475, 41 N. E. 671.

In such action the verdict and judgment against the town are conclusive evidence of the existence of a defect in the highway, the injury to the individual while he was in the exercise of due care, and the amount of the injury.

Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; *Boston v. Worthington*, 10 Gray, 496.

If a person has created a defect in a public street, and a town is in consequence thereof obliged to pay damages to a traveler on the street, the fact that the town is in fault in not remedying the defect does not make it *in pari delicto* with the creator of the defect, and prevent recovery against him.

Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; *Boston v. Worthington*, 10 Gray, 496; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 450.

If the landlord lets premises abutting upon a way, which contain a defect or a nuisance dangerous to persons lawfully using that way, he may be liable to such persons for injuries suffered thereupon, although the premises are occupied by the tenant, if the landlord is held to have contemplated and intended that such use shall be made of the premises. If the landlord lets his premises with a nuisance upon them, all the authorities agree that he is responsible to third parties. That the tenant may be also liable is no defense to the landlord.

Taylor, Land. & T. 8th ed. § 175; *Buswell*, Personal Injuries, § 89; *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Delay v. Savage*, 145 Mass. 38, 12 N. E. 841; *King v. Pedly*, 1 Ad. & El. 822; *Larue v. Farren Hotel Co.* 116 Mass. 67; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Lufkin v. Zane*, 157 Mass. 117, 17 L. R. A. 251, 31 N. E. 757; *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 459; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 481; *Burt v. Boston*, 122 Mass. 223.

NOTE.—For earlier authorities in this series on the question of liability for continuing a nuisance created by others, see *Ahern v. Steele* (N. Y.) 5 L. R. A. 449; *Willits v. Chicago*, B. & K. C. R. Co. (Iowa) 21 L. R. A. 608; *Philadelphia & R. R. Co. v. Smith* (C. C. App. 3d C.) 27 L. R. A. 131.
51 L. R. A.

Loring, J., delivered the opinion of the court:

In this case there was a mistrial, but we think that the plaintiff is entitled to keep his verdict. The jury were told that to charge the defendant they must be satisfied that the defendant kept control of all work done by its "motion" men, or that, when Hill began to work as a motion man on the land in question, the use of a derrick, as it was then erected, was contemplated by the defendant and by Hill. The jury were further told that, if they did not find one of these two facts, their verdict must be for the defendant. The jury should have been told that the guy of the derrick was a nuisance, and that the defendant was liable if it allowed the derrick, with the guy as it was set up, to be maintained on its land, even though it had been set up by Littleback before the defendant became the owner of the land; at any rate if the fact that it was stretched across the highway, as it was, was known to the defendant. A motion man is a licensee carrying on work on his own account on the land of the licensor, the quarry owner. He is not a tenant. He has no right of possession in the land worked by him, but merely the privilege of quarrying rock on it, and working up the rock into marketable shape,—in the case at bar into paving blocks. The payments made by him to the quarry owner are by way of "stumpage"—in this case, \$2 for every 1,000 of paving blocks,—and not a payment by way of rent. The quarry owner in such a case is no more liable for injuries caused by the motion man and his servants than he would be in case the work of quarrying the rock and working it up into paving blocks had been done by an independent contractor. Indeed, his liability is not so extensive; for, in case of work done by a licensee, the work done is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may be liable for that reason, even when done by an independent contractor, because it is a thing dangerous in itself, or because the doing of it involves a duty to others, or because it is itself a nuisance. *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894; *Robbins v. Chicago City*, 4 Wall. 679, 18 L. ed. 432; *Black v. Christ Church Finance Co.* [1894] A. C. 48; *Pickard v. Smith*, 10 C. B. N. S. 470; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335; *Angus v. Dalton*, L. R. 4 Q. B. Div. 184, L. R. 6 App. Cas. 829; *White v. Jameson*, L. R. 18 Eq. 303. Even more the erection of a derrick is such an act that, if it had been done by an independent contractor, and a traveler on the highway had been injured by the negligence of the contractor's servants in erecting it, the landowner would not have been liable. Such an act is a mere transitory act done in the progress of the work, and is what has been described, for want of a better term, as "a casual act of wrong or negligence," and as "collateral negligence." *Pickard v.*

Smith, 10 C. B. N. S. 470; *Angus v. Dalton*, L. R. 4 Q. B. Div. 184, L. R. 6 App. Cas. 829; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335; *Robbins v. Chicago City*, 4 Wall. 679, 18 L. ed. 432. But the result of Littleback's erecting the derrick as he did erect it, with the guy stretched across the highway so low as to be dangerous to persons driving over the way, was the erection of a nuisance on the defendant's land. We have no doubt that an owner is bound to see to it that his land is so managed by persons brought onto it by him as not to cause injury to others; and that if a structure is erected on his land by a licensee, which is in fact a nuisance, and he suffers it to remain there, he is liable to anyone injured thereby,—at any rate when he knows of the existence of the thing which constitutes the nuisance. That there might be such a duty on the owner of land was suggested by Littledale, J., in *Laugher v. Pointer*, 5 Barn. & C. 547, 500, a case which had to do with personal property, but in which the whole subject was discussed; and that suggestion has since been quoted with approval. See *Parke R.*, in *Quarman v. Burnett*, 6 Mees. & W. 499, and in *Rapson v. Oubitt*, 9 Mees. & W. 710, 714; *Cresswell, J.*, in *Rich v. Basterfield*, 4 C. B. 783; *Rolfe, B.*, in *Hobbitt v. London & N. W. R. Co.* 4 Exch. 254; *Jessel, M. R.*, in *White v. Jameson*, L. R. 18 Eq. 303, 305. This principle was enforced in *White v. Jameson*, L. R. 18 Eq. 303; *Chibnall v. Paul*, 20 Week. Rep. 536; *Atty. Gen. v. Stone*, 12 Times L. R. 76. And see *Thomas, J.*, in *Hilliard v. Richardson*, 3 Gray, 349, 366. Compare *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314, as to the necessity of knowledge on the part of the landowner. Though the defendant had no control over the manner in which the work was done on its land by motion men, yet, if a nuisance was erected on it by a motion man, it was not only its right, but its duty, to see that the nuisance was abated.

We assume that proper instructions were given to the jury on the preliminary question of the defendant's liability in case the jury found that Lucas had, earlier in the day, knocked the guy rope out of the prop which held it up above the highway, and that the instructions which are under discussion here were given only in case the jury found in favor of the plaintiff on that preliminary question of fact. The whole charge is not set forth in the bill of exceptions, and no question has been raised by the defendant on this point, on which the evidence was conflicting. Under the instructions upon which the case was submitted to them, the jury must have found either that work done by motion men is done under the control of the owner of the quarry, or that the defendant in this case knew of the existence of the derrick, erected as it was erected; for they were instructed that, unless they found that the work of motion men was done under the control of the owner of the quarry, they must find, to charge the defendant in this case, that the defendant contemplated that Hill would use the derrick as it was

used by him when he began to work as a motion man. That includes a finding that the defendant knew of the existence of the derick. The defendant cannot complain that the jury were told that they might hold the defendant liable on the ground that the work done by motion men is done under the land-owner's control. There was no evidence on which such a finding could be made. But the defendant cannot complain of that. No objection was taken by it to that part of the charge.

Hypotheses overruled.

BOSTON WOVEN HOSE & RUBBER COMPANY.

v.

Edward KENDALL et al.

(.....Mass.....)

1. The liability of an employer for injury to an employee by the explosion of a boiler, on the ground of negligence in failing to discover the defect in the boiler by inspection, will not preclude the employer from recovering against the maker of the boiler, where the employer's negligence was induced by the warranty or representations of the maker.
2. Damages which an employer is compelled to pay for injuries to an employee caused by the explosion of a boiler are not too remote to be included in the recovery of damages against the maker of the boiler for breach of warranty.
3. The admission, in evidence, of a patent for the process of devulcanizing india rubber by hot naphtha vapor under pressure, is proper to lay a foundation for the patentee's testimony that he notified the maker of a boiler which exploded during such an experiment, of the use for which the boiler was intended.
4. Evidence of experiments made after the explosion of a boiler, with similar machinery and with all conditions similar except a hinge, which did not result in an explosion, is admissible for the purpose of showing that the explosion was caused by a defective hinge.

(March 2, 1901.)

EXCEPTIONS by defendants to rulings of the Superior Court for Middlesex County made during the trial of an action seeking to hold defendants liable for injuries resulting to plaintiff by reason of the explosion of a boiler manufactured by defendants upon plaintiff's order, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

NOTE.—The above case is an unusual one, as it turns on the question of the effect of negligence of an employer toward his employees in failing to discover a defect in appliances, with respect to his own right of action against the maker of the defective article to recover for the damages which he has sustained. The decision that his own negligence, though making him liable to the employees, does not preclude recovery against the maker of the article, be-

Messrs. Alfred Hemenway and H. S. MacPherson, for defendants:

This is a case wherein plaintiff seeks indemnity from defendants for what he was bound in law to pay, and did pay, as damages for its own negligence.

Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159; *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372.

Plaintiff's own evidence shows that, notwithstanding the defendants' alleged negligence, it could have prevented the accident by ordinary care at and before the time of the accident.

Holly v. Boston Gaslight Co. 8 Gray, 131, 69 Am. Dec. 233; *Fletcher v. Boston & M. R. Co.* 1 Allen, 9, 79 Am. Dec. 695.

Since, notwithstanding the defendants' negligence, the plaintiff, by ordinary care at the time of the accident, could have prevented the accident, its misconduct in not so preventing the accident was the cause of the accident, and it cannot recover from defendants.

Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 144 N. Y. 663, 39 N. E. 360; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191.

Plaintiff's negligence in not discovering and remedying the patent defect is not excused in law by the alleged reliance upon defendants, for plaintiff was bound in law to use the due care (i. e., ordinary care) which it admits would have enabled it to discover and remedy the defect.

White v. Winnisimmet Co. 7 Cush. 155; *Smith v. Smith*, 2 Pick. 621, 13 Am. Dec. 464; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 72, 60 Am. Dec. 406; *Clark v. Barrington*, 41 N. H. 44; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Palmer v. Andover*, 2 Cush. 602; *Tucker v. Henniker*, 41 N. H. 317.

The use of the tank, laden with naphtha gas under 80 pounds pressure, and without inspection to see that the contents were securely shut in, was a fault, a misfeasance, on plaintiff's part, and prevents it from recovering for defendants' prior negligence.

As plaintiff's evidence shows that ordinary care by it would have prevented the explosion, it cannot recover upon the contract of warranty the damages claimed.

Loker v. Damon, 17 Pick. 284; *Dodd v. Jones*, 137 Mass. 322.

Mr. Conrad Remo, for plaintiff:

The defendants would have been liable to the injured employees for the full amount received by the employees from the plaintiff.

cause his negligence was induced by the maker's warranty or representations, is probably the first on this exact point. Earlier cases that touch on the general question of the liability for injuries caused by explosions of boilers or similar articles are *Ryan v. Los Angeles Ice & Cold Storage Co. (Cal.)* 32 L. R. A. 524; and *Louisville, N. A. & C. R. Co. v. Lynch (Ind.)* 34 L. R. A. 293.

Hayes v. Philadelphia Coal & I. Co. 150 Mass. 457, 23 N. E. 225; *Toomey v. Donovan*, 158 Mass. 232, 33 N. E. 396; *Finnegan v. Fall River Gasworks Co.* 159 Mass. 311, 34 N. E. 523; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Elliott v. Hall*, L. R. 15 Q. B. Div. 315; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Marney v. Scott* [1899] 1 Q. B. 986; *Mowbray v. Merryweather* [1895] 2 Q. B. 640.

From this liability to the injured employees, the defendants have been relieved by the releases given by the employees to the plaintiff, in consideration of the money paid to them by the plaintiff.

Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; *Goss v. Ellison*, 136 Mass. 503; *Brown v. Cambridge*, 3 Allen, 474.

The circumstance that the plaintiff was negligent toward its employees in failing to discover or remedy the defect in the boiler does not relieve the defendants from liability to the plaintiff for manufacturing a defective boiler, because the plaintiff owed no duty to the defendants to inspect the boiler in order to see that it was safe to use at a pressure of less than 100 pounds per square inch, and the parties were not *in pari delicto*.

Boston v. Ooon, 175 Mass. 283, 56 N. E. 287; *Holyoke v. Hadley Co.* 174 Mass. 424, 54 N. E. 889; *Louell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372; *Williams v. Mercer*, 144 Mass. 413, 11 N. E. 720; *Jacobs v. Pollard*, 10 Cush. 287, 57 Am. Dec. 105; *Swansey v. Ohace*, 16 Gray, 303; *Mowbray v. Merryweather* [1895] 1 Q. B. 857, [1895] 2 Q. B. 640; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Philadelphia Co. v. Central Traction Co.* 165 Pa. 456, 30 Atl. 934; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

As the defendants were the "active cause" of the injury, and the plaintiff's negligence consisted merely in the failure to "discover and remedy" the defect in the boiler, the plaintiff may recover over against the defendants the money it was obliged to pay to its employees.

Holyoke v. Hadley Co. 174 Mass. 424, 54 N. E. 889; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191, 127 Mass. 166, 34 Am. Rep. 355; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 144 N. Y. 663, 39 N. E. 360; *Grand Trunk R. Co. v. Latham*, 63 Me. 177; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Mowbray v. Merryweather* [1895] 2 Q. B. 640; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159; *Nashua Iron & Steel Co. v. Brush*, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. Rep. 213.

Steel Co. v. Brush, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. Rep. 213.

The plaintiff was bound by the law to pay its injured employees the sums which it did pay them, and the payment was not a gratuity.

Ford v. Fitchburg R. Co. 110 Mass. 240, 14 Am. Rep. 598; *Spicer v. South Boston Iron Co.* 138 Mass. 426; *Lawless v. Connecticut River R. Co.* 136 Mass. 1; *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61; *Mowbray v. Merryweather* [1895] 2 Q. B. 640; *Marney v. Scott* [1899] 1 Q. B. 986.

The circumstance that the plaintiff was exposed to this liability to its employees by the negligent act of the defendants in furnishing a defective boiler does not relieve the plaintiff from liability to its employees.

Old Colony R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372.

The measure of damages is the sum for which the defendants, being the first and principal wrongdoers, were originally liable to the injured employees, before the releases were given to the plaintiff.

Louell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Old Colony R. Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372; *Mowbray v. Merryweather* [1895] 2 Q. B. 640; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

Holmes, Ch. J., delivered the opinion of the court:

This is an action to recover damages which the plaintiff had to pay to its employees for personal injuries caused by an explosion of a boiler made by the defendants. The facts may be stated in a few words. The defendants, who were first-class boiler makers, undertook to make for the plaintiff a boiler which would stand a working pressure of 100 pounds, and, on the plaintiff's testimony, understood that the boiler was to be used to contain naphtha vapor for experiments in devulcanizing india rubber. An experiment was tried, and, at a pressure of less than 100 pounds, the naphtha vapor blew out the packing between the door and the end of the boiler by the side of the hinge, escaped into the air, ignited, and caused the damage for which the plaintiff had to pay. According to the plaintiff's evidence the accident was due to an improper construction of the hinge, which, by not having play enough, prevented that part of the door which was nearest to it from being pressed close to the boiler end by clamps which were used for that purpose.

At the trial the defendants asked many rulings and took many exceptions, but in the main they are condensed by the present argument into the general proposition that, in as much as the plaintiff could not have been compelled to pay its workmen except on the ground that it had been wanting in due care, it cannot hold the defendants answerable for what would not have happened if the plaintiff had done its duty. The case is treated by the defendants' counsel as if it stood on the same footing as one where a plaintiff

seeks to recover for personal injuries to himself to which his own negligence has contributed. But the judge allowed the plaintiff to recover a verdict on proving, as it did to the satisfaction of the jury, that it was liable for the damages which it paid, and also that, although negligent as toward its servants, it had shown all the care which the defendants had a right to expect.

We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of. *Glynn v. Central R. Co.* 175 Mass. 510, 511, 56 N. E. 698, and cases cited. Nevertheless, it is held by our decisions that in some cases of that sort there may be a recovery, and this seems to be recognized in the case upon which the defendants chiefly rely. *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159. The defendants, to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have been held liable on the ground of a want of such care, and that, in such a case at least, it cannot make the defendants indemnify it.

We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it, and probably not falling within the exceptional rule as to well-known articles made by reputable makers and sold in the market ready for use. *Shea v. Wellington*, 163 Mass. 364, 369, 40 N. E. 173. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract the consequence which ensued must be taken to have been contemplated, and was not too remote.

The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good. See Stat. 1894, chap. 522, § 29. The New Hampshire decision is not against it, and there is an English case which went to the court of appeals, which is very much in point. *Moubray v. Merryweather* [1895] 1 Q. B. 857, [1895] 2 Q. B. 640. It is intimated in that case that the workman himself could have recovered in the first place against the

defendant. Whether that is a necessary condition of a recovery over we need not consider. See *Holyoke v. Hadley Co.* 174 Mass. 424, 428, 54 N. E. 889; *Consolidated Hand-Method Lasting Mach. Co. v. Brudley*, 171 Mass. 127, 134, 50 N. E. 404. There are many cases in our own and other reports, which offer as strong or stronger applications of the principle of liability over. *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191; *Old Colony R. Co. v. Slavens*, 148 Mass. 303, 19 N. E. 372; *Holyoke v. Hadley Co.* 174 Mass. 424, 54 N. E. 889; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 327, 328, 40 L. ed. 712, 718, 719, 16 Sup. Ct. Rep. 564; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987.

Two exceptions were taken to the admission of evidence. The first was to the admission of a patent for a process of devulcanizing india rubber by hot naphtha vapor under pressure, granted to Dr. Clark, for whose experiments the boiler was ordered. This laid a foundation for Clark's testimony that he notified the defendants of the use for which the boiler was wanted. The other exception was to letting in testimony that experiments two or three months later with a similar machine, and with all conditions similar except the hinge, did not result in an explosion. Evidence to the same point already had been let in before the exception was taken, and, even if an exception properly were open, we should hesitate to sustain it, considering that the result in some degree tended to confirm the theory that the construction of the hinge caused the trouble.

Exceptions overruled.

John B. SWEETLAND

v.

LYNN & BOSTON RAILROAD COMPANY.

(.....Mass.....)

1. The question whether a passenger riding on the front platform of an electric car is in the exercise of due care is ordinarily for the jury.
2. A rule forbidding passengers on electric cars to ride on the front platform, and declaring that the company will

NOTE.—As to negligence of passenger on street car in standing on platform see former cases in this series as follows: Upham v. Detroit City R. Co. (Mich.) 12 L. R. A. 129, and note; Hawkins v. Front Street Cable R. Co. (Wash.) 16 L. R. A. 808; Elliott v. Newport Street R. Co. (R. I.) 23 L. R. A. 208; Muldoon v. Seattle City R. Co. (Wash.) 22 L. R. A. 794; Vall v. Broadway R. Co. (N. Y.) 30 L. R. A. 626; and North Chicago Street R. Co. v. Baur (Ill.) 43 L. R. A. 108.

For waiver by railroad company of rule against riding on platform, see former case in this series of *Graham v. McNeill* (Wash.) 43 L. R. A. 300.

not be responsible for their safety there, is a reasonable one, for the violation of which a passenger may be denied any remedy for injury resulting therefrom.

3. A custom to receive passengers upon the front and rear platforms of electric cars without question, and to receive fare from them, will constitute a waiver and abandonment of a rule which forbids them to ride there.
4. Officers of an electric-railway company are supposed to know the habitual methods of their servants in managing their cars.

(February 26, 1901.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. *Overruled.*

Plaintiff was a passenger upon an electric car of the defendant. At the time he boarded the car all the seats were taken and people were standing on the inside of the car. Plaintiff was smoking, and took his place with others upon the front platform of the car. When the car approached a switch, the speed was increased, and the car unexpectedly running on to the switch, gave a lurch and threw plaintiff off and injured him.

Further facts appear in the opinion.

Messrs. H. F. Hurburt and D. E. Hall for defendant.

Messrs. Joseph F. Hannan and William H. Niles, for plaintiff:

The defendant must be held to have had "reasonable cause to know anything that was habitually and openly done on its cars."

Nichols v. Lynn & B. R. Co. 168 Mass. 528, 47 N. E. 427.

The practice of stopping to receive passengers who must stand on the running board or the steps of the car, when seats and platforms are full, and of collecting fares of such passengers, is as common now as it was in the days of the decisions relating to horse cars.

Such practice is notorious.

Messel v. Lynn & B. R. Co. 8 Allen, 234; *Lapointe v. Middlesex R. Co.* 144 Mass. 18, 10 N. E. 497; *Cummings v. Worcester, L. & S. Street R. Co.* 166 Mass. 220, 44 N. E. 126; *Wilde v. Lynn & B. R. Co.* 163 Mass. 533, 40 N. E. 851; *Beal v. Lovell & D. Street R. Co.* 157 Mass. 444, 32 N. E. 653; *O'Neill v. Lynn & B. R. Co.* 155 Mass. 371, 29 N. E. 630; *Wilton v. Middlesex R. Co.* 125 Mass. 130, 107 Mass. 108, 9 Am. Rep. 11.

A breach of the carrier's rule will not amount to contributory negligence when it appears that the carrier has habitually permitted the regulation to be disregarded.

5 Am. & Eng. Enc. Law, 2d ed. p. 648; *Chicago, M. & St. P. R. Co. v. Lovell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; *Jones v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 279, 45 N. W. 444; *New York, L. E. & W. R. Co. v. Bull*, 53 N. J. L. 286, 21 Atl. 1052.

51 L. R. A.

Knowlton, J., delivered the opinion of the court:

There was evidence of negligence on the part of the defendant's motorman in running the car. The car was about to pass over a frog at a curve where the defendant's rules required that cars should not be run faster than 4 miles an hour, and there was testimony that the car was suddenly started up just before it reached the frog, and was going at the rate of 12 or 15 miles an hour when it struck the frog and threw the plaintiff off. There was also evidence from which the jury might find that the plaintiff was in the exercise of due care, notwithstanding that he was riding on the front platform of the car, unless he was acting in violation of one of the defendant's rules in being there. Ordinarily it is a question of fact for a jury whether a passenger riding on the front platform of an electric car or a horse car is in the exercise of due care. *Lapointe v. Middlesex R. Co.* 144 Mass. 18-21, 10 N. E. 497; *Cummings v. Worcester, L. & S. Street R. Co.* 166 Mass. 220, 44 N. E. 126; *Wilde v. Lynn & B. R. Co.* 163 Mass. 533, 40 N. E. 851; *Beal v. Lovell & D. Street R. Co.* 157 Mass. 444, 32 N. E. 653.

The remaining question in the case relates to the effect of a sign attached to the hood of the car before and at the time of the accident, which read as follows: "Notice. All persons are forbidden to be on the front platform of this car, and this company will not be responsible for their safety. Per order of the directors." This purports to be a prohibition of passengers from riding on the front platform, and not a notice stating the terms on which they may ride there. The judge rightly instructed the jury that such a rule would be reasonable (*O'Neill v. Lynn & B. R. Co.* 155 Mass. 371, 29 N. E. 630), and that, if the plaintiff was intentionally violating the rule, he could not recover (*Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373; *Wills v. Lynn & B. R. Co.* 129 Mass. 351). But the jury were permitted to find that, notwithstanding the sign, the rule, if it ever was intended to be a rule, had been allowed by the defendant to become a dead letter, so that in effect the case was as if there never had been such a rule. We have no doubt that a railroad company, after making a rule in regard to the conduct of passengers, may waive and abandon it, and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If a railroad company does this, it cannot set up the rule to defeat the rightful claim of a passenger who has acted in the well-warranted belief that the rule is not in force. *Chicago, M. & St. P. R. Co. v. Lovell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Jones v. Chicago, St. P., M. & O. R. Co.* 43 Minn. 279, 45 N. W. 444; *New York, L. E. & W. R. Co. v. Bull*, 53 N. J. L. 286, 21 Atl. 1052. If such signs as this are placed over the front platform of cars, and if afterwards the persons in charge of the cars are accustomed to receive passen-

gers upon the cars in such numbers as to crowd the front and rear platforms, as well as the other parts of the cars, and the passengers are permitted to ride freely and without question upon the front platforms, paying for so riding the usual fare, the passengers may well believe, and the jury may well find, that the notice was not intended as a rule to be obeyed, and that the front

platforms were intended by the company to be used by passengers. The officers of the company might be supposed to know the habitual methods of their servants in managing their cars. We are of opinion that the instructions were correct, and that the evidence well warranted the submission of the questions to the jury.

Exceptions overruled.

MICHIGAN SUPREME COURT.

George D. CLARK *et al.*, *Plffs. in Err.*,
v.

Alvin W. NEEDHAM, *et al.*

(.....Mich.....)

A lease by a firm of all its machinery used in the manufacture of chaplets or anchors, with an agreement that they will not for five years manufacture or sell any chaplets or anchors, except that they may furnish double-headed chaplets for the use of a single third party, upon the execution of which lease the lessee leases back the machinery to the first lessor to use for any purpose except for the manufacture of chaplets or anchors,—constitutes an illegal contract in restraint of trade, where it is not limited as to territory, and the lessor has been engaged in carrying on such business in other states.

(October 31, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due under a leasing contract. *Affirmed.*

Statement by Grant, J.:

Plaintiffs are copartners carrying on a manufacturing business in Connecticut. One portion of their business was the manufacture of chaplets, which consist of pieces of wire and a plate riveted to the ends to support cores in castings. Double-headed chaplets are used in making cast-iron boilers and heavier castings. The defendants are copartners carrying on a like business in Michigan, at Detroit. Negotiations were entered into between the parties to induce plaintiffs to cease the manufacture of these chaplets. These negotiations culminated on November 4, 1897, in making the following lease, so called: "This agreement, entered into this 4th day of November, 1897, between

Clark & Cowles, of Plainville, Connecticut, as parties of the first part, and the Empire Wire & Nail Company, of Detroit, Michigan, as parties of the second part, witnesseth: The first parties, in consideration of the payments to be made to them as hereinafter stated by the second parties, do hereby lease and let to the second parties, their heirs, executors, and assigns, all of the machinery of every name and nature now used or belonging to the parties of the first part, in their building at Plainville, Connecticut, or elsewhere, used by them or others for the manufacture of chaplets or anchors, for the term of one year from and after date hereof, with the right in second parties to extend said time one year at a time until the expiration of five years, if the second parties give to first parties thirty days' notice of their intention to extend the time for another year, before the expiration of the current year. In consideration of the above and the agreement hereinafter set forth, the second parties agree to pay to the first party the sum of \$1,500 per year, payable \$300 in cash, and \$100 each month in advance. As a part consideration of the above, and the payment of the sum aforesaid by the second parties, the first parties agree and do hereby bind themselves not to manufacture or sell, or in any way engage in the manufacture or sale of, said chaplets or anchors during the continuance of this lease, except that they may sell to and manufacture for the A. A. Griffing Iron Co. of Jersey City, New Jersey, double-headed chaplets for their own use. . . ." The balance of this agreement is immaterial. "This agreement, entered into this 4th day of November, 1897, between the Empire Wire & Nail Co., of Detroit, Michigan, party of the first part, and Clark & Cowles, of Plainville, Connecticut, parties of the second part, witnesseth: The first party in consideration of \$1, receipt of which is hereby acknowledged, and

NOTE.—As to validity of contracts in restraint of trade without limitation of place, see earlier authorities in this series as follows: Gamewell Fire Alarm Teleg. Co. v. Crane (Mass.) 22 L. R. A. 673, and *note*; Lufkin Rule Co. v. Fruegel (Ohio) 41 L. R. A. 185; Anchor Electric Co. v. Hawks (Mass.) 41 L. R. A. 189.

For such earlier authorities on contracts to stifle competition or in partial restraint of trade, see also *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33, and *note*; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457, and *note*; *National Benefit Co. v. Union Hospital Co.* 51 L. R. A.

(Minn.) 11 L. R. A. 437, and *note*; *Carroll v. Giles* (S. C.) 4 L. R. A. 157, and *note*; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469, and *note*; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* (Mass.) 12 L. R. A. 563; *Texas Standard Cotton Oil Co. v. Adoue* (Tex.) 15 L. R. A. 598; *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770; *Nester v. Continental Brewing Co.* (Pa.) 24 L. R. A. 247; *Oakdale Mfg. Co. v. Garst* (R. I.) 23 L. R. A. 639; *Kramer v. Old* (N. C.) 34 L. R. A. 389; *Cowan v. Fairbrother* (N. C.) 32 L. R. A. 829; and *Trenton Potteries Co. v. Oliphant* (N. J. Eq.) 46 L. R. A. 255.

other valuable considerations, received to its full satisfaction of the parties of the second part, does hereby lease and let to the said second parties, their heirs, executors, and assigns, all the machinery of every name and nature now controlled by or belonging to the party of the first part, by virtue of a lease from the parties of the second part, of even date herewith, situated in the buildings of the parties of the second part at Plainville, Connecticut, or elsewhere, used by them or others for the manufacture of chaplets or anohors, for the term of one year from and after date hereof, with the right in the second party to extend said lease for one year at a time until the expiration of five years, for the purpose of manufacturing anything whatever, except chaplets or anohors; it being the intention hereof to permit the parties of the second part, their heirs, executors, or assigns, to use said machinery for any purpose, except the manufacture of said chaplets or anohors." Defendants paid for one year. It is claimed by the plaintiffs that the agreement was extended for the second year. Defendants claim that it was not. Plaintiffs sued to recover for the cash payment due under the lease, and for the rent for the month of June, 1899. The court directed a verdict for the defendants on the ground that the agreement was void as against public policy.

Messrs. Anderson & Rackham, for plaintiffs in error:

The restriction, in the light of all the facts and circumstances existing in the case at bar, is not a general restraint.

1. The restraint is partial, in that it is (a) limited as to time; (b) limited as to subject-matter (being but a portion of the business and trade of the plaintiffs); (c) limited to the persons with whom plaintiffs may trade.

2. It is a reasonable restraint.

3. The public interest and welfare are not shown by the testimony, nor can it be presumed, to be injuriously affected by the operation of the restrictive proviso, either as unduly restraining trade or as promoting monopoly.

4. It is supported by a good consideration. *Maxim Nordenfelt Guns & A. Co. v. Nordenfelt* [1893] 1 Ch. 630; *Wallis v. Day*, 2 Mees. & W. 273.

The test by which the reasonableness of such a covenant is measured and determined is not space alone, to-day, as it was before the advent of the railway, steamboat, telephone, and telegraph had transformed the methods and scope of trade and commerce, and by their agencies brushed away all trace of county, state, and national boundaries in a commercial sense.

Wallis v. Day, 2 Mees. & W. 273; *Jones v. Lees*, 1 Hurlst. & N. 189; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Badische Anilin und Soda Fabrik v. Schott* [1892] 3 Ch. 447; *Maxim Nordenfelt Guns & A. Co. v. Nordenfelt* [1893] 1 Ch. 630, [1894] A. C. 51 L. R. A.

335; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Beal v. Chase*, 31 Mich. 490; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *Anchor Electric Co. v. Hawkes*, 171 Mass. 106, 41 L. R. A. 189, 50 N. E. 509; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652, 28 N. E. 469; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

It depends upon the situation of the parties, the nature of their business, the interests to be protected by such restriction, its effect upon the public; in short, upon all the surrounding circumstances.

Hubbard v. Miller, 27 Mich. 19, 15 Am. Rep. 153.

Courts concern themselves, not so much with a literal interpretation of the phraseology employed in expressing the restriction, as in clothing it with such an interpretation as shall be entirely consistent and harmonious with the apparent intent of the parties as to the business in hand, in the light of all the surrounding facts and circumstances, the end sought to be accomplished, and the benefit intended to be derived by the person in whose favor it is inserted.

Hubbard v. Miller, 27 Mich. 21, 15 Am. Rep. 153; *Ruck v. Coward* (Mich.) 6 Det. L. N. 864, 81 N. W. 328; *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. Rep. 940; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157; *Doty v. Martin*, 32 Mich. 463; *Timmerman v. Dever*, 52 Mich. 34, 17 N. W. 230; *Smith's Appeal*, 113 Pa. 570, 6 Atl. 251; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Peltz v. Fischele*, 62 Mo. 171; *Underwood v. Barker* [1899] 1 Ch. 300.

The law will not presume an agreement void as illegal or against public policy, when it is capable of a construction which would make it consistent with the law and valid.

Curtis v. Gokey, 68 N. Y. 304; *Bailey, Opus Probandi*, p. 137.

The restraint is not against public policy.

Maxim Nordenfelt Guns & A. Co. v. Nordenfelt [1893] 1 Ch. 645.

The restraint is supported by a good consideration.

There being a consideration for the contract, the court will not inquire into its adequacy.

Up River Ice Co. v. Denler, 114 Mich. 303, 72 N. W. 157; *Doty v. Martin*, 32 Mich. 463; *Cowan v. Fairbrother*, 118 N. C. 406, 32 L. R. A. 820, 24 S. E. 212.

The lease in question is not in violation of either Federal or state statutes.

The lease in question is a Connecticut contract, executed and operative there, and therefore not governed by our statute.

Kling v. Fries, 33 Mich. 275; *Webber v. Donnelly*, 33 Mich. 469; *Monaghan v. Reid*, 40 Mich. 665; *Roethke v. Philip Best Brewing Co.* 33 Mich. 340.

There is no evidence in this case to show that the contract is void under the laws of

Connecticut, and if good at the common law it must be upheld.

Voorheis v. People's Mut. Ben. Soc. 91 Mich. 473, 51 N. W. 1109.

Mr. T. T. Leete, Jr., for defendants in error:

The contract is illegal and invalid.

Two papers were executed at the same time, between the same parties, with reference to the same matter; they are therefore to be construed as one instrument.

Sutton v. Beckwith, 68 Mich. 310, 36 N. W. 79; *Keagle v. Pessell*, 91 Mich. 622, 52 N. W. 58.

This agreement tended to give the defendants a monopoly of the business of manufacturing chaplets and anchors. It was not an agreement incident to a sale or lease, in good faith, of the property of the plaintiffs in order to acquire the goodwill of their business.

Chappel v. Brookway, 21 Wend. 157; *Richardson v. Buhl*, 77 Mich. 657, 6 L. R. A. 457, 43 N. W. 1102; *Western Wooden-ware Assn. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503, 47 N. W. 604; *Wiley v. Baumgardner*, 97 Ind. 66; *Bishop v. Palmer*, 148 Mass. 469, 16 N. E. 299; *United States v. E. C. Knight Co.* 156 U. S. 10, 39 L. ed. 331, 15 Sup. Ct. Rep. 249.

A contract that tends to lessen competition is void as against public policy.

McMullen v. Hoffman, 174 U. S. 641, 43 L. ed. 1118, 19 Sup. Ct. Rep. 839.

Grant, J., delivered the opinion of the court:

These two instruments constitute but one instrument and must be construed together. Briefly stated, the agreement in this: Plaintiffs, in consideration of \$1,500, to be paid to them annually, agreed for a period of five years not to manufacture or sell chaplets, except for only one party. Plaintiffs' sales were not limited to the place of manufacture, but extended into other states. The plain object of the agreement was to substantially close this part of plaintiffs' business, and to give defendants a monopoly of it. The parties evidently recognized the invalidity of such a contract, put in plain and unequivocal language, and sought to evade it by these two so-called leases. The arrangement was a bare subterfuge to evade the law. Defendants did not buy out plaintiffs' business, machinery, and plant, or lease them for the purpose of continuing their (plaintiffs') business. The result intended and accomplished was to close that part of plaintiffs' business, to throw their employees out of employment, and to deprive the public of any benefit from the continuance of their business. This is not the case of *Beal v. Chase*, 31 Mich. 490, where *Beal* purchased the entire plant, business, and goodwill of *Chase* for the purpose of continuing the same business. In that case both the employees and the public derive the same benefit as though the business were to be continued by *Chase*. The learned counsel for defendants concede the invalidity of those contracts which are entered into for the express purpose of, and 51 L. R. A.

result in, closing one's business for the benefit of a rival business, in throwing employees out of employment, and in depriving the public of the benefit of such business. Such contracts tend to destroy competition and create monopolies, and are void. Plaintiffs, however, seek to avoid the result of this contract on the ground that it is not in general restraint of trade, but is limited as to time and subject-matter. They concede that it is unlimited as to territory, and that the contract, if binding, covers the entire United States. They cite, among other cases *Hazim Nordenfelt Guns & A. Co. v. Nordenfelt* [1893] 1 Ch. 630, and *Mitchel v. Reynolds*, 1 P. Wms. 181. Those cases are in their facts, the parallel of those in *Beal v. Chase*; and *Mitchel v. Reynolds* is cited in the learned opinion of Justice Christianity in *Beal v. Chase* (page 518), to which we refer for a statement and analysis of that case. Any such contract is invalid, whether the restraint be for one year or any number of years, or is unlimited as to time. The agreement to close one part of a business is as much against the policy of the law as a contract to close the entire. The one is as reprehensible as the other. They only differ in degree. Under this contention a party might agree with one person to close one part of his manufactory, and then agree with a second person to close the other part; the two constituting his entire business. In *U. S. v. E. C. Knight Co.* 156 U. S. 1, 16, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249, it is said: "All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." See also *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839. This contract is clearly within the inhibition of the laws of the United States (26 Stat. at L. 209, chap. 647) and the laws of this state (Comp. Laws, § 11,377). We settled the principle governing contracts of this character in *Western Wooden-ware Assn. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503, 47 N. W. 604, and further discussion is unnecessary.

Judgment affirmed.

The other Justices concur.

Mary H. BARKER et al., Appts.,

v.

Margaret I. VALENTINE et al.

(.....Mich.....)

Cohabitation after the removal of an impediment to marriage by the death

NOTE.—On the subject of cohabitation as proof of marriage where it begins unlawfully there is a note in this series with the case of *Collins v. Voorhees* (N. J. Eq.) 14 L. R. A. 264; also the case of *Schuchart v. Schuchart* (Kan.) 50 L. R. A. 180.

of a former wife is sufficient to constitute a lawful marriage, where the second wife entered into the relation in good faith, without any knowledge of the impediment until after the death of the husband, where she continued to live with him seven years after the death of the former wife, during which time he procured insurance on his life, making her the beneficiary and calling her his wife.

(December 4, 1900.)

APPPEAL by complainants from a decree of the Circuit Court for Wayne County in favor of defendants in a suit to enjoin the payment of the proceeds of a benefit certificate to one claiming to be the wife of the decedent. *Affirmed.*

The facts are stated in the opinion.

Mr. William B. Jackson, with Mr. Edward S. Grece, for appellants:

The beneficiary must have an insurable interest in the life of the assured. Margaret Desbrough was simply a lewd woman, and had no right as the wife of George A. Valentine, either at common-law or otherwise, and therefore had no insurable interest in his life.

23 Am. & Eng. Enc. Law, p. 957.

If a mutual benevolent association names certain classes, and the insured member designates someone who is not of these classes, the fund will, when the society admits a liability to someone, pay to someone who sustains the required relationship to the member.

Parke v. Welch, 33 Ill. App. 188; *Simon v. O'Brien*, 87 Hun, 100, 33 N. Y. Supp. 815; *Tyler v. Odd Fellows' Mut. Relief Assn.* 145 Mass. 134, 13 N. E. 360.

There is no allegation or proof of any actual marriage between George A. Valentine and Margaret I. Desbrough after the impediment was removed. It must appear that these parties presently agreed to take each other as husband and wife after the impediment was removed by the death of Valentine's lawful wife, Ida, and that this agreement was followed by cohabitation.

Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220; *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293; *Lorimer v. Lorimer* (Mich.) 7 Det. L. N. 367, 83 N. W. 609.

An actual marriage after the impediment is removed must be proved by competent evidence (not by mere inference), and when the relation of the parties is illicit in its inception, the presumption is that such illicit relation continues, and reputation and cohabitation do not rebut this presumption.

Rose v. Rose, 67 Mich. 619, 35 N. W. 802; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234; *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460.

Messrs. De Vere Hall and Phillips & Jenks, for appellees:

A ceremony is not necessary to the existence of marital relations in this state.

Peet v. Peet, 52 Mich. 464, 18 N. W. 220; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Bishop, Marr., Div. & Sep. p. 12*; *Lorimer v. Lorimer* (Mich.) 7 Det. L. N. 51 L. R. A.

367, 83 N. W. 609; *People v. Mendenhall*, 119 Mich. 404, 78 N. W. 325; *Re McLaughlin*, 4 Wash. 570, 16 L. R. A. 699, 30 Pac. 651; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *United States v. Hays*, 20 Fed. Rep. 710; *White v. White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; *Yates v. Houston*, 3 Tex. 433.

Where two parties to a contract have no dispute as between themselves, where both are satisfied with the contract and its terms and its relations, a third party has no right to be heard in court to insist that no contract existed between them.

Williams v. Kilburn, 88 Mich. 279, 50 N. W. 293; *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460.

If the defendant Margaret I. Valentine, was not a proper person, under the laws of the order, to have been named a beneficiary, then the policy was void on the ground of public policy.

Mutual Ben. Assn. v. Hoyt, 46 Mich. 473, 9 N. W. 497; *Smith v. Pinch*, 80 Mich. 332, 45 N. W. 183; *Standard Life & Acci. Ins. Co. v. Catlin*, 106 Mich. 138, 63 N. W. 897.

A party occupying the position that Margaret I. Valentine would occupy in this case, in the event of the court holding that she was not a common-law wife, has an insurable interest in the life of the person whom she claims as her husband.

Joyce, Ins. § 816; *Watson v. Centennial Mut. Life Assn.* 21 Fed. Rep. 698; *Story v. Williamsburgh Masonic Mut. Ben. Assn.* 95 N. Y. 474; *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646; *De Grote v. De Grote*, 175 Pa. 50, 34 Atl. 312.

Moore, J., delivered the opinion of the court:

April 20th, 1892, George A. Valentine, a resident of Detroit, made a written application for membership in the Great Camp of the Knights of Maccabees. In that application, among others, the following questions were asked and answered:

Q. Are you married?

A. Yes.

Q. The name and relation of the party or parties for whose benefit your certificate is to be applied?

A. Margaret I. Valentine, wife.

He declared that the above were fair and true answers to the questions. The Margaret I. Valentine mentioned in the application is the same person who is a defendant in this case. A certificate was issued in which it was stated that, if the certificate was in force at the time of the death of Mr. Valentine, upon satisfactory proof of his death "his beneficiary, to wit, Margaret I. Valentine, his wife, will be entitled to receive one assessment on the membership, but not to exceed \$2,000." Mr. Valentine died December 3, 1890. Due proofs of his death were furnished the great camp. After the proofs

had been filed, a protest was filed with said order by the complainant, Mary H. Barker, who is a sister of Mr. Valentine, against the payment to the said Margaret I. Valentine of the amount of such certificate on the ground that the said Margaret was not the wife of the said George A. Valentine. After the filing of said protest, notice was given by said order to both said Margaret and the said Mary H. Barker, or their attorneys, and the matter was referred to the executive committee of the great camp; and said committee, acting under and in accordance with its laws, appointed a time and place for the hearing of the respective claims of the said Margaret and the said Mary H. Barker. Several adjournments were had, and finally the matter was heard before said committee, a large amount of proofs being filed before them; and the said committee, acting without fraud and in good faith, decided that under the proofs the payment of the amount of said certificate should be made to the said Margaret I. Valentine. An appeal was taken, as provided by the laws of said order, by Mary H. Barker to the Great Camp of the Knights of the Maccabees for the state of Michigan. This appeal was heard before the committee on appeals and grievances, on the testimony presented before the executive committee, and also on additional testimony presented to them. At the hearing before the executive committee, and at the hearing before the committee on appeals and grievances, both parties were represented by counsel; and after a full hearing the last-named committee decided in favor of Margaret I. Valentine, and recommended to the great camp that the amount of the certificate be paid to her. The report was adopted by the great camp, then in session, after a hearing before the great camp, in which the complainant was represented by counsel, and by the action of the great camp its officers were instructed to pay the amount of such certificate to the said Margaret I. Valentine. Thereupon, and before the payment of the amount of such certificate, the complainant filed a bill in this case to restrain the organization from paying the money to the said Margaret, and to require the payment of the same to the said Mary H. Barker. After a full hearing the court dismissed the bill of complaint, and the case is brought here by appeal.

The questions presented to the court are: First. Was the beneficiary named in the certificate the wife of George A. Valentine? Second. Under the laws of the order, have these parties a right to appeal to the courts, or is the action of the order final? Third. In any event, can the complainants, or either of them, be entitled to the fund in question? As we think the answer to the first question is decisive, we shall not discuss the others.

The facts are not in dispute. So far as material, they are as follows: In 1872 Mr. Valentine was married to Ida Barron in the state of New York. Differences arose between them, and Mr. Valentine instituted divorce proceedings against his wife. An order was made requiring him to pay alimony

and solicitor's fees. He did not comply with this order, and it does not appear that anything further was done in that proceeding. In 1884 Mr. Valentine came to Detroit, Ida Valentine remaining in the state of New York. Margaret Desbrough was a resident of Detroit. In 1881 she filed a bill of complaint for divorce against her husband, Henry Desbrough, which resulted in the court granting her a decree of divorce. The decree was not entered in the records at that time, though Mrs. Desbrough did not know of that fact until after the death of George Valentine, when the court made an order directing the decree to be entered *nunc pro tunc*. It is claimed in the brief of counsel that in May, 1885, a marriage ceremony was performed at Detroit between George A. Valentine and Margaret Desbrough. Upon the trial of this case the fact was not proved, but it was proved that he introduced Mrs. Desbrough as his wife, and stated that they had been married, and that they lived and cohabited together as husband and wife. Some time after this occurred Mr. Valentine and Margaret Valentine returned to Mr. Valentine's former home, in New York; and in September, 1889, Ida Valentine made a complaint against Mr. Valentine as a disorderly person, for failing to support her, and a warrant was issued. The docket of the police court showed that Mr. Valentine pleaded "Not guilty," and that on the adjourned day the parties failed to appear. Mr. Valentine claimed to his acquaintances in New York that he had been divorced from his first wife, but there is nothing in the record to show that he had in fact been divorced. In October, 1889, Ida Valentine died. The record does not disclose just when Mr. Valentine returned to Detroit, but he had been living there some time when he made application for membership in the defendant order, with Margaret Valentine; he introducing her as his wife, and she introducing him as her husband, and they living together as husband and wife. Shortly after this Mr. and Mrs. Valentine moved to Cleveland, and rented a house of Mr. Case, in which they lived for more than six years, and until the time of his death. The testimony is overwhelming that in Cleveland they lived together as husband and wife. Mrs. Valentine was a member of a church belonging to one of the leading denominations. They introduced each other as husband and wife. They lived in a respectable neighborhood, were visited by respectable people, and in turn visited respectable people. The complainant in this case lived with them for a time, and also corresponded with them, as did other relatives of Mr. Valentine, and treated the defendant as the wife of George Valentine. It is now said by counsel that they did this because they supposed that George Valentine had been divorced from his first wife when he married the defendant. There is nothing to show that Mrs. Valentine knew that there was any impediment to her marriage with Mr. Valentine until after his death.

It is the claim of complainant that,

as Mr. Valentine had a lawful wife living when he married the defendant, their relations were illicit, and, when this illicit relation once exists, it is presumed to continue, and subsequent actual marriage will not be presumed from continued cohabitation and reputation after the legal impediment to enter into such a contract is removed; citing *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234. An examination of *Rose v. Rose* shows that the question arose between the parties to the alleged marriage contract; the one claiming that there was an agreement to marry, and the other denying it. In disposing of the case the court said that the testimony had been carefully reviewed, and failed to satisfy the court that any marriage was ever agreed upon. The court used the following language: "The complainant's bill, and her testimony relied upon to support it, present a sad exhibition of the indecencies and immoralities of these parties, and the continuance of which, through almost an entire generation, unpunished, is now sought by the complainant to be made the basis of the most sacred of all contracts known to the law. A court of equity will never set its seal of confirmation to such baseness and immorality." The case of *Van Dusan v. Van Dusan* was also a case where one of the parties alleged that the marriage relation never existed. In disposing of the case, Chief Justice Hooker said: "The evidence does not satisfy us that these parties ever availed themselves of the opportunity offered them after the divorce was obtained, of changing their relation. Doubtless the complainant was willing, and we could wish that defendant had been honorable enough to grant her request; but it is not within our province to make a contract of marriage on account of commiseration for one or contempt for the other party, when the evidence does not show one to exist. We think the case within the principle of *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802. We are therefore not disposed to disturb the decree of the circuit judge, who saw the witnesses, and, in our judgment, committed no error in dismissing the bill." There is nothing in either of these cases to indicate that if, after the impediment to a lawful marriage between them had ceased, they had intended to take each other as husband and wife, and had indicated that intention by treating each other in all respects as though they were married, and had introduced each other as husband and wife, and had so held themselves out to the world, and had lived together as husband and wife, the court would not have held that the presumption that the illicit relation which existed when they commenced to live with each other continued after the impediment to their marriage ceased was overcome. In the case of *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245, the plaintiff married Mr. Blanchard when she had a former husband, Mr. Musgrave, living. Musgrave died in June, 1871. The plaintiff and Mr. Blanchard continued to live together as husband and wife until his death in

August, 1872. Mr. Blanchard introduced her as his wife. He made a will in which he mentioned her as his wife. They lived happily, and in his last illness, which lasted about ten months, Mrs. Blanchard waited upon him, and treated him in all respects as a lady would treat her husband. She was recognized in the community as the wife of Mr. Blanchard, and was treated with respect. The court said: "Under these circumstances even if the marriage were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Musgrave in June, 1871." 1 Bishop, Mar., Div. & Sep. §§ 970, 975, state the rule as follows: "Sec. 970. If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability,—as where there is a prior marriage undissolved,—their cohabitation, thus matrimonially meant, will in matter of law make them husband and wife from the moment when the disability is removed; and it is immaterial whether they knew of its existence or its removal, or not, nor is this a question of evidence. This doctrine is overlooked in some of the cases, but it is abundantly sustained by others, and the reasoning on which it rests is conclusive. Here are the mutual present consent, to which not even written or spoken words are necessary, and consummation, which is useful in the proofs, but is not necessary,—more, therefore, than the law requires." "Sec. 975. Though a cohabitation was introduced by a formal ceremony of marriage, and the parties erroneously supposed the impediment of a former marriage to have been taken away, and never had their mistake corrected, still, in localities where formal solemnization is not essential, valid marriage may be presumed to have occurred after the impediment was removed. To employ words more nicely accurate, and cover a larger ground, the living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife; for here are all the elements of a contract of present matrimony." In § 979 the author gives instances: "Where a woman had formally married, believing her husband to be dead, and, on his returning, still continued to cohabit under the second marriage, and kept it up for several years after he really died,—a second marriage after such death was presumed. And in another case, where a married man, knowing his wife to be alive, entered into a form of marriage with another woman, who did not know of the impediment, and continued the cohabitation under this second marriage until after the death of the first wife,—a marriage after such death was inferred." See also *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *United States v. Huys*, 20 Fed. Rep. 710; *White v. White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; *Yates v. Houston*, 3 Tex. 433; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778. The legal impediment to a marriage

between these parties, if it had not been removed before, was removed by the death of Ida Valentine in October, 1889. The parties after that date resided and cohabited together. Mr. Valentine applied for insurance, in which he declared he was married, and named his beneficiary, Margaret I. Valentine, his wife. They were regarded and treated by their relatives and neighbors as husband and wife. Mr. Valentine was a carpenter by trade. He was ill for a long time before his death. The testimony is that Mrs. Valentine treated him kindly, gave him his medicine, and did all those things a wife would be expected to do for her husband. She took in boarders, and applied the proceeds to his support as well as her own. No question was raised after the death of Ida Valentine but what Margaret Valentine and George Valentine were husband and wife until his death, seven years after the legal impediment to their marriage had ceased to exist. Under such circumstances, their marriage must be presumed. *Hutchins v. Kimball*, 31 Mich. 126, 18 Am. Rep. 164; *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220; *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460; *People v. Mendenhall*, 119 Mich. 404, 78 N. W. 325; *Lorimer v. Lorimer* (Mich.) 7 Det. L. N. 367, 83 N. W. 609.

The decree is affirmed, with costs.

The other Justices concur.

Ben E. WEST et al.

v.

Charles J. BECHTEL, *Piff. in Err.*

(.....Mich.....)

The refusal of a purchaser of wood to keep his agreement to pay for each shipment as received, and his declaration that he would not pay for a shipment until the next shipment was received, while he insisted on the complete delivery of the wood, do not constitute such an abandonment of the contract on his part as will justify the seller in refusing to ship any more wood.

(November 18, 1900.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiffs in an action to recover damages for failure to perform a contract to sell wood. *Affirmed.*

The facts are stated in the opinion.

Mr. M. L. Dunham, for plaintiff in error:

Where one party has departed from a special contract for the delivery of specific articles each to the other, the other party may treat it as rescinded; and if, by the terms

NOTE.—As to right to rescind or abandon contract because of other party's default, see note to *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 33, and *Gerli v. Poldebard Silk Mfg. Co.* (N. J. L.) 80 L. R. A. 61. See also *Du Bois v. Du Bois City Waterworks Co.* (Pa.) 43 L. R. A. 92; *Worthington v. Gwin* (Ala.) 43 L. R. A. 382.

51 L. R. A.

of the contract, concurrent acts are to be performed, as to the delivery of property by one party and the payment of the price by the other, if either party refuses performance, the other may treat the contract as abandoned, and justify rescission under it.

Stahelin v. Novle, 87 Mich. 124, 49 N. W. 529; *Hall v. Rupley*, 10 Pa. 231; *Webb v. Stone*, 24 N. H. 288.

The right to rescind a contract exists, when there has been a material change in the subject-matter, before the final consummation of the agreement brought about by the act of one of the parties, which the party rescinding did not authorize or assent to.

Harris v. Piatt, 64 Mich. 105, 31 N. W. 135; *Grand Rapids & B. O. R. Co. v. Van Dusen*, 29 Mich. 431.

The condition in a contract must be fulfilled before action lies.

Moore v. Campbell, 111 Ind. 328, 12 N. E. 495.

Where performance of one act is to precede another, the legal obligation to perform the latter is dependent upon the performance of the former as a condition precedent.

De Kay v. Bliss, 4 N. Y. S. R. 728; 3 Am. & Eng. Enc. Law, p. 911; *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 322.

One party to a contract which imposes reciprocal obligations upon both parties may have a right to rescind it by reason of the failure of performance of conditions by the other party.

Doughten v. Camden Bldg. & L. Asso. 41 N. J. Eq. 556, 7 Atl. 479; *Woods v. Russell*, 5 Barn. & Ald. 942; *Cunningham v. Morrell*, 10 Johns. 203, 6 Am. Dec. 332; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Norington v. Wright*, 5 Fed. Rep. 708; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec. 620; *Fletcher v. Cote*, 23 Vt. 114; *Shirley v. Shirley*, 7 Blackf. 452; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Ward v. Kadel*, 38 Ark. 174; *Chapin v. Norton*, 6 McLean, 500, Fed. Cas. No. 2,599.

If one party refuses to perform, he is regarded as consenting to a rescission, so that upon the other party's acting on such consent the contract is at an end.

Cromwell v. Wilkinson, 18 Ind. 365.

One party may, by neglecting or refusing to perform the contract on his part, place it in the power of the other party to avoid it or not at his pleasure.

Bannister v. Read, 6 Ill. 92; *Graves v. White*, 87 N. Y. 463; *Shaffner v. Killian*, 7 Ill. App. 620; *School Dist. v. Hayne*, 46 Wis. 511, 1 N. W. 170; *Carney v. Newberry*, 24 Ill. 203; *Graham v. Holloway*, 44 Ill. 385; *Hawley v. Smith*, 45 Ind. 183.

Messrs. Hatch & Wilson, for defendants in error:

Defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms.

Blackburn v. Reilly, 47 N. J. L. 290, 1 Atl. 27; *Freeth v. Burr*, L. R. 9 C. P. 208; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434; *Norington v. Wright*, 115 U. S. 188, 29 L. ed. 386, 6 Sup. Ct. Rep. 12; *Winchester v. Newton*, 2 Allen, 492; *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Myer v. Wheeler*, 63 Iowa, 390, 21 N. W. 692; *Lee v. J. B. Sicles Saddlery Co.* 38 Mo. App. 201; *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Hooker, J., delivered the opinion of the court:

Plaintiffs are coal and wood dealers in Grand Rapids, and the defendant is a dealer in wood at Manton, Michigan. The former offered to purchase 400 cords of wood at \$1 per cord, f. o. b. car at Manton, from the latter if he would ship "right away," promising to remit as fast as the wood should "come in."

The offer was accepted. Both offer and acceptance were by letter, the acceptance being dated January 14, 1899. Three cars were shipped, and two were paid for. On February 7, 1899, plaintiffs wrote, asking that wood be shipped faster, stating that they needed the wood. February 22, 1899, the S. P. Bennett Fuel & Ice Company, of Grand Rapids, wrote defendant inquiring for wood and offering to buy.

February 24, 1899, plaintiffs wrote, saying that "your conversation over telephone day before yesterday (22d) confirms our idea that you did not intend to fill contract" adding that, though price had materially advanced, they should expect the wood, and would be seriously damaged if he did not ship it. On February 27, 1899, defendant wrote the S. P. Bennett Fuel & Ice Company offering some wood at \$1.40 per cord.

February 28, 1899, defendant replied to the plaintiffs, saying that the plaintiffs had agreed to pay for wood as fast as it came in, and that he had shipped a car February 4, which on February 21, they admitted that they had received two weeks before, but had not paid for, and concluding with a threat to sue if he did not receive his pay.

On March 2, 1899, the Bennett Company wrote defendant to ship three cars of wood at \$1.40 per cord, adding that it must be seasoned. March 7, 1899, defendant wrote said company that it was not very dry, but going fast at \$1.40, and asked to know at once if it was wanted. He purchased some wood of him. There was testimony tending to show that in the talk by telephone the defendant said to plaintiffs: "You have not paid for the last you got. When are you going to pay for that?" and the plaintiff replied, "I will pay for that when I get some more."

The defendant testified that plaintiff said that "they should not pay for it until they got some more," and he replied "that they would have to pay for it before they got any."

The action was brought by the purchasers to recover damages for a breach of their contract. They also garnished the Bennett 51 L. R. A.

Fuel & Ice Company which was owing the defendant \$100.85.

In the justice court plaintiffs recovered a judgment of \$82.80 and costs. The defendant appealed, and in the circuit plaintiffs obtained a judgment for \$8.55, and they were allowed full costs. The circuit judge instructed the jury that "here was a contract whereby the defendant had agreed to deliver a certain quantity of wood right away on board cars up there, and the plaintiff had agreed to pay for it as fast as the wood came in. The plaintiff claims that the wood was not being delivered right away, that it was coming several days apart; coming too slow; he claims that he was not satisfied with the way it was being delivered, and that he anticipated on account of the rise he might have some trouble. He therefore withheld the pay; instead of paying for every carload as quick as it came, he paid for the first carload after the second arrived, and the second after the third arrived, and so on, intending fully to pay up when he should receive the wood."

A contract of this character might be broken up by either party. A refusal to pay—nonpayment according to the terms of the agreement—might, under certain circumstances, constitute such a breach of the contract as would release the other party, and a refusal to deliver might be such a breach of the contract on the part of the defendant as would release the other party or give him a cause of action.

But the particular circumstances connected with the case ought to be taken into consideration. The mere refusal to pay for a portion of the property delivered until more was received would not alone constitute such a breach of the contract as would warrant the other party, the defendant, in repudiating the entire contract. But to warrant the defendant in refusing further to perform his part of the contract by delivering the wood which he had contracted to deliver, it ought to be made to appear that there was not merely a refusal to pay at once for the portion already delivered, but the circumstances connected with the whole matter, the conduct of both parties, ought to be taken into consideration, and it should be made to appear, to warrant the defendant in refusing further to deliver, that the conduct of the plaintiff was such as indicated that he did not intend to perform his part of the contract.

I do not think, gentlemen of the jury, that the evidence in this case is sufficient to warrant a finding on your part that there was such a breach of the contract on the part of the plaintiffs that would justify the defendant in refusing to further perform his contract. And therefore the only questions for you to determine in this case are, whether or not the plaintiff has lost anything on account of the advance in the price—the market price—of wood, after the refusal to deliver by the defendant, and, if so, How much has he lost? In other words, What has that advance been?"

Error is assigned upon this, and it is the only important question in the case.

Counsel for the defendant cite several cases in support of the proposition that a mere default in payment of instalments is not to be treated as an abandonment of the contract.

Among the early cases which recognize the difference between covenants which are precedent, and those which are not, is *Boone v. Eyre*, B. R. East, 17 Geo. III. 1 H. Bl. 273, note a. In that case the plaintiff conveyed a plantation in the West Indies, with the flock of negroes upon it, in consideration of an annuity, and covenanted that he had a good title to the former, and was lawfully possessed of the latter. In an action for the nonpayment of the annuity, a plea was filed alleging that the plaintiff was not, at the time of making the deed, lawfully possessed of the negroes, and so had not a good title to convey. The plaintiff demurred to the plea. Lord Mansfield said: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where the breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro, not being the property of the plaintiff, would bar the action," and he gave judgment for the plaintiff.

The case of *Boone v. Eyre* was commented on by Lord Loughborough, in the case of *St. Albans v. Shore*, 1 H. Bl. 270, 278. In the latter case the parties were to exchange lands described at prices agreed upon. It was further agreed that "all timber trees, elms, and willow trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices or values thereof to be paid by the respective purchasers of the estates at the time before mentioned."

The defendant refused to perform, and in an action for breach of contract, filed a plea that the plaintiff, after making the agreement, cut down and destroyed 500 elms, and 500 willow trees, upon the estate, thereby making it impossible for him to perform the contract. A general demurrer was filed by the plaintiff. Lord Loughborough said: "It is clear, in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant (if I may use the expression), he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar the same consequence must follow. It was argued on the part of the plaintiff that the agreement respecting the trees was not a condition precedent, and therefore, a breach of that agreement could not be pleaded in bar of the action. In support of this argument the case of *Boone v. Eyre*, was cited; but in that case, though the court of King's bench held the plea insufficient, yet 51 L. R. A.

they laid down a clear and well-founded distinction,—that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; and for this plain and obvious reason,—because the damages might be unequal. The cases also of *Hunlocke v. Blacklove*, 2 Wms. Saund. 156, and *Cole v. Shallet*, 3 Lev. 41, were cited as being in favor of the plaintiff. But it is unnecessary to enter into the discussion of those cases; though perhaps doubts may reasonably be entertained of the doctrine laid down in Saunders, and though the cases cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the court. For we found our opinion on the present case on the ground of the distinction in *Boone v. Eyre*, which we think a fair and sound one. Then the question is, whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant. Now the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed that all trees, etc., which then were upon any of the estates, should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it, between the time of entering into the contract, and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not; for if it may be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This is not an action of covenant, where one party has performed his part, but is brought for a penalty, on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment."

This case was decided in 1789. The question was again raised in 1836 in the case of *Franklin v. Miller*, 4 Ad. & El. 599. The defendant being indebted to divers persons made an agreement to pay to the plaintiff the full amount of all accounts paid for the defendant, by him, with the expense, and a salary of £40 per quarter, until said debts should be fully settled. The plaintiff promised to perform such service, and expended time and money in so doing, and, payment being refused when due, he sued for a breach of contract. The defendant's plea alleged a failure to perform upon the part of plaintiff, in that he did not pay and settle all of

the accounts that he might have done, had he used diligence. Plaintiff replied, in substance, that the failure of defendant to pay justified his nonperformance and a rescission of the contract, and to this the defendant demurred. Littledale, J., said: "With respect to the plea the plaintiff may say: Assuming that there has been a default made as to my part of the contract, it is only a partial breach, and the defendant's argument would go the length of insisting that if I had in any one week omitted to pay the sovereign, he might put an end to the contract, and deprive me of all the money I have paid in advance; for he states that he has rescinded the agreement altogether." It is a clearly recognized principle that, if there is only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to."

This was based on *Boone v. Eyre*, which case the learned judge quoted at length, and he concluded with the statement that, "So, here, it cannot be contended that, if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed." Coleridge, J., said: "I think both the replication and the plea bad. The plea is not good unless one party to a contract like this may treat it as rescinded if the other fails in the slightest degree to perform his part of it. The rule is that, in rescinding, as in making, a contract, both parties must concur. In *Withers v. Reynolds*, 2 Barn. & Ad. 882, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The present case is different; and the plaintiff is entitled to judgment."

In *Fillicul v. Armstrong*, 7 Ad. & El. 557, decided in 1837, the defendant discharged one whom he had employed to teach French. In an action for breach of the contract, defendant pleaded that plaintiff was absent for two days beyond the time fixed by defendant for plaintiff's vacation. Upon demurrer to the plea, the court held that while the defendant might be entitled to sue the plaintiff for absenting himself, that such absence did not put an end to the contract.

In *Freeman v. Taylor*, 8 Bing. 125, decided in 1831, the plaintiff chartered to the defendant a ship to go from London to Madeira and Cape of Good Hope, and thence to Bombay and back. Action was brought for damages against the defendant for not loading the ship with a cargo at Bombay. Upon the trial it appeared that the captain made a deviation to the island of Mauritius, and defendant's agents at Bombay, in consequence of such deviation refused to find a cargo. It was left for the jury to say whether the deviation was of such a nature as to deprive the defendant of the benefit of his con-

tract, and this was held proper. See also *Mount v. Larkins*, 8 Bing. 108.

The case of *Freeth v. Burr* (1874) L. R. 9 C. P. 208, was in some respects quite similar to the present case. Defendant contracted to sell 250 tons of pig iron at a fixed price, one half to be delivered in two, and the remainder in four, weeks, payment net cash fourteen days after delivery of each parcel. The market was rising, and, notwithstanding urgent demands by plaintiff for delivery, the first 125 tons was not completed for nearly six months. The plaintiff refused to pay for it, claiming a right to set off the loss, but still urged the delivery of the remainder. The defendants treated the refusal to pay as a breach and abandonment of the contract, and declined to deliver more. It was held that the mere refusal to pay did not warrant the plaintiff in treating the contract as abandoned. Coleridge, Ch. J., laid down the rule as follows: "The question is whether the fact of the plaintiff's refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free, and to justify his refusal to continue to perform it. This certainly appears, viz., that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my views that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is, as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract, and set the other party free. That is the true principle on which *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73, was decided, whether rightly or not upon the facts, I will not presume to say. Where by the nondelivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonassohn v. Young*, 4 Best. & S. 296, 32 L. J. Q. B. N. S. 385, that that case may be supported. In *Withers v. Reynolds*, 2 Barn. & Ad. 882, there was an express refusal by the plaintiff to perform the contract; and Patteson, J., says: 'If the plaintiff had merely failed to pay for any particular load, that of itself might not

have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant therefore is not liable for ceasing to perform his part of the contract.' Wightman, J., certainly, and Crompton, J., by inference, in *Jonassohn v. Young*, 4 Best. & S. 299, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the nondelivery or the nonpayment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere nonpayment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers, did not put an end to the contract so as to dis-entitle the purchasers to maintain an action for nondelivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that this ruling was correct, and that the rule should be discharged." Keating, J., concurring, said: "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Nonpayment is an element. But, looking at all the circumstances of this case—a rising market, a failure on the part of the defendant to deliver the iron according to the terms of the contract, a series of deliveries in small quantities long after the times for delivery provided for by the contract, and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity,—I do not think they show an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, and, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat the contract as rescinded, and to refuse to deliver the remainder of the iron." Denman also said: "I am of the same opinion. The learned judge ruled that the mere refusal by the plaintiffs to pay for the portion of the iron delivered did not warrant the defendant in considering the contract as at an end; and he gave the defendant leave to move to enter a verdict or a nonsuit if the court should think that ruling wrong. I am of opinion, upon the authority of *Withers v. Reynolds*, 2 Barn. & Ad. 882, that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But, in the words of Patteson, J., the conduct of the plaintiff, coupled with the nonpayment, amounted to an express refusal to perform the contract on his part. There was nothing of the sort here. After the way in which that case has been treated in subsequent au-

thorities I think we are bound to hold it to be a correct statement of the law, and to act upon it. Notwithstanding the plaintiff's refusal to pay, the defendant was bound to go on and deliver the rest of the iron."

The case of *Mersey Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434, decided in 1882 and 1884, contains extended discussion upon this subject by several eminent English judges. The defendants agreed to purchase from the M. Co. a quantity of steel, to be delivered on board ship, in five monthly instalments, payment to be made within three days after receiving shipping documents. The company delivered about half of the first instalment, but before payment became due a petition was presented to wind up the company. The defendants were erroneously advised that they could not safely pay the company without an order of court. The company gave notice that it should treat the refusal to pay as releasing it from any further obligation. No further iron was delivered, and an action was brought to recover the price of what had been delivered. The defendants set up a counterclaim for damages for nondelivery. The court of Queen's bench held, reversing Coleridge, Ch. J., that the defendants had not, by postponing payment, under the erroneous advice of their solicitor, so shown an intention no longer to be bound by the contract, as to release the plaintiffs from further performance of it, and that the plaintiffs were liable for damages occasioned by the nondelivery. Jessel, M. R., said: "This appeal raises two points, one of which is of very great importance. The first question is, What is the rule which is to prevail as regards the getting rid of the liability of the further performance, or to the performance, of a contract in consequence of the acts or defaults of the other party in respect of that contract. If one party breaks a contract is the other party bound to perform his part of it or not? There is no absolute rule which can be laid down in express terms as to whether a breach of contract on the one side has exonerated the other from performance of his part of the contract. But I think the rule of law is properly stated in *Freeth v. Burr*, L. R. 9 C. P. 208, and it is stated in a very few words by the judge from whose decision this appeal comes. He says: 'I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them; but I think it may be taken that the fair result of them is as I have stated, namely, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.' That makes it a question of evidence; you must consider the nature of the breach, the circumstances under which the breach occurred, and then see whether that is the result of it. There may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally you must infer the intention from the acts of the parties. Then

he goes on: 'Now, nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract, and set the other party free.' If you have the act so done on the one side, the other party, if he elects to be free, is no longer liable to perform his part of the contract. Now in *Freeth v. Burr*, L. R. 9 C. P. 208, and the other cases on the subject, no such distinction is taken as is referred to by Lord Bramwell, if I rightly read his judgment, in *Honck v. Muller*, L. R. 7 Q. B. Div. 92, between the case of a contract partly performed and a contract never performed at all. In *Freeth v. Burr*, there had been part performance. In the case of the *Re Phoenix Bessemer Steel Co.* L. R. 4 Ch. Div. 108, the point was not argued. That was an action founded on a contract for selling goods on credit. The venders had said: 'We will not sell you the goods any more except for cash.' The other side said: 'But we are entitled to credit, and if you will not sell them to us, except for cash, we will not take them at all, and there shall be an end of it.' The only point argued was whether the persons who were entitled to the credit were insolvent in such a way, and to such an extent that the venders had a right to say 'we will not sell except for cash.' That was the only point argued. Nobody argued that upon the refusal of the venders to sell without cash, and when the answer is 'we must decline to take the iron,' the venders were released from the contract. I held that they were not when the case came originally before me at the rolls, and the court of appeal affirmed that decision. That was the case of a contract which had been part performed to a very considerable extent. So, again, in *Withers v. Reynolds*, 2 Barn. & Ad. 882, the contract had been partly performed. The notion, therefore, that there is any difference in this respect between a contract part performed and a contract not performed at all, is not, I think, well founded. I am not sure that I am right in supposing that Lord Bramwell in *Honck v. Muller*, L. R. 7 Q. B. Div. 92, intended to say that in no case where the contract was part performed could one party rely on the refusal of the other to go on, although that seems to me to be the fair construction of his judgment. Again, in *Simpson v. Crippin*, L. R. 8 Q. B. 14, no such distinction was taken. *Hoare v. Rennie*, 5 Hurlst. & N. 19, was on demurrer, which the judges seem to have forgotten, and to have treated it as a special case, and drawn inferences of fact. That being so, the only point we have to consider is, whether the evidence in this case ought to lead us to the conclusion that the buyers refused to go on with the contract?" Lindley, L. J., concurred, saying: "The first question is, whether the defendants are entitled, apart from any question of set-off, to any damages by reason of the breach by the plaintiffs of a contract on their part. Lord Coleridge held that they were not, on the ground that there had been such a refusal to perform the contract as to amount to a

rescission of it. Whether there was such a refusal depends entirely on the correspondence. The view which the Lord Chief Justice took of it is stated in these words: 'Here the defendants, while insisting on future deliveries, positively refused to pay for the iron already delivered, and for all which might subsequently be delivered, unless the plaintiffs fulfilled a condition which the defendants in my opinion had no right to impose. Now, without pausing to remark on the terms in which that conclusion is expressed, I confess it appears to me that the correspondence does not bear that interpretation. The alleged refusal arose in this way. It appears that the advisers of the defendant company took a view which was untenable, that is to say, they took the view that the defendants could not properly pay certain money which they owed to the plaintiff company, by reason of the pendency of the petition to wind up the company. This view was taken under the impression that there was something in § 153 of the companies act of 1862 which rendered such a payment improper. It was overlooked that § 153 applies to dispositions by the company of its property, and not to payments to the company. The distinction is obvious, and not only obvious in the language of § 153, but there is a case in *Re Barned's Bkg. Co.* L. R. 3 Ch. 105 in which it was held by Lord Cairns that a transfer of shares to a company which was being wound up was not within § 153, and exposed the company to calls with respect to the shares. The advice therefore was mistaken advice. However, it was given, and the consequence of that advice was that the defendants declined, or refused (I will use that word for the moment) to pay what they owed. But they did not so decline or refuse as to warrant the inference which, according to the case of *Freeth v. Burr*, L. R. 9 C. P. 208, is necessary to disentitle them from insisting on the contract, the inference, I mean that they abandoned the contract, or repudiated it, and would not go on with it. The inference is quite the other way. The true inference to be drawn from the correspondence is that they were ready enough to pay, but felt embarrassed, and did not know how to pay. Whether they ought to have been embarrassed is quite another matter. Acting honestly and having got the advice they did, they felt embarrassed and hesitated about paying. It was not such a refusal to pay as brings the case at all within the principle of *Freeth v. Burr*, L. R. 9 C. P. 208. Now I certainly do not pretend to reconcile all the cases on this subject. I have tried in vain to reconcile *Hoare v. Rennie*, 5 Hurlst. & N. 19; *Simpson v. Crippin*, L. R. 8 Q. B. 14; and *Honck v. Muller*, L. R. 7 Q. B. Div. 92. I can understand each case by itself, but there is very considerable difficulty in reconciling them. It is not, however, necessary to do that. What we have to do is to extract from the cases some intelligible principle by which to be guided, and it appears to me that the principle is stated accurately in *Freeth v. Burr* (1874)

L. R. 9 C. P. 208 by Lord Coleridge himself in delivering his judgment in that case. What he says as to the result of the cases is: 'The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.' I think that is the fair way of testing each of these cases, and it appears to me that Lord Coleridge either lost sight of that in deciding this case, or drew an incorrect inference from the correspondence. Taking that as the true test, it appears to me, that the true and fair construction of the important letters of the 10th of February, the 17th of February, and the 1st of March, is this, that the defendants refused, or declined, or hesitated to pay, not as is stated in *Freeth v. Burr* (1874) L. R. 9 C. P. 208, 'evinced an intention no longer to be bound by the contract,' but evincing a difficulty suggested to them by their solicitor; a difficulty which they did not see their way to get out of." The comments of Lord Bowen are of especial interest, with reference to the question of rescission which is given prominence in some of the cases. He said: "Nondelivery of a single parcel would not be necessarily, of course, sufficient to intimate that the person who does not deliver intends no longer to be bound, but I am far from saying that nondelivery of a single parcel might not in particular contracts and under particular circumstances, be sufficient. So as to nonpayment. Nonpayment of itself is certainly not necessarily evidence of an intention no longer to be bound by the contract, but I do not say there might not be circumstances under which the court would be entitled to draw that inference from it. If Lord Bramwell in *Honck v. Muller*, L. R. 7 Q. B. Div. 92, is to be understood as saying that the doctrine can no longer be applied when the contract has been part performed, it seems to me that his observation goes beyond what can be supported, for, as the master of the rolls has pointed out, many of the cases where one party was allowed to treat the conduct of the other as putting an end to the contract were cases in which the contract had been part performed. A fallacy may possibly lurk in the use of the word 'rescission.' It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties; but we are dealing here, not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it. With regard to *Hoare v. Rennie*, 5 Hurlst. & N. 19, I think that the true explanation of that case is that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct or the reverse." The case was affirmed in the House of Lords. Lord Blackburn used the following language: "As to the first point, I myself have no doubt that *Withers v. Reynolds*, 2 Barn. & Ad. 882, correctly lays down the law to this extent, that

where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'If you go on and perform your side of the contract, I will not perform mine' (in *Withers v. Reynolds*, 2 Barn. & Ad. 882, it was: 'You may bring your straw, but I will not pay you upon delivery, as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you'), that in effect amounts to saying, 'I will not perform the contract.' In that case the other party may say: 'You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and, if necessary, I will sue you for damages; but at all events I will not go on with the contract.' That was settled in *Hochster v. De La Tour*, 2 El. & Bl. 678, in the Queen's Bench, and has never been doubted since, because there is a breach in the contract, although the time indicated in the contract has not arrived.

That is the law as laid down in *Withers v. Reynolds*, 2 Barn. & Ad. 882. That is, I will not say, the only ground of defense, but a sufficient ground of defense. In *Freeth v. Burr*, L. R. 9 C. P. 208, it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is clear to me that it is not so. So far from respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason,—that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, 'Because we have power to do wrong, we will refuse to pay the money that we ought to pay,' I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a bona fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers v. Reynolds*, 2 Barn. & Ad. 882, and *Freeth v. Burr*, L. R. 9 C. P. 208, and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law as I always understood it, is that where there is a contract in which there are two parties each side having to do something (it is so laid down in the notes to *Pordage v. Cole* (1871) 1 Wms. Saund. 320), if you see that the failure to perform one part of it goes to the root of the contract,—goes to the foundation of the whole,—it is a good defense to say: 'I am not going to perform my part of it when that which is the root of the whole and the

substantial consideration for my performance is defeated by your misconduct." Lord Bramwell said: "My Lord Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but if they had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers v. Reynolds*, 2 Barn. & Ad. 882, and the reasoning which you have heard. But I really cannot, with great submission to the noble lord, find any evidence of that, and Mr. Cohen certainly did not attempt to prove it, but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree."

The case of *Winchester v. Newton*, 2 Allen, 402, is in harmony with the English view. The court said: "It is true that the present plaintiffs denied their liability to make payment for any portion of the timber until the whole was delivered, treating the whole delivery as one entire contract. In that they were wrong, and this court held them liable for the timber first delivered, at the expiration of six months after its delivery. But we think that act was not under the circumstances a repudiation of the contract for future delivery, or to operate to excuse the defendant from the performance of his further contract to deliver timber by the 1st of April, 1859. The contract had been substantially divided, the new stipulation postponing both delivery and payment, as to all embraced within it, an entire year beyond the time applicable in both these respects to the delivery of the first parcel. In regard to each portion, a distinct liability attached to the parties, and this was not discharged by the plaintiffs' refusal to pay for the first portion, under the circumstances stated. The case of *Withers v. Reynolds*, 2 Barn. & Ad. 882, is much relied upon on the part of the defendant. That case, upon a careful scrutiny, will be found to have been put upon the ground of something more than a mere refusal to pay for articles already delivered. It was considered by the court as a prospective refusal, and applicable to articles yet to be delivered upon the contract. But in the present case the plaintiffs did not in their refusal to pay for the first parcel of timber upon the ground that the day of payment therefor had not arrived, deny their liability or affirm their purpose not to pay promptly and fulfil to the letter their promise to pay for the timber to be delivered under the extended contract. As to that payment, they took the same view as the other party. Both held that for the timber yet to be delivered payment was to be made in six months after its 51 L. R. A.

delivery. The denial of payment for the timber delivered prior to the 1st of April, 1858, was a denial based upon the legal effect of the contract, the vendee alleging that it postponed the entire payment. This refusal to pay for the timber that had been delivered on the 1st of October, 1858, did not operate to discharge the other party from his promise to deliver timber on the 1st of April, 1859."

The supreme court of New Jersey takes the same view of this question. *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27. In the latter case the English and American authorities were considered, and the rule adopted in the *Mersey Case* was approved. The court said: "The rule to be applied in determining whether the express obligations of such contracts remain, after one or more breaches by either party, has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion the rule established in England by the judgment of the House of Lords in *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, Affirming the judgment of the court of appeal in L. R. 9 Q. B. Div. 648, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Sarjeant Williams in his notes to *Pordage v. Cole*, 1 Wms. Saund. 320 b, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It, of course, is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself,—cases in which the courts would see that the partial stipulation was so important, so went to the root of the matter (to use a phrase of Blackburn, J., in *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410), as to make

its performance a condition of the obligation to proceed in the contract."

In New York the question was considered in the case of *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203, and it was held that a delivery of one invoice of glass that was inferior to that contracted did not justify the purchaser in refusing to take subsequent consignments of glass corresponding with the requirements of the contract. See also *Ebling v. Bauer*, 17 N. W. Week. Dig. 497; *Selby v. Hutchinson*, 9 Ill. 319; *Bloomington Electric Light Co. v. Radbourn*, 56 Ill. App. 165; *Gatlin v. Wilcox*, 26 Ark. 309.

The case of *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692, is closely analogous to the present case. Plaintiffs sold defendants 10 carloads of barley. Defendants were to pay 75 cents per bushel for each carload, when delivered. On receipt of the first carload the defendants refused to pay upon the ground that the barley was not equal to the sample, but stated that they had given plaintiffs credit for 65 cents per bushel, and would withhold payment until the 10 carloads were delivered, and urged shipment of the remainder. It was held that this did not entitle the plaintiff to rescind the contract, and that he was liable for damages resulting from nondelivery of the remainder. See also *Burge v. Cedar Rapids & M. River R. Co.* 32 Iowa, 101. A valuable note upon this subject will be found in *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 33.

The authorities are reviewed in *Norington v. Wright*, 115 U. S. 188, 29 L. ed. 306, 6 Sup. Ct. Rep. 12, though the exact question before us was not involved. An interesting note upon that case at circuit will be found in 21 Am. L. Reg. N. S. 395, where the authorities, English and American, are collected. In 2 Benjamin Sales, § 909, the author says that "in America the law appears to be fairly settled, in accordance with the case of *Simpson v. Crippin*, viz., that in the absence of any expressed intention of the parties, a contract for the sale of goods by successive deliveries is severable, and the failure to accept or deliver one instalment does not entitle the other party to refuse delivery or acceptance of the instalments that remain. Only one case, *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603, has been found, in which the rule laid down in *Simpson v. Crippin*, is directly attacked. The editor of American Notes to the 4th edition takes issue with Mr. Benjamin, but we think his views are not as well supported by the authorities as the review of *Norington v. Wright*, by Mr. Landreth. See also Clark, Contr. 652 *et seq.*; *Lee v. J. B. Sickles Saddlery Co.* 38 Mo. App. 201, and 1 Beach Modern Law of Contracts, ¶¶ 122, 123, 849, and notes.

It is urged that the following cases show that a different rule prevails in Michigan: *Grand Rapids & B. City R. Co. v. Van Dusen*, 29 Mich. 443; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 168; *Stahelin v. Soule*, 87 Mich. 124, 49 N. W. 529; *Scheible v. Klein*, 89 Mich. 385, 50 N. W. 857. An ex-

amination of these cases will show that they are distinguishable.

The case of *Grand Rapids & B. City R. Co. v. Van Dusen* contains a dictum that repeated failures to pay estimates on railroad grading would have justified the plaintiff in quitting work and claiming damages. He did not quit, but performed his contract, and claimed damages for increased cost, occasioned by defendant's failure to pay; but the court held that he was entitled to interest only, which was the measure of damages, regardless of the actual injury. The case holds simply that a failure to pay estimates is a departure from the terms of the contract for which interest may be recovered. But in such a case the dictum may have been correct, upon the ground that it was a departure from the contract in such a substantial particular as to excuse for nonperformance by the other party of the contract that could not be called severable.

Hubbardston Lumber Co. v. Bates, 31 Mich. 168, is not in any way decisive on this question.

The case of *Stahelin v. Soule*, 87 Mich. 124, 49 N. W. 529, is more nearly in point. It arose out of a contract to furnish ties. The plaintiff agreed to move his sawmill and cut logs for the defendant only. It was claimed by the defendant that the failure of the plaintiff to perform work contracted for made it necessary for him to get his ties cut at another mill in order to meet his engagements, and excused him from performing his contract. The court held that this raised a question for the jury, and said: "Where one party has departed from a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded; and if, by the terms of the contract, concurrent acts are to be performed, as the delivery of property by one party and the payment of price by the other, if either party should refuse to perform his part of the contract, the other may treat the contract as abandoned, and justify rescission under it."

That was not an instance where the case turned upon a provision which "made concurrent the delivery of property and payment of the price," though it did involve mutual acts, the nonperformance of which might excuse a departure from the contract. Manifestly if a person contracted to deliver a horse to another, for which he was to receive a price upon delivery, he would be justified in withholding delivery, if the other refused to pay the price, and, on the other hand, the purchaser need not pay the price if the seller refused to deliver the horse. Either refusal would go to the whole contract. That is the most that can be made of the text in that case.

The cases hereinbefore cited distinguished between such cases, and others, involving delivery and payment by instalment, and they illustrate the possible hardship of the application of so rigid a rule, and relieve against it. At the same time they hedge about the immunity of the nonperforming party by

conditions and limitations that amply protect the other.

The questions of solvency and intention enter into the case, and a jury passes upon them.

For reasons that will be obvious to the reader, the case of *Scheible v. Klein*, is not controlling here.

Counsel for the defendant cite a number of cases, most of which can be distinguished from the present case, though it is true that some of them are very similar. We do not discover that the question before us has been passed upon by this court, and it is unnecessary to discuss the other cases cited. The subject was referred to in the cases of *McGregor v. Ross*, 96 Mich. 108, 55 N. W. 658; *Robinson v. Lake Shore & M. S. R. Co.*

103 Mich. 607, 61 N. W. 1014, and *Eakright v. Torrent*, 105 Mich. 294, 63 N. W. 293.

In some of the cases discussed herein it is said that there may be a question for the jury, i. e., whether there was an intention to abandon, or not perform, the contract. In this case, however, there is nothing to indicate such an intention. The plaintiff insisted upon the delivery of the wood, and it does not even appear that he did not intend to pay for every succeeding car that the defendant might deliver.

We think, therefore, that the learned circuit judge did not err in holding that the plaintiff had established a right to recover. *The judgment is affirmed.*

The other Justices concur.

NORTH CAROLINA SUPREME COURT.

W. M. TURPIN

v.

D. G. CUNNINGHAM, *Appt.*

(127 N. C. 508.)

A change of the color of a horse which was correctly described in a mortgage when it was given as a bay horse, but which, from natural or unnatural causes, became a white and sorrel spotted horse, without any appearance of bay whatever, does not defeat the rights of the mortgagee as against a person who purchased the horse after his change of color, without any notice of the mortgage.

(December 22, 1900.)

APPEAL by defendant from a judgment of the Superior Court for Haywood County in favor of plaintiff in an action brought to enforce a chattel mortgage against a horse in possession of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. F. Ray and Ferguson & Son for appellant.

No appearance for appellee.

Clark, J., delivered the opinion of the court:

One Ray, being indebted to the plaintiff, executed to him September 13, 1894, to se-

NOTE.—The peculiar facts of the above case are such that there seems to be no direct precedent on the subject.

On the general question of the sufficiency of description in chattel mortgage, reference to earlier cases in this series may be made as follows: *Johnson v. Grisard* (Ark.) 3 L. R. A. 795, and *note*; *Meredith v. Kunze* (Iowa) 4 L. R. A. 455.

51 L. R. A.

cure the debt, a mortgage on a certain "bay horse, six years old, which I purchased of said Turpin." The mortgage was regular in all respects, and was filed for registration March 2, 1895; the horse being left in possession of the mortgagor. After the registration, and before the mortgage fell due, the mortgagor traded the horse to a party in another county, who had no actual notice of the mortgage; and after the mortgage fell due (September 13, 1895) the horse was traded from party to party until the defendant purchased him, in 1897, with no actual notice of the mortgage. "At the time and prior to the time the defendant purchased said horse, he had entirely changed color, from some natural or unnatural cause, until he was not a bay horse, but a white and sorrel spotted horse, without any appearance of bay whatever." The mortgagee had done all the law required him to do, when the horse was specifically described in the mortgage, and that instrument was duly recorded. There being no doubt as to the identity of the horse, the mortgagee does not lose his right to subject the horse to the payment of the lien, because of the change in appearance, due, probably, to old age. A mortgage on pigs, calves, or other young animals is not vitiated by their growing up into boars, sows, bulls, and cows, and the like. Nor would a mortgage upon boars and bulls be destroyed by turning them into barrows and oxen, which would be a more substantial alteration than a change of color. The horse may shed his color, but a mortgage is not so easily shed. It usually sticks closer than the skin. In adjudging that the mortgagee could recover the horse, or his value, if not produced, to be applied to the mortgage debt, *there was no error.*

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

John ROSE, Appt.,
v.
Henry HIRSH et al.
(94 Fed. Rep. 177.)

I. The number of infringing articles purchased by defendant for incorporation into his manufactured product may form the basis of damages in an action for infringement of a patent, where up to the time of infringement he had procured all his stock from the patentee, who maintained a strict monopoly, and afterwards deliberately substituted infringing articles for the patented ones, so that the conclusion is reasonable that, in the absence of infringement, he would have purchased the same quantity from the patentee.

2. The difference between the cost and selling price of a number of articles equal to those used by the infringer is the proper measure of damages in an action for infringement of a patent, where the expenses of the patentee are simple and easily computed, as to which he has suppressed no evidence, while defendant has not used evidence within his power to show that the alleged cost is erroneous, and the plaintiff's evidence is corroborated by the cost of the infringing articles.

(May 4, 1899.)

A PPEAL by plaintiff from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania confirming the report of a master refusing to

NOTE.—Damages for infringement of patents, copyrights, or trademarks as affected by loss of profits.

- I. Nature and scope of the subject.**
- II. The concurrent remedies in patent cases.**
- III. Actions in equity.**
- IV. Actions at law.**
 - a. Statement as to existence of the remedy.**
 - b. Measure of damages generally.**
 - c. As affected by mode of enjoyment of patent.**
 - 1. Different rules with relation to.**
 - 2. By granting licenses.**
 - a. Application of the rule.**
 - b. What sufficient to constitute an established fee.**
 - c. Right to base fee on utility.**
 - 3. By holding close monopoly.**
 - a. Application of the rule.**
 - b. Establishment of loss of sales.**
 - c. Establishment of reduction of price.**
 - d. Consideration of profits of the infringer.**
 - e. When profits of infringer may be made the criterion.**
 - f. Separation of profits due to patent.**
- V. The rule in equity under statutes authorizing damages.**
 - a. Scope of subdivision.**
 - b. The act of Congress of 1870.**
 - c. Estimation of damages under.**
 - d. Separation of profits and damages due to patent.**
 - e. The English act of 1853.**
- VI. Effect of recovery.**
- VII. The rule in copyright cases.**
- VIII. The rule in trademark cases.**
- IX. Conclusion.**

I. Nature and scope of the subject.

The infringement of a patent, copyright, or trademark is a tort, and the question of damages for its infringement as affected by loss of profits, with reference to whether the profits are proximate or remote, absolute or contingent, or certain or uncertain, is governed by the same rules as the question of damages for tort as affected by loss of profits, which is treated in another note.

Thus, where profits are recoverable by the owner of a patented invention against an infringer, they are such profits or gains as result

directly or immediately from the wrongful act of the infringer. Remote and contingent profits or gains depending upon the result of successful schemes or investments are never allowed. *Piper v. Brown*, Holmes, 196, Fed. Cas. No. 11,181.

And the infringement of a patented process for preserving fish, which enabled the owner to withdraw them from the market during the season of abundance, and to demand and receive a larger price for green, unpreserved fish remaining in his hands for sale in the market, does not warrant a recovery in equity against the infringer for 1-2 cents per pound on the sale of green fish in the year, as such a profit is too remote and indirect for recovery. *Ibid.*

In cases of infringement of patents, copyrights, and trademarks, however, the fact that the infringer usually makes a profit from the infringement, and may be held as a trustee with reference to it for the rightful owner and required to account in equity, adds another element for consideration; and this, as well as the peculiar nature of property in patents, copyrights, and trademarks, has a direct and particular bearing on questions as to the measure of damages and the allowance of profits lost as damages. But profits for which an infringer may be required to account are not damages, and cases with relation to such profits are not included in this note, except so far as is necessary in arriving at the question of the allowance of damages in addition to such profits, provided for by the United States and English patent acts.

II. The concurrent remedies in patent cases.

Under the statutes and rules of law existing previous to the act of Congress of July 8, 1870, authorizing a recovery by the owner of a patent against an infringer, in equity, for damages in addition to the profits of the infringer, the owner of a patent whose right had been infringed might proceed in equity in a proper case, and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or he might sue at law, in which case he would be entitled to recover as damages compensation for the loss of profits or the pecuniary injury he had suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts. *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Coupe v. Royer*, 155 U. S.

allow damages for infringement of a patent. *Reversed.*

Before *Acheson*, Circuit Judge, and *Kirkpatrick* and *Buffington*, District Judges.

The facts are stated in the opinion.

Mr. Henry E. Everding for appellant.

Mr. William C. Strawbridge for appellees.

Buffington, District Judge, delivered the opinion of the court:

This is an appeal from a decree entered by the circuit court of the eastern district of Pennsylvania, dismissing exceptions to and confirming the report of a master. 91 Fed. Rep. 149. After entry by that court of a decree adjudging appellees to have infringed the 1st claim of patent No. 504,944, granted to John Rose, the appellant, a master was appointed to state an account of the

gains and profits which the appellees received, and the damages sustained by the appellant by reason of said infringement. The master found that the appellees had used a considerable quantity of rods containing the patented device, as to which he reported: "The complainant evidently has been damaged by the defendants' use of the infringing rods, but the evidence presents no definite basis on which such damages can be assessed." He therefore reported but nominal damages, and ordered appellant to pay the costs of the accounting. To this report appellant excepted. On hearing, the exceptions were dismissed, the report confirmed, and a decree entered in conformity with the master's recommendations. The entry of said decree is here assigned for error.

The proofs show that the patented article was a completed umbrella stick. Appellee's

560, 39 L. ed. 264, 15 Sup. Ct. Rep. 199; *Willimantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865; *McKeever v. United States*, 14 Ct. Cl. 396; *Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296; *Bragg v. Stockton*, 27 Fed. Rep. 509.

Jurisdiction in actions at law, however, was exclusive unless proper grounds for equitable jurisdiction existed. A court of equity would not take cognizance of a case unless grounds for an injunction or other equitable relief existed; and a bill for a mere naked account of profits and damages against an infringer would not be sustained, though the rule is one of administration, and not of jurisdiction. *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975, Overruling *dicta* to the contrary in *Perry v. Corning*, 6 Blatchf. 184, Fed. Cas. No. 11,003, and in other circuit court cases.

The above case of *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975, though decided after the passage of the act of Congress of July 8, 1870, and though deciding nothing with reference to loss of profits or damages of the owner of the patent, is here included as plainly showing the line between equitable and legal cognizance of patent cases before as well as since that act. Indeed, it contains an extended exposition and history of American legislation and judicial decision on the subject of patents.

III. Actions in equity.

Actions in equity for the infringement of a patent go on the theory of converting the infringer into a trustee for the patentee or owner of the patent, with regard to the profits which he has made by the use of the invention. Such profits are not recovered as damages. They are recovered as having arisen from a wrongful use of the invention, and as belonging to the real owner of the invention. Cases with regard to the recovery of such profits, therefore, are not within the scope of this note, where they were instituted previous to the enactment of legislation authorizing courts of equity to find damages as well as profits.

Thus, where profits are the proper measure of damages in actions for infringements of patents, it is the profits which the infringer makes or ought to make which govern, and not the profits which the patentee can show that he might have made. *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764.

Before the act of Congress of July 8, 1870, both profits and damages could not be recovered in a single suit for the infringement of a patent. 51 L. R. A.

ent. Willimantic Thread Co. v. Clark Thread Co. 27 Fed. Rep. 865.

And a decree in an action for profits and damages for the infringement of a patent, though the bill prayed for both profits and damages, cannot be rendered for damages, but must be confined to profits alone, where the bill was filed previous to the passage of the act of Congress of July 8, 1870 (16 Stat. at L. 198, chap. 230), which first authorized courts of equity to allow damages in addition to profits. *Union Paper-Bag Mach. Co. v. Murphy*, 97 U. S. 120, *sub nom. Ellsabeth v. American Nicholson Pav. Co.* 24 L. ed. 1000.

So, in *Perry v. Corning*, 7 Blatchf. 195, Fed. Cas. No. 11,004, which was an action in equity, the court stated the rule to be that the circuit court as a court of equity has full concurrent jurisdiction with the circuit court as a court of law, of all actions for the infringement of patents; but the court refused to say whether as a court of equity it could or would award damages irrespective of the gains and profits accruing to the infringer from the infringement, or in addition to such gains and profits.

In England previous to the act of 1859 an injunction and an account of profits were the only relief which could be given in equity to the owner of a patent infringed. The court never granted damages. *Betts v. De Vitre*, 11 L. T. N. S. 533, 5 New Rep. 165.

And the owner of a patent can only recover the profits which have been actually made by the defendant in an action for an infringement under 15 & 16 Vict. chap. 83, § 42, providing that in such action it shall be lawful for a court or judge, on application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account and the proceeding therein respectively, as to such court or judge may seem fit. The loss which the owner of the patent has sustained by the infringement can only be recovered at the hands of the jury in an action at law. *Elwood v. Christy*, 18 C. B. N. S. 494, 34 L. J. C. P. N. S. 130, 13 Week. Rep. 498.

IV. Actions at law.

a. Statement as to existence of the remedy.

The first patent act in the United States—act of 1790 (1 Stat. at L. 109, chap. 7)—gave an action at law upon the case as a remedy for its violation; and the right to maintain an action at law for the infringement of a patent,

bookkeeper testified that they had used 121 gross of such infringing rods. It is also shown that prior to November, 1894, the patented rod could not be purchased except from appellant, who alone made them, and who maintained a close monopoly of their manufacture, and that appellees purchased such rods from him, and thus acquiesced in the monopoly of his patent from 1891 to June 20, 1894. At the latter date they ceased buying from appellant, and thereafter deliberately infringed his patent, until enjoined in this case. During the last five months they purchased, *viz.*, from January 23 to June 20, 1894, they bought from Rose 123 gross at prices ranging from \$24 to \$28. Analysis of these bills shows that for said period the price was substantially \$24 per gross; for of 19 different invoices 15 were at \$24, and these covered 118 gross, while

the two at \$26 and \$28, respectively, aggregated but $4\frac{1}{2}$ gross. There was no evidence that Rose, prior to November, 1894, sold to anyone at a less price than \$24 per gross. In November, 1894, appellees began purchasing from Riehl, who was theretofore connected with appellant's business, and from him and other infringing makers, down to November, 1896, when they were enjoined, bought and used 121 gross of the infringing rods. During this time appellees were contesting the validity of Rose's patent in the present case. That the appellees regarded the rods as desirable is shown by their continuous purchase and use of them, through infringing makers, up to the time they were enjoined. Under these facts and conditions, —the appellant manufacturing rods, and maintaining, until the appellees began infringing, a close monopoly, and the appel-

and to recover for loss of profits, or for damages, as they are designated in the statutes and many of the cases, has existed ever since.

This right was not affected by the act of Congress of July 8, 1870, giving courts of equity authority to award damages in equity causes. It remained intact in matters of equitable as well as legal cognizance, though since that act there have probably been but few instances of actions at law for the recovery of the patent owner's profits lost through the infringement, where grounds for equitable interference existed.

b. Measure of damages generally.

The general rule as to the measure of damages for the infringement of a patent is that the patentee is entitled to the actual damages he has sustained by reason of the infringement; and these damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the infringer had not interfered with his rights. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

What an infringer gained from the use of a patented invention is not the proper standard of damages in an action at law for the infringement. *Coupe v. Royer*, 155 U. S. 565, 39 L. ed. 263, 15 Sup. Ct. Rep. 199, *Reversing Royer v. Coupe*, 29 Fed. Rep. 858; *Cassidy v. Hunt*, 75 Fed. Rep. 1012; *McComb v. Brodie*, 1 Woods, 153, Fed. Cas. No. 8,708; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

Nor what the infringer might have made. *McComb v. Brodie*, 1 Woods, 153, Fed. Cas. No. 8,708.

The measure is not what the infringer gained, but what the patentee or owner lost. *Coupe v. Royer*, 155 U. S. 566, 39 L. ed. 264, 15 Sup. Ct. Rep. 199; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Willmantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865; *Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296; *McComb v. Brodie*, 1 Woods, 153, Fed. Cas. No. 8,708.

It is an indemnity to the plaintiff for the actual proximate loss sustained by the infringement. *Lee v. Pillsbury*, 49 Fed. Rep. 747; *Buck v. Hermance*, 1 Blatchf. 398, Fed. Cas. No. 2,082; *Tatham v. LeRoy*, 2 Blatchf. 474, Fed. Cas. No. 13,760; *Royer v. Shultz Belting Co.* 45 Fed. Rep. 51; *Guyon v. Serrell*, 1 Blatchf. 244, Fed. Cas. No. 5,881; *Moote v. Silsby*, 1 Blatchf. 445, Fed. Cas. No. 4,916; *Pitts v. Hall*, 2 Blatchf. 229; *Hall v. Wiles*, 2 Blatchf. 194, Fed. Cas. No. 5,954; *Philip v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Tilghman v. Proctor*, 125 U. S. 137, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Parker v. 51 L. R. A.*

Hulme, 1 Fish. Pat. Cas. 44, Fed. Cas. No. 10,740; *Wintermute v. Redington*, 1 Fish. Pat. Cas. 239, Fed. Cas. No. 17,896; *Ransom v. New York*, 1 Fish. Pat. Cas. 252, Fed. Cas. No. 11,578.

The question being, not what the owner of the patent may have speculatively lost, but what he actually did lose as shown by the evidence. *Royer v. Shultz Belting Co.* 45 Fed. Rep. 51.

And the profits which may be recovered for the infringement of a patent must be the legitimate fruits of that patent; and the patentee of a plow, which patent is infringed, is not entitled to recover as part of his damages any loss sustained by reason of his inability to use another plow, or any other plow than those made under or embodying the patent infringed. *Carter v. Baker*, 1 Sawy. 527, Fed. Cas. No. 2,472.

The resultant profits of an infringement are ordinarily best arrived at by determining the difference between the actual ascertained cost and the actual ascertainable value to the infringer, which value, in case of sales by him, is the price obtained or the market value of the thing sold. Profits contingent upon future bargains or speculations, or future states of the market, cannot be estimated and are not recoverable. *Piper v. Brown*, *Holmes*, 196, Fed. Cas. No. 11,181.

And the measure of damages for the infringement of a patent, in an action at law, is not affected by the act of Congress of July 8, 1870 (U. S. Rev. Stat. § 4921), providing that profits made by an infringer by the use of an invention may be recovered in equity, and, in addition thereto, compensation may be obtained for any direct injury done to the patentee, not fully recompensed by the recovery of the profits realized by the infringer. *Royer v. Shultz Belting Co.* 45 Fed. Rep. 51.

So, the measure of damages for the infringement of a design is the excess of value of the thing to which the design is applied over that of the same thing made in any other way open to the public. *Tomkinson v. Willets Mfg. Co.* 34 Fed. Rep. 536.

And the profits of a patented hotel register when sold, and of the advertisements in it, are included in the damages for an infringement. *Hawes v. Gage*, 5 Pat. Off. Gaz. 494; *Hawes v. Washburn*, 5 Pat. Off. Gaz. 491.

So, in *Page v. Ferry*, 1 Fish. Pat. Cas. 298, Fed. Cas. No. 10,682, which was an action on the case for the infringement of a patent on an improvement in circular saws, the jury were instructed to assess the actual damages that the plaintiff had sustained by the use of his im-

tees, who were users, having for more than three years purchased all their Rose patent rods from him alone, and having thereafter continued to use rods containing the patented device in their business,—it is reasonable to conclude that, if the appellees had not deliberately and wantonly become infringers, and wrongfully trespassed on appellant's patent rights, they would have purchased from appellant the rods they used. Moreover, the law is that in cases of wanton infringement every doubt is to be resolved against the infringer. *Providence Rubber Co. v. Goodyear*, 9 Wall. 803, 19 L. ed. 571. These facts unite to afford substantial, not mere conjectural, grounds on which to base the conclusion that the appellant, by appellees' wrongful acts, lost the sale of these particular rods, and to that extent assuredly was damaged. *Creamer v. Bowers*, 35 Fed.

Rep. 209; *Covert v. Sargent*, 38 Fed. Rep. 237.

The appellees having, then, in fact wrongfully deprived the appellant of the sale of 121 gross of the patented article, the patentee has a right to be reimbursed for all damages resulting therefrom. While finding such was the appellant's right, the master, as we have seen, thought the evidence presented no definite basis on which damages could be assessed. When the facts and circumstances attending this case are considered, it seems to us the master was in this regard in error. The proofs show that the appellant carried on his business in a small way. He was in rented premises. The value of his plant did not exceed \$300. He was an assembler of parts made by others, rather than a manufacturer himself. He had no salesmen, carried no insurance, had

provement during the term of the illegal user, or the amount of the profits actually received by the defendant during the time he ran his mill with the improvement of the plaintiff.

c. As affected by mode of enjoyment of patent.

1. Different rules with relation to.

While the general measure of damages is as above stated, the question as to how and upon what basis the loss of the owner of the patent, due to the infringement, shall be computed and ascertained, is controlled by the mode of enjoyment of the patent which the owner may adopt, each mode of enjoyment giving rise to a different rule of computation.

2. By granting licenses.

a. Application of the rule.

Where the patentee or the owner of a patent has seen fit to exercise his monopoly by selling licenses for the use of his invention for states, counties, or other districts, or of portions of the invention, or has permitted its use upon the payment of royalties, and when there has been a sufficient number of such sales or royalties to establish a regular price or fee, he has himself fixed the average of his actual damage for the use of his invention without a license; and in such case that price, with interest, will be taken as the primary and true criterion of his damages for infringement. *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; *Tilghman v. Proctor*, 125 U. S. 137, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Washington, C. & G. Steam Packet Co. v. Sickles*, 19 Wall. 611, 21 L. ed. 203; *Philip v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Locomotive Safety Truck Co. v. Pennsylvania R. Co.* 5 Bann. & Ard. 514, 2 Fed. Rep. 677; *Sickles v. Borden*, 3 Blatchf. 535, Fed. Cas. No. 12,832; *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Bann. & Ard. 252, Fed. Cas. No. 5,600; *Livingston v. Jones*, 3 Wall. Jr. 330, Fed. Cas. No. 8,414; *Emerson v. Simm*, 6 Fish. Pat. Cas. 281, Fed. Cas. No. 4,443; *Goodyear v. Blahop*, 2 Fish. Pat. Cas. 160, Fed. Cas. No. 5,559; *McCormick v. Seymour*, 3 Blatchf. 209, Fed. Cas. No. 8,727; *Keller v. Stolzenbach*, 37 Pat. Off. Gaz. 564; *Cottler v. Stimson*, 20 Fed. Rep. 906; *May v. Fond du Lac County*, 27 Fed. Rep. 691; *Graham v. Plano Mfg. Co.* 35 Fed. Rep. 597. And see *Creamer v. Bowers*, 35 Fed. Rep. 206, *infra*, V. e.

The amount of an established license fee for 51 L. R. A.

the use of a patented invention is what the patentee loses by the use of the invention in violation of the patent, without a license, and a proper measure of damages for the infringement. *Wooster v. Simonson*, 20 Fed. Rep. 316.

And this was the rule as well after as before the act of Congress of July 8, 1870, empowering courts of equity to award damages for infringement of a patent. *Philip v. Nock*, 17 Wall. 460, 21 L. ed. 679.

The profits lost, when it can properly be done, will be regarded as simply the fee which would have been charged if the infringer had procured a license. *McKeever v. United States*, 14 Ct. Cl. 396.

And if the owner of the patent claims anything above the amount of the established fee, he is bound to substantiate the claim by clear and distinct evidence. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

Thus, the price paid for a license to make a new and useful patented improvement on a steam engine to be used in vessels is a suitable guide as to damages in an action for an infringement of the patent. *Hogg v. Emerson*, 11 How. 587, 13 L. ed. 824.

And the patentee of an improvement upon a reaping machine, which patent is infringed by one who has previously held a license for the use of such patent, under which he has made and sold many hundred machines, but who refuses to pay for the last 300 machines under the belief that the patentee is not the original inventor, suffers no damage beyond the refusal to pay the usual license price, and that is all he can recover. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

So, the measure of damages for the infringement of a patent for an improvement in the machinery of grist mills, the injury to the owner's right consisting, not in using his invention, but in using it without compensating him, since it is to his interest that all mills should adopt and use it, provided they pay the price of a license, was held in *Sanders v. Logan*, 2 Fish. Pat. Cas. 168, Fed. Cas. No. 12,295, to be the price or value of a license; and in such case an account of the profits is not required.

But a license fee, to establish a measure of damages against infringers, must have been paid or secured before the infringement complained of. *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

And a royalty charged for the use of a patent, in order to be binding on a stranger to the licenses which establish it, must be a uniform one. *Westcott v. Rude*, 19 Fed. Rep. 830, 139

no clerical help, and sold, packed, and delivered his finished product himself. His customers were few and solvent. His operations, being simple, afforded a comparatively easy basis for determining operative cost. Moreover, the bulk of the work and all of the stock were done or furnished by other manufacturers at fixed prices. For these items he produced bills, the accuracy of which is not questioned. In this way alone he accounted for \$10.01 of the total manufacturing price of \$10.37, to which he testified. These items were: Tubing, \$7.63; enameling, \$2.16; and springs, 22 cents per gross. The remaining ones were 18 cents for labor, and a like sum for running expenses. This last item, he testified, was a due proportion of his rent and other general expenses, which, as we have seen, were of an unusually simple character. The proofs

show that the labor was done by some three boys, who, while they worked by the day, were able to turn out a known amount *per diem*. The appellant testified that no labor book was kept, and there was therefore no failure on his part to produce any evidence bearing on the cost of labor within his power. It would therefore seem that the figures fixing these two items, to which alone any possible element of uncertainty could attach, were under the proofs reasonably certain; nor was their correctness qualified by cross-examination. But the appellant's affirmative proof on this question does not stand alone. The correctness of the figures testified to by him is strengthened and substantially corroborated by the admitted business operations of the appellees, as well as by their omission to use means within their power to contradict them, if, indeed,

U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

Though in fixing a patent fee as a measure of damages in an action on the case for infringement of a patent, if the owner has accepted small fees in particular cases for the purpose of introducing his invention to public notice, that fact should be taken into consideration by the jury. *Sickels v. Borden*, 3 Blatchf. 535, Fed. Cas. No. 12,832.

And it must relate exclusively to the patent claimed to be infringed, in order to be taken as a measure of damages therefor. *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

License fees for the use of a patent and another patent, blended together, will not establish a royalty as to either patent, which can be used as a measure of damages for infringement. *Ibid.*

And an established license fee for the use of an entire invention secured by six claims of a patent is not a correct measure of damages for an infringement of only part of such claims. The inquiry in such case is, What is the value of the right invaded and the extent of the injury? *Wooster v. Simonson*, 16 Fed. Rep. 680; *New York & C. S. S. Co. v. Harrison*, 16 Fed. Rep. 681.

And a clause in a license requiring that a specified royalty shall be paid for every article containing any of the patented improvements affords no proof—or at least no conclusive proof—against an infringer that he should be required to pay the entire royalty named in the license, for infringing only one of two or more claims of a patent, unless the one infringed be shown to be the only claim which has any value, or unless the different claims are substantially the same. *Westcott v. Rude*, 19 Fed. Rep. 880.

But a license fee for a whole machine is a fair measure of damages for infringement of a patent thereon, where the fee covered the right to use the whole of the six claims of the patent, while the infringement was only of the first and third claim, and the second, fourth, and fifth claims were merely structural, indicating only certain specific forms within which the invention could be worked, and the sixth claim related to the organization of instrumentalities which enabled the machine to stop under certain circumstances, and worked independently of other claims, and no allowance was made therefor. *Willmantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865.

So, in *Bell v. Daniels*, 1 Bond, 212, Fed. Cas. No. 1,247, it was said that there are no doubt cases in which the license price of a patent may 51 L. R. A.

be the criterion of damages in an action for infringement, but there are few instances in which, where the invention is pirated, the patentee ought to be concluded by a former offer to sell.

The burden of proof rests with the complainant in an action for the infringement of a patent to show a license fee charged by him for the use of his invention, as such damages are not presumed, but must be proved. *Robertson v. Blake*, 94 U. S. 728, 24 L. ed. 245; *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

b. What sufficient to constitute an established fee.

To constitute an established fee for the use of a patented invention, which will serve as a measure of damages in case of infringement, it must have been paid by such a number of persons as to indicate a general acquiescence in its reasonableness. *Rude v. Westcott*, 180 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463.

To be binding on a stranger or infringer, sales of licenses for the use of a patent must be sufficient in number to establish the fee or royalty charged for the use of the patent as its market value. *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

Proof of a single license given for the making, using, and vending of a patented improvement cannot be regarded as affording the only measure of compensation to which the owner of the improvement is entitled, in an action for an infringement of the patent by making, using, and vending the patented improvement, so as to prevent a resort to general evidence as a basis of decision. *Judson v. Bradford*, 3 Bann. & Ard. 539, Fed. Cas. No. 7,564; *Westcott v. Rude*, 19 Fed. Rep. 830.

And an assumption of the judge in a former infringement case, that \$3 for a machine, which was what the owner of the patent had granted one license for on certain conditions, would most nearly approximate the damages to which the complainant was entitled, is not sufficient to establish a customary charge or royalty in a subsequent case, where the owner of the patent did not acquiesce, but contended for a larger sum on the next opportunity. *Graham v. Plano Mfg. Co.* 35 Fed. Rep. 597.

Nor is a rescinded contract for a license to use a number of inventions upon the payment of a royalty a measure of damages for the infringement of a part of such inventions. *Bussey v. Excelsior Mfg. Co.* 1 McCrary, 161, 1 Fed. Rep. 640.

And sales of licenses made at periods years

successful contradiction was possible. If the cost of his manufacturing operations was falsely understated by Rose, the appellees had it in their power to have contradicted him by Riehl, who had been connected with Rose in his business, who was cognizant of the cost of Rose's manufacturing, as well as of his own subsequent independent work. As a conjoint infringer with Hirsh, he was presumably hostile to Rose. Not only did they fail to call him, but they failed to call other manufacturing infringers whose output they bought, who certainly knew the actual cost of making similar rods. The fact that appellees bought like rods from those manufacturers at \$7 and \$8 per gross affords convincing corroboration that the cost of \$10.37, testified to by Rose, was correct.

The facts we have stated being in evidence,

apart will not establish any rule on the subject, or determine the value of the patent. *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888, 9 Sup. Ct. Rep. 463.

And evidence as to the sale of licenses to use a patented invention in three instances, the price in only two being given (one of which was a sale made before the reissue of the patent), and all being more than ten years before the infringement alleged, not a single sale or license during such ten years being shown, though the appliance was on the market,—is not sufficient to establish a market value of the patent, which will operate as a measure of damages or warrant a recovery. *Houston, E. & W. T. R. Co. v. Stern*, 20 C. C. A. 568, 41 U. S. App. 309, 74 Fed. Rep. 630.

So, no price can be said to be fixed or royalty established for the use of a patent, which will preclude the estimation of the loss of profits as damages for an infringement, where the patentee varies his price according to the courage or ability of the infringer to resist or where there are other circumstances showing the absence of a fixed and established fee. *Matthews v. Spangenberg*, 14 Fed. Rep. 350.

And a fixed license fee or an established royalty is not shown in an action for the infringement of a patent for an improvement on a furnace, by sales of the right to use the improvement, where two thirds of those who took the licenses did so after suit was commenced against them, and they became liable to be stopped in their business by an injunction, and the prices therefor varied from \$100 to \$2,500, and none of the licenses given expressed any limitation as to the amount of business to be done under it. *Black v. Munson*, 14 Blatchf. 285, Fed. Cas. No. 1,463.

And evidence that the owner of a patent for a safe lock had successfully prosecuted infringers, and that a settlement had been arrived at with one of them at \$20 per lock, and with another at \$6.66 per lock, and, if he manufactured more than seventy-five per year, at \$10 per lock, one third of such royalties to be allowed to the patent in suit, is not sufficient to establish a license fee which can properly be taken as a measure of actual damages in an action for infringement. *Greenleaf v. Yale Lock Mfg. Co.* 17 Blatchf. 253, Fed. Cas. No. 5,783.

Nor is evidence in an action for the infringement of a patent, that the owner had instituted ten or eleven suits against infringers, and in all cases except one a settlement was made between the parties, in some instances before and in others after a decree, by a payment of 51 L. R. A.

the master was fully justified in finding, as we do, and especially so in the absence of all counter proof by the appellees, that the appellant, by the appellees' wrongful impairment of his sales, was damaged to the extent of the difference between the cost price of \$10.37 and the selling price established as between these parties, viz., \$24. This, on the 121 gross wrongfully used, was \$1,649.23. On this sum interest should be allowed from May 31, 1898,—the date of the filing of the master's report. *Tilghinan v. Proctor*, 125 U. S. 161, 31 L. ed. 672, 8 Sup. Ct. Rep. 894.

It is therefore ordered that the decree of the court below be reversed, and the record remanded, with directions to enter a decree in favor of the appellant, together with interest from May 31, 1898, and costs on the bill, accounting, and this appeal.

\$50 for each infringing machine sold or used by the respective defendants. *Cornely v. Marchwald*, 32 Fed. Rep. 292.

Nor is an established royalty for the use of a patent, which can be used as a measure of damages for an infringement, shown by proof of five instances in which the owner had received compensation for the violation of his patent, in four of which suit had been brought, and the settlement was not only for future use, but included past damages and a discontinuance of the suits; and in only two was there any actual payment and a formal license granted to continue the use of the infringing apparatus; and, of the remaining three, two settled by surrendering their infringing apparatus and purchasing others from him, and one simply turned over the infringing machine and paid past damages; and in the instances where there was a money settlement different amounts were paid. *Matthews v. Spangenberg*, 14 Fed. Rep. 350.

So, licenses for the future, given wholly or partially in consideration of a settlement for infringements of a patent, are held in *Gottfried v. Crescent Brewing Co.* 22 Fed. Rep. 433, not to be admissible in evidence against a stranger in an action for an infringement, to show the establishment of a license fee or royalty which will operate as a measure of damages.

It is competent for a patentee in an action at law for infringement of a patent, in order that the jury may measure his damages, to prove the contract price at which licenses have been granted under his patent while it was in force. But in order to be competent, the price agreed on must have been fixed with regard to future use. It is not competent to prove the prices paid for infringements, or in settlement of infringements already committed. *United Nickel Co. v. Central P. R. Co.* 36 Fed. Rep. 186; *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.* 19 Fed. Rep. 614.

In order to be competent as evidence of value, the price agreed upon must have been fixed with regard to future use when there was no liability between the parties, and when they are presumed to have acted voluntarily and to have made up their minds deliberately as to what was a fair price. *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.* 19 Fed. Rep. 614.

Proof of license fees charged and paid before use, for the right to use an invention, is admissible in an action for infringement, upon the same theory that proof of sales, in open market, of any marketable commodity is competent, because it shows or tends to show a market price. But settlements for past use of

an invention cannot be brought within the rule, because inconsistent with the principles upon which it rests. *Westcott v. Rude*, 19 Fed. Rep. 880.

And a license fee to fix the average of damage for infringement of a patent should be established before the case in which it was sought to be used was commenced, and cannot be claimed as such where it was granted pending the suit. *Graham v. Geneva Lake Crawford Mfg. Co.* 24 Fed. Rep. 642.

A license fee or royalty established after the infringement of a patent is evidence of the value of the patented invention, but not as an absolute test of value. Whether the situation was such that the value was equal to the license fee before the latter became established is a question of fact for the master, and the weight of the evidence is for him. *Wooster v. Thornton*, 26 Fed. Rep. 274.

So, a patentee cannot, by inserting in his licenses a stipulation for a certain royalty, with a proviso that half that sum shall be received in full in case of prompt payment, acquire a right to demand the entire sum of an infringer. *Westcott v. Rude*, 19 Fed. Rep. 830.

And a contract for royalties for the use of a patented invention, containing numerous conditions intended to secure the introduction of the invention to the public notice and use, and providing for the return to the purchaser of certain proportions of the royalty upon the happening of certain contingencies, cannot be deemed to establish an unqualified license fee, which will fix the average of actual damages for an infringement. *Graham v. Geneva Lake Crawford Mfg. Co.* 24 Fed. Rep. 642.

And a royalty of \$5 for the use of a patented machine, which is subject to be reduced to \$3 if the purchaser performs his contract, will be taken as establishing an average of damage for infringement of \$3 and not of \$5. *Ibid.*

Nor is a sum paid or agreed to be paid by a licensee for a patent, a price at which those who wish to use it can obtain a right to do so, or which would constitute a royalty, or market price or value, in an action for its infringement, where the plaintiff thereby parted with his whole property and right therein, thus depriving himself of the right to fix the price, before the infringement complained of. *Bell v. United States Stamping Co.* 32 Fed. Rep. 549.

Such a transfer is not the establishment of an ordinary license fee or royalty which will furnish a measure of damages in an action for an infringement, unless it is shown that the licensees were deprived of the sale of the number of machines which the infringer manufactured and sold under the patent. *La Baw v. Hawkins*, 2 Bann. & Ard. 564, Fed. Cas. No. 7,961.

So, it cannot be assumed or inferred that a license fee agreed to be paid relates alone to the use of the patent in question, when the contract upon its face discloses other considerations and inducements for the payment of the royalty, so as to warrant using the fee thus paid as a measure of damages for infringement. *Adams v. Bellaire Stamping Co.* 28 Fed. Rep. 360.

And proof of a license fee charged for two improvements in fruit driers is not competent, in an action for infringement of a patent, to show the damages sustained by an infringement of one of those improvements. *Hunt Bros. Fruit Packing Co. v. Cassidy*, 3 C. C. A. 525, 7 U. S. App. 424, 53 Fed. Rep. 257.

But proof that a patentee whose patent secured to him the exclusive privilege of making men's and boys' clothing of vulcanized rubber sold the exclusive privilege for \$10,000 and 5 cents on every square yard of rubber cloth made, 51 L. R. A.

and that the purchaser sold to another for \$25,000, the latter to pay the tariff, is sufficient to furnish a measure by which damages for infringement can be accurately determined without resorting to evidence of profits. *Goodyear v. Bishop*, 2 Fish. Pat. Cas. 154, Fed. Cas. No. 5,550.

And a license fee charged for the use of a patent is sufficiently certain to be used as a measure of damages for an infringement, where it was adhered to uniformly under ordinary circumstances, and many licenses were taken at that rate, and it was never departed from except where the licenses arose from the settlement of suits for or controversies about infringements. *Asmus v. Freeman*, 34 Fed. Rep. 902.

It is not important that a larger or smaller sum was demanded and paid under special circumstances. *Ibid.*

So, the rule, that where less than the whole number of claims of a patent has been infringed evidence must be adduced to show the value of the part infringed, is inapplicable where the claim infringed embraces the whole invention and the other claims are simply structural. *Asmus v. Freeman*, 34 Fed. Rep. 902.

And a royalty which had been received for a patent for an improvement in a drying apparatus embraced in two claims is not subject to objection as evidence of damages in an action for an infringement of the patent, on the ground that the royalty was for the entire machine, including both claims, and that no attempt was made to segregate the amount due to each, where the evidence tends to show that the royalty was for the second claim of the patent alone, and that the improvement covered by the first claim was not only valueless, but a detriment to the machine, as under such testimony the jury can properly apportion all the damages to the second claim. *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585.

Nor are license fees for the use of a patented process for making springs rendered inadmissible in evidence to furnish the basis of an established license fee, in an action for infringement of a patent, by the fact that one of the licenses was granted but a short time before the commencement of the action and the other during its pendency, and that both licensees had infringed, one to a limited extent, and the other to a greater extent, where neither, upon paying for the infringement, was bound to take a license for the future, and there is nothing which casts the slightest doubt on the good faith of either transaction, and they seem to have been a fair business arrangement, and the amount of royalty charged seems to be a reasonable and just rate. *Cary v. Lovell Mfg. Co.* 37 Fed. Rep. 654.

So, *Emigh v. Baltimore & O. R. Co.* 5 Fed. Rep. 284, holds that where a patent for an improvement in railroad-car brakes, which is valuable to the patentee only as he can induce railroads to use it and pay for its use, and which is worth nothing to him as a monopoly, was infringed, in view of the great difficulty of proving with exactness the profits which accrued thereon to the infringer, a license fee existing during the latter portion of the life of the patent will be taken as the measure of compensation least likely to do injustice to either party, though it did not exist during a part of the period of the infringement.

And in *Bates v. St. Johnsbury & L. C. R. Co.* 32 Fed. Rep. 628, which was an action for the infringement of a patent for an improvement in railroad-car platforms, couplers, and buffers, in which it appeared that the patentee had a

regular price of \$100 per car for the right to use his improvements, but that he was in the habit of authorizing the makers of cars to put his improvements upon them, and collecting for their use afterwards, and that he sometimes varied the price according to special circumstances, and that the use of the infringer was for but a small part of the term of the patent, a finding by the referee of an allowance of \$50 per car as the fair market value of the damage to the patentee by the infringement was held conclusive.

A royalty, however, paid for the transfer of the right to use an invention and to sell the right to use it, is not a criterion of the value of an ordinary selling right. *Colgate v. Western Electric Mfg. Co.* 28 Fed. Rep. 146.

And a royalty paid for the whole monopoly of selling and manufacturing under a patent is not sufficient evidence of the value of the right to make occasional sales thereunder in a particular territory. *Ibid.*

Nor is the royalty paid by licensees for the right to use an invention evidence of damages sustained by the patentee from the sale of the patented article, sufficient to authorize a recovery, since the value of some patents consists principally in the right to use the invention, and the value of others in the right to sell; and infringement by selling and infringement by use of the patented articles are essentially different invasions of the patentee's property. *Ibid.*

c. Right to base fee on utility.

The doctrine was adopted in a number of the earlier cases, that where the sales of the right to use a patent have been too few to establish a criterion of their actual or market value, to get at a fair measure of damages or an approximation to it, general evidence must be resorted to, and the utility and advantage of an invention over the old modes or devices that have been used for working out similar results are pertinent and appropriate as a criterion by which to ascertain the measure of damages. *McKeever v. United States*, 14 Ct. Cl. 396; *Lee v. Pillsbury*, 49 Fed. Rep. 747; *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585; *Cassidy v. Hunt*, 75 Fed. Rep. 1012; *Suffolk Mfg. Co. v. Hayden*, 3 Wall. 815, 18 L. ed. 76.

And that in fixing the amount of the damages the jury may take into consideration the value and utility and advantage of a patented machine over other machines calculated to accomplish the same results, and ascertain the value from all the evidence as to its character, operation, and effect. *Lee v. Pillsbury*, 49 Fed. Rep. 747.

And that in such case the determination of the amount is within the province of the jury. *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585.

The measure of damages for infringement of a patent, adopted in those cases, was the fair and reasonable value of a license to manufacture and use the patented article, being such a royalty as it might reasonably be presumed the infringer would have been willing to pay and the owner to accept if the matter at the outset had gone to an express agreement. And where no established license fee appeared, and all the evidence of value had been offered by the claimant that the nature of the case admitted of, the court determined the amount of royalty, in the absence of evidence with reference thereto on the part of the defendant, by a consideration of the manufacturer's price of the patented article, and the percentage which ordinarily constitutes a fair royalty, and the judgment of experts familiar with sales and licenses for simi-

lar articles, and the prices paid by individuals for licenses under the patent in question. *McKeever v. United States*, 14 Ct. Cl. 396; *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585.

Thus, the jury in an action to recover a royalty for the use of a patented invention for an improvement in dump cars should determine what would have been a reasonable royalty for the infringer to pay for the use of the cars in question, at so much per car; and in determining this point, the utility and cheapness of operation or use of the cars in question as compared with other things known or used at or prior to the time of the alleged infringement, and the saving, if any, to the infringer by the use of such cars, should be their leading guides. *Ross v. Montana Union R. Co.* 45 Fed. Rep. 424.

So, the jury in an action at law for the infringement of letters patent for an improvement in feed water-heaters for steam fire engines, by using the patent attachment on an engine, where there was no evidence of any license fee ever having been demanded or paid by anyone, should consider the utility and advantage to the defendant of the use of the patented device as compared with any other means of obtaining similar results, which were open to the defendant's use, and the cost of using one as compared with the cost and saving of the use of the other, and from such data ascertain, in the exercise of a sound judgment, what would be a fair compensation to the complainant for the damages sustained by reason of the defendant having infringed, instead of purchasing the right to use, the invention. *Brickill v. Baltimore*, 8 C. C. A. 500, 8 U. S. App. 503, 60 Fed. Rep. 98.

In *Coupe v. Royer*, 155 U. S. 566, 39 L. ed. 264, 15 Sup. Ct. Rep. 199, however, it was held that where the evidence in an action for the infringement of a patent discloses the existence of no license fee and no impairment of the market of the owner of the patent, nominal damages only should be awarded.

This case was not deemed by the court in *Cassidy v. Hunt*, 75 Fed. Rep. 1012, *supra*, to affect the rule above stated, it being there said by McKenna, J., that *Coupe v. Royer* does not purport to reverse prior cases, but that it assumes a rule to be well established, and must therefore find its explanation in confining its language to the precise action of the lower court, which told the jury that it was an inference of law that what the defendant gained the plaintiff lost, and, thus confined in effect, it is not antagonistic to *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585, *supra*, as the latter only decides that what would be a reasonable royalty may be established by evidence.

But in *Seattle v. McNamara*, 26 C. C. A. 652, 48 U. S. App. 372, 81 Fed. Rep. 863, it was held that where an invention had not been used except by the patentee, and the right to use it had not been sold to anyone, it cannot be said that a market for the invention has been created which could be the subject of impairment by the act of an infringer.

And that no recovery can be had for the infringement of a patent for an improvement in spark arresters by using the patented machine without a license, in the absence of evidence of impaired market or other damage to the owner of the patent resulting from the infringement, except evidence of three sales of the right to use, made a long time before, which were not sufficient to establish a market value of the patent—was held in *Houston, E. & W. T. R. Co. v. Stern*, 20 C. C. A. 568, 41 U. S. App. 309, 74 Fed. Rep. 686.

And in *Seattle v. McNamara*, 26 C. C. A. 552, 48 U. S. App. 372, 81 Fed. Rep. 863, *supra*, it was said that the particular doctrine laid down in *Coupe v. Royer*, 155 U. S. 565, 39 L. ed. 263, 15 Sup. Ct. Rep. 199, *supra*, that there is no remedy at law for the infringement of a patent, unless the plaintiff shows actual damages to himself, or shows that prior to the act of infringement a sufficient number of sales of the patented invention or of the right to use the same had been made at a settled price, to establish a royalty or a market price for the use of the invention, so that by the act of the infringer his market had been injured,—in effect disaffirms the doctrine in *Hunt Bros. Fruit-Packing Co. v. Cassiday*, 12 C. C. A. 316, 29 U. S. App. 116, 64 Fed. Rep. 585, holding in effect that, in the absence of an established royalty and of data from which the value of a royalty can be calculated with mathematical certainty, damages in that class of cases are calculable upon such evidence as it is in the nature of the case to produce.

So, in *Parker v. Bamker*, 6 McLean, 631, Fed. Cas. No. 10,725, which was an action for damages for the infringement of the plaintiff's patent in using his percussion water wheel for mills, in which an estimate was made on the amount of lumber which could be sawed in parts of a year in such a mill, one fourth of the proceeds was allowed to go for the expense of the mill, one fourth to keep it in repair, one fourth for the hire of a sawyer, and one fourth for profits, and a verdict and judgment were rendered for the amount thus estimated for profit. But in this case there was no opposition and no objections were raised.

B. By holding close monopoly.

a. Application of the rule.

Where the owner of a patent has availed himself of his exclusive patent by keeping his invention a monopoly and granting no licenses, the difference between his pecuniary condition after an infringement and what his condition would have been if the infringement had not occurred is to be measured, so far as his own sales are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with his monopoly, and the money he did receive from such sales; and if such difference can be ascertained by proper and satisfactory evidence, it is the proper measure of his damages. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. ed. 954, 6 Sup. Ct. Rep. 934, affirming 17 Blatchf. 244, Fed. Cas. No. 12,367; *Covert v. Sargent*, 38 Fed. Rep. 237; *Tatham v. Le Roy*, 2 Blatchf. 474, Fed. Cas. No. 13,760; *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192.

And in such case the jury may inquire how many customers were diverted from the owner to the infringer, whether the owner was prepared to supply the market and was prevented by the infringer, and whether by the competition of the infringer he was limited, hindered, or interfered with in his business or otherwise actually damaged in a sum equal to the profits which he could have made if he had made and sold the goods made and sold by the infringer, over and above what he did in fact make and sell. *Goodyear v. Bishop*, 2 Fish. Pat. Cas. 154, Fed. Cas. No. 5,559.

And in order to ascertain the profits which would accrue to a patentee of an improvement upon a machine which he is engaged in manufacturing, the cost of the materials and labor, and the interest on the capital used in the manufacture, and the expense to which the manufacturer is subjected in putting it into market,

such as that of agencies and transportation and insurance, are to be taken into consideration, as well as an allowance for bad debts, and the aggregate sum of the cost is to be deducted from the price paid by the purchaser, the balance being the net profit on each machine. *Seymour v. McCormick*, 16 How. U. S. 480, 14 L. ed. 1024; *McComb v. Brodie*, 1 Woods, 153, Fed. Cas. No. 8,708.

Where a patentee does not vend the rights under his patent, or avail himself of the proceeds of sales of his mere patent right, but uses the patented invention exclusively himself, and to furnish the products to the community out of his own manufactory or establishment, if the patent is for an entire machine the patentee is entitled as damages for infringement to the profits he could have made in the construction and vending of the machine over and above the mere profits arising out of the manufacture. *McCormick v. Seymour*, 3 Blatchf. 209, Fed. Cas. No. 8,727.

And his measure of damages for the infringement is all the advantages of the use of his patented improvement, excluding the profits of the manufacture, and excluding also the value, if any, of the use of the old machine. *Ibid*.

A patentee can recover as damages in an action at law for an infringement the market value of the use of his invention, except in cases where by the mode of enjoyment of the monopoly he has himself established such market value by granting the use of the invention to the public for prescribed royalties or license fees. *Royer v. Shults Beiting Co.* 45 Fed. Rep. 51; *Whittemore v. Cutter*, 1 Gall. 478, Fed. Cas. No. 17,600.

Thus, the measure of damages for the infringement of a patent for an article of manufacture is the profits which the patentee is deprived of on account of the manufacture and sale of the article by the infringer. *Putman v. Lomax*, 10 Biss. 546, 9 Fed. Rep. 448.

So, the rule of damages in an action for the infringement of letters patent for an improvement in the construction of cook stoves is to give the actual loss sustained, which would be the ordinary profits the patentee derives from the sale of his stoves, computed on the number of stoves manufactured and sold by the infringer. *Buck v. Hermance*, 1 Blatchf. 398, Fed. Cas. No. 2,082.

And the damages which may be recovered in an action at law by the owner of an improvement in spark arresters, against one who used his improvement without his license, are not confined to actual damages, and proof is not confined to sales to other parties, or to evidence of an established license fee. *Houston, E. & W. T. R. Co. v. Stern*, 20 C. C. A. 568, 41 U. S. App. 300, 74 Fed. Rep. 636.

So, the damages for an infringement suffered by the owner of a patent upon a mirror, which gave him a monopoly of sale of such mirrors in the United States, is the loss which he sustained by the diversion of trade which he would have enjoyed if the infringer had not supplanted him in the market, and his consequent loss of profit on such trade. *Hall v. Stern*, 20 Fed. Rep. 788.

And the owner of a patent for the manufacture of horseshoe nails, who did not grant licenses, but himself manufactured and sold the nails made by his patented machinery, is entitled to recover substantial damages from one who manufactured a quantity of nails in such a manner as to infringe his patent, the measure of which is the amount of profit which he would have made if he had himself made and sold the nails made and sold by the infringer, with a deduction of a fair percentage for sales due to the increased activity of trade produced

by the rivalry of the two competitors. *United Horse-Shoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561.

So the owner of a patent for an improvement in saws, consisting in providing the saws with a series of holes corresponding with the wear of the teeth, to facilitate dressing or filing, was held in *American Saw Co. v. Emerson*, 8 Fed. Rep. 806, to be entitled as damages for infringements for all the saws sold by the infringer, to the difference between the owner's cost and selling price of an equal number of saws, where the patented saw was the only perforated saw.

And the measure of damages for the infringement of a patent for an invention employed in a stone-crushing machine by the use of the invention in a different machine is the sum the owner of the patent would have realized from his invention if the infringer had bought a stone-crushing machine of him, instead of procuring a different crusher. *Blake v. Greenwood Cemetery*, 21 Blatchf. 222, 16 Fed. Rep. 676.

And the measure for the infringement of a patent which the owner did not make a practice of selling, but let out the patented article at a rental or royalty, in an action in which an inquiry as to damages is directed, is the profit of the rental of the article during the entire period from the time when it came into the possession of the infringer until the date of the assessment of the damages or of its surrender; and it is immaterial, for the purpose of the assessment, whether it had been in actual use during all of that period or not. *United Telephone Co. v. Walker*, 56 L. T. N. S. 508.

So, in *Brodie v. Ophir Silver Min. Co.* 5 Sawy. 608, Fed. Cas. No. 1,919, it was held that the damages in an action at law for the infringement of a patent for an improvement to a barrel for amalgamating gold and silver ores are to be determined by the value of the use of the infringing barrels after the issue of the patent. But the question in the case was as to the power of the court to increase the actual damages.

A patentee of an improvement in the bearings or bushes for the shafts of screw and submerged propellers, however, who is himself the manufacturer, but who has been in the habit of occasionally licensing the use of his invention to other manufacturers on payment of a fixed royalty for each machine, is entitled to claim on recovery against an infringing manufacturer the amount of his ordinary royalty by way of damages only. He is not entitled, in addition thereto, to a manufacturer's profit, though the rule might be different if he had been in the habit of charging infringers with a higher royalty than ordinary licensees. *Penn v. Jack*, L. R. 5 Eq. 81, 37 L. J. Ch. N. S. 136.

b. Establishment of loss of sales.

A patentee who enjoys his monopoly by manufacturing and selling the patented device without granting licenses must, in order to establish the amount of his loss of profits growing out of an infringement, show by satisfactory evidence to what extent the competition of the infringer has diverted sales which he would otherwise have made himself. *Covert v. Sargent*, 38 Fed. Rep. 237.

The presumption is that if an infringer had not been wrongfully concerned in the manufacture, the persons who purchased the manufactured article of him would have purchased from the owner of the patent. *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192; *Tatham v. Le Roy*, 2 Blatchf. 474, Fed. Cas. No. 13,760.

But the mere fact that sales were made by an infringer of a patent of the patented article does not raise a presumption, without more, 51 L. R. A.

that such sales were lost to the owner of the patent. *Bell v. United States Stamping Co.* 32 Fed. Rep. 549.

And it is for the plaintiff in an action for infringement of a patent to establish by satisfactory evidence that he would have sold more of the patented articles than he did sell, if the infringing articles had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the distinctive patented feature of the patented article. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

Where there is no license fee for the use of a patent, and no price fixed for royalty, the plaintiff in an action at law for an infringement is required to give some data which will enable the jury to approximate the amount of damage sustained thereby. *Lee v. Pillsbury*, 49 Fed. Rep. 747.

And the burden of proof rests with the plaintiff in an action for infringement of a patent, to show the amount of damages he has suffered, and to furnish the jury with reasonably satisfactory evidence to enable them to reach a conclusion on the subject. *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.* 19 Fed. Rep. 514.

And the owner of a patent cannot recover for an infringement the profits he would have made had he made the sales made by the infringer, where he does not show that he would have had an opportunity to make such sales if the infringer had not made them. *Roeizer v. Simon*, 31 Fed. Rep. 41.

And a patentee of an improvement upon a machine, which patent is infringed, is not entitled to measure his damages by the amount of profits he would have made if he had constructed and sold all the machines which the infringer constructed and sold, where there is no evidence to show that the patentee would have constructed and sold any more than he actually did, if it had not been for the infringement. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1,024.

It must appear that he had the ability and would have sold his machine to the purchasers who bought of the infringer. *Tatum v. Gregory*, 31 Fed. Rep. 446.

And the owner of a patent cannot recover, in an action for its infringement, for loss sustained by him by reason of the diversion of sales which he would have made but for the sales made by the infringer, where he fails to give evidence showing the cost of his patent, thus furnishing no basis for the computation of his loss of profits. *Cornely v. Marckwald*, 32 Fed. Rep. 292.

So where the infringer of a patent places the infringing article on the market at such a low price as to drive the patented article out of the market and leave the infringer a very small margin of profit, it cannot be said that the owner of the patent would have sold his higher-priced article to the persons who bought the cheaper articles from the infringer. And the damages in such case should not be fixed at the amount of profits the owner would have made on the number of articles sold by the infringer. *Jennings v. Rogers Silver-Plate Co.* 105 Fed. Rep. 967.

Nor is the owner of a patent on a mirror, which gave him a monopoly of the sale of such mirrors in the United States, who sold principally to retailers, which patent was infringed by a retailer who imported similar mirrors and sold them at greatly reduced prices, selling three times as many as he had formerly sold during the same period, making no profits, entitled to recover damages on the theory that he lost the

sale of all the mirrors imported and sold by the infringer during the period in question, as under the circumstances it does not follow that he would have sold such mirrors to the same customers or to retail merchants. *Hall v. Stern*, 20 Fed. Rep. 788.

And evidence that the owner of a patent for an improvement in composite pavements lost valuable contracts through the competition of an infringer, and of the amount of profits which he lost in consequence thereof, is not admissible in an action for the infringement, where it appears that the owner of the patent charged no more for its pavements with the improvement than for those without. *Vulcanite Paving Co. v. American Artificial Stone Pav. Co.* 36 Fed. Rep. 378.

So, recovery of the full amount of profits which a patentee would have made had he sold all the goods that an infringer of the patent for an improvement in clasps of thimbles for hitching devices had made, was held to be improper, in *Covert v. Sargent*, 38 Fed. Rep. 237, where it was impossible to determine from the testimony how many thimbles the complainant would have sold if the defendant, instead of selling the thimbles of the patentee, had confined himself to selling other fastening devices which he was at liberty to sell.

And *Everest v. Buffalo Lubricating Oil Co.* 31 Fed. Rep. 742, holds that the owner of a patent on a process for testing oil, who did not himself manufacture oil or in any way use the patented improvement, cannot recover for an infringement on the theory that he had lost the profits on sales he would have made if the infringer had not unlawfully sold goods in which the improved process had been used.

And in *Magic Rifle Co. v. Douglas*, 2 Fish. Pat. Cas. 830, Fed. Cas. No. 8,948, which was an action for damages for the infringement of letters patent for an improvement in the manufacture of rifles, the court, in charging the jury as to the measure of damages, directed them to inquire whether or not they were satisfied that the plaintiffs were prevented from selling the number of boxes of rifles that was sold by the defendants, and that, if they were, the plaintiffs had the right to recover the amount of profits of which they were deprived by the defendant's sales.

A patentee who elects to enjoy his monopoly of manufacturing and selling under the patented device without granting licenses, however, whose patent is invaded by another selling in competition with him, is not required, in order to recover the profits he would have made but for such competition, to show by direct evidence that he would have made all or some part of the sales which were made by his competitor; but he must prove facts and circumstances which legitimately create the presumption that he would have made the sales himself, had it not been for the sales of the infringer. *Covert v. Sargent*, 38 Fed. Rep. 237.

The object of an inquiry in an action for the infringement of a patent in such case is the quantity of the injury done to his trade by the illegal use of the infringer, and this must always be more or less a matter of estimate, since it is not possible to ascertain with mathematical precision what in the ordinary course of business would have been the amount of his profits. *United Horse-Shoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561.

And evidence in an action for infringement of a patent under which the patentee manufactured and sold the patented device without granting licenses, that certain of his customers stopped buying the patented device of him after the infringer offered it at a reduced price, and then became and continued customers of the 51 L. R. A.

infringer, is sufficient at least to authorize the presumption that the patentee lost the sales made by the infringer to such purchasers. *Covert v. Sargent*, 38 Fed. Rep. 237.

And where a car manufacturing company was a customer of the owner of a patent for an improved mode of constructing ventilating and hot-air registers for railroad cars, purchasing a large number of registers, and afterwards became infringers of the patent, but continued to make some purchases from the owner of the patent, it is a proper assumption that had it not been for the infringement it would have purchased of the patent owner, all the registers made and used by it, which will warrant a recovery in an action for the infringement, for the loss of the profits which would have been realized from such purchase. *Creamer v. Bowers*, 35 Fed. Rep. 206.

So, where a patent upon a mirror, giving the owner a monopoly of the sale of such mirrors in the United States, is infringed by one who had formerly purchased of the patent owner, by importing similar mirrors and selling them at a greatly reduced price without making any profit, it may be reasonably assumed that the infringer would have continued to deal with the owner of the patent as he had been accustomed before the infringement; and the amount of his annual purchases in the past may be taken as a fair criterion of the probable purchases in the future had it not been for the infringement; and damages for the loss of profits which would have accrued on such sales are recoverable. *Hall v. Stern*, 20 Fed. Rep. 788.

And a verdict for \$2,000 in an action at law for damages for infringement of a patent for a writing fluid will be permitted to stand, though there was no proof of the cost of the manufacture of the fluid or of the selling price, where it appears that the sales were highly profitable, and that the infringer had manufactured and sold very large quantities, and had prepared large quantities of labels and sold many of them, and the defendant made no effort to make the amount of damages reasonably certain, as he might have done by evidence on his part. *Stephens v. Felt*, 2 Blatchf. 37, Fed. Cas. No. 13,368.

The plaintiff in such an action ought not to be held to the most explicit and exact proof of the amount of profits which he would have made but for the infringement, and of damages sustained, where the defendant prefers to leave the matter to general inference and the estimate of the jury, when he might make it reasonably certain by evidence on his part. *Ibid.*

What a patentee would have made if an infringer had not infringed his rights is a question of fact, and not of law. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

And the question whether, if it had not been for the infringement of a patent, the owner would have sold more of the patented articles than he did sell, and what profits he would have made on them, is one of fact. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

See also *Zane v. Peck Bros.* 13 Fed. Rep. 475; *Dobson v. Dornan*, 118 U. S. 10, 30 L. ed. 63, 6 Sup. Ct. Rep. 946; *Cornely v. Marckwald*, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 744; *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248; *Dobson v. Hartford Carpet Co.* 114 U. S. 439, 29 L. ed. 177, 5 Sup. Ct. Rep. 945; *Maier v. Brown*, 17 Fed. Rep. 738, *infra*, V. c.

As to apportionment of profits lost between patented and unpatented features, see *infra*, IV. c. 3, f.

a. Establishment of reduction of price.

Reduction of prices on a patented article, and

consequent loss of profits, enforced by the competition of an infringing article, constitute proper ground for awarding damages for the infringement, where it is shown that the reduction was directly and solely caused by the infringement. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 20 L. ed. 954, 6 Sup. Ct. Rep. 934, Affirming 17 Blatchf. 244, Fed. Cas. No. 12,367; *Boesch v. Graff*, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378.

And in determining the damages suffered from the infringement of a patent for an article which was a subject of sale, the prices which the owner of the patent sold at before the infringer came into the market as a competitor, together with the fact of the reduction of prices caused by the competition, should be taken into consideration. *Smith v. Prior*, 2 Sawy. 461, Fed. Cas. No. 13,095.

But where a patentee or owner of a patent seeks to recover for an infringement because he has been compelled to lower his price to compete with the infringer, he must show, in an action for the infringement, that his reduction in prices was due solely to the acts of the defendant, or, if not, to what extent it was due to such acts, so as to furnish data by which actual damages may be calculated. *Boesch v. Graff*, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378.

It is for the plaintiff in an action for the infringement of a patent to establish by satisfactory evidence, not only that a reduction of his prices was caused by the infringement, but how much such reduction was, and how much of it was caused by the act of the defendants, and how much was due to the fact that the infringing articles contained the patented feature. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

The reduction of price of a patented article by the owner of the patent will not be deemed to have been the result of an infringement, so as to warrant a recovery for the loss occasioned thereby, in an action for the infringement, where it was gradual from the time the patented article was first put on the market, and continued after the infringer was enjoined from selling the infringing article. *Cornely v. Marckwald*, 32 Fed. Rep. 292.

And in determining the damages caused by a forced reduction of prices because of the infringement of a patent, the fact that sales of the owner of the patent were increased in number by the reduction of price, resulting in profit to him on the added sales, and counterbalanced to some extent the diminution of profits on the rest of the sales, is to be considered. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

And the owner of a patent for the manufacture of horseshoe nails, who does not grant licenses, but himself manufactures and sells the nails made by his patented machinery, is not entitled to recover of an infringer who makes nails in such a manner as to infringe the patent and sells them, for damages due to a reduction in the prices of his nails, alleged to have been caused by the competition, where he lowered his price to such an extent as to injure his own trade, and in lowering it he seems to have been prompted by an anxiety to drive his rival from the field, and the circumstances indicate the presence of other formidable competitors in the market, which might itself have caused the reduction. *United Horse-Shoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561.

But when reduction of price in the plaintiff's sales is the only element of damages in an action for infringement of a patent, if the essential feature of the plaintiff's structure and the

infringing structure, respectively, is the patented device, and the patented device, being only a part of the structure, must necessarily be embodied in the complete structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and is deprived, by the act of the defendant in selling at low prices the infringing structure containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold,—the defendant's infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices; and such losses may be recovered after making allowance for anything which might give the defendant an advantage in selling his structure. *Fitch v. Bragg*, 21 Blatchf. 302, 16 Fed. Rep. 243.

And where the rights of the owner of a patent for an improvement in gas and water pipes for several states are interfered with by the sale of another, in his territory, of large quantities of the patent pipe, by reason of which he is compelled to greatly reduce his price, and the evidence establishes the fact that each of the sales made in his territory would have been made by him had the infringer not interfered, the profits which he would have realized had he made such sales are a fair measure of damages, and the reduction in price he was compelled to make by the unlawful sales should also be taken into consideration. *Hobbie v. Smith*, 27 Fed. Rep. 636.

So, the fact that the infringer of a patent for making horseshoe nails might have made nails equally good and equally cheap without infringing the patent at all has no effect upon the right of the owner of the patent to recover damages for an injury by sales of the infringing article. *United Horseshoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561.

And the owner of a patent for improvements in bustles and improvers for ladies dresses, whose business was interfered with by the manufacture of an infringing article sold at a cheaper price, who, in order to avoid being driven out of business, reduced his prices to those of the infringer from time to time, when the infringer reduced, but never going below the infringer's prices; it appearing that previous to the infringement he had no competition, is entitled to recover in an action for the infringement, in which he claimed an injunction and damages, and not an accounting of profits, damages based on the original price of the bustles which he in fact sold at the lower price and those which the infringer sold at the lower price, diminished by the profits which the infringer made by his own connection and exertions, and the profits on the increased sales which were the consequences of the diminution in price, where it appears that, but for the infringement, the owner of the patent would have sold at the original price all the bustles which he in fact sold, and those which the infringer sold at the lower price as well. *American Braided Wire Co. v. Thomson*, L. R. 44 Ch. Div. 274.

And the fact that the infringer only imitated one set of bustles does not prevent a recovery by the owner of the patent, of damages based on the reduced price of all the bustles manufactured by him, where there was such a similarity between all such bustles that if he reduced the price of one particular kind he must necessarily reduce the price of others also, if he hoped to sell them at all. *Ibid.*

In the above case, *United Horseshoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561, *supra*, was distinguished upon the

ground that that was not a case in which the infringer was manufacturing a thing which could only be made by the owner of the patent. There the infringer was manufacturing a thing which the owner had particular machinery for making, but there was a competition in the market of articles similar to those made by the owner, made more cheaply by his machinery than the infringer had been making and selling the article, using the patented machinery, and the owner had not merely followed the lead of the infringer in reducing his price, but had gone before the infringer in reducing, and reduced prices below those at which the infringer was selling, thus warranting the conclusion that the reduction of the price was made in consequence of the competition, not only of the infringer, but all other persons in the market.

The mere opinion of persons interested in a patent, that an enforced reduction in the price of the patented article was solely due to competition by an infringer, is not sufficient, in an action for damages for the infringement, to warrant a recovery for loss sustained through such reduction. *Boesch v. Graff*, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378.

The question whether the price which the owner of a patent received for his goods was less than that which he would have received but for the infringement is one of fact, as are also the questions as to the amount of the reduction, and as to how much of it was occasioned by the acts of the infringer, and how much was attributable to the fact that the infringing articles contained the patented feature. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

See also *Cornely v. Marckwald*, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 744; *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040; and *Carter v. Baker*, 1 Sawy. 512, Fed. Cas. No. 2,472, *infra*, V. c.

As to apportionment of loss by reduction of price between patented and unpatented features see *infra*, IV. c. 3, §.

d. Consideration of profits of the infringer.

The rule has been laid down broadly and generally in a number of cases, that, where no royalty or license fee for the use of a patent has been established, the profit made by the infringer is an element which the jury in an action for the infringement may consider in determining the amount of profits lost by the owner of the patent through the infringement; and some of the earlier cases and cases in lower courts have gone so far as to hold the profits of the infringer to be themselves the proper measure of damages.

This rule that, where a patentee or patent owner has not sought his profit from royalties or licenses, the profits made by the infringer may be considered in determining his damages caused by an infringement, was laid down in *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 879.

And in *Parker v. Hulme*, 1 Fish. Pat. Cas. 44, Fed. Cas. No. 10,740, it was held that the verdict in an action at law for the infringement of a patent should be founded upon the full and liberal measure of the plaintiff's actual damages, and that the jury may take into consideration the loss sustained by the plaintiff, and the profit made by the defendant, and the price of any license charged for the use of the patent.

And the owner of a patent whose patent was infringed was held in *Many v. Sizer*, 1 Fish. Pat. Cas. 17, Fed. Cas. No. 9,058, to be entitled to damages from the infringer to the full extent of the injury he has sustained from the wrongful use of his patent; and it was also held that the number of the patented articles made by

the infringer, and the amount of profits he has realized from them, are proper to be taken into consideration on that question, but are not conclusive as to the extent of the injury, which may be either greater or less than the profits realized by the infringer.

So, in *Pitts v. Hall*, 2 Blatchf. 229, Fed. Cas. No. 11,192, it was held that one mode of arriving at such damage is to ascertain the profits which the party infringing has derived from the use of the invention, but that this measure is not controlling, and if, on looking into the profits made by the defendant, the jury find that they do not correspond with the fair profits which the patentee, if left alone, would have realized, they have a right to look to such profits and base their award thereon.

And *McMurray v. Emerson*, 36 Fed. Rep. 901, holds that the gains or savings made by the infringer of a patent upon an invention for an improvement in tools for soldering the caps or covers on tin cans may be considered as evidence of damages in an action at law for the infringement, where it does not appear that a license fee for the use of the invention has ever been established.

And *Wilber v. Beecher*, 2 Blatchf. 133, Fed. Cas. No. 17,634, holds that the owner of a patented improvement in a mill for breaking and grinding bark, which patent is infringed, is entitled to recover in an action on the case for the infringement all the actual profits which the defendant has made by the use of the principle of his combination, which is in effect the same thing as the damages which he has sustained by reason of the use which the infringer had made of his property, as the law presumes that if the infringer had not put his machines into the market the demand would have been for the plaintiff's machines, and that he would have received the profits which went into the hands of the infringer.

The true rule would seem to be that where, in an action at law for the infringement of a patent, it appears that no sales have been made of the patent right by the plaintiff, or licenses given for the use of it, so as to establish a patent or license fee as a criterion by which to ascertain the measure of damages, the profits of the defendant may be considered by the jury, not as the primary or controlling measure of damages, but as one of the elements from which the damages or the compensation may be ascertained. *Cassidy v. Hunt*, 75 Fed. Rep. 1012; *Royer v. Shults Belting Co.* 45 Fed. Rep. 51; *Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,206; *Ransom v. New York*, 1 Fish. Pat. Cas. 252, Fed. Cas. No. 11,573.

But such proof is merely a means to an end, and profits are not recoverable as such in such an action, and are of no value in estimating the damages unless further evidence is produced from which the court or jury can legitimately infer that, but for the infringement, the profits realized by the infringer, or some definite portion thereof, would have been realized by the patentee. *Royer v. Shults Belting Co.* 45 Fed. Rep. 51.

The recovery is what the jury shall find to be the plaintiff's loss, not because the infringer realized profits, but because under all the circumstances the jury may infer as a fact that, but for the interference, the plaintiff would have realized those profits. *Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296.

And the jury can give only actual damages, and cannot speculate upon the possibility, or even probability, of damages beyond such as are proved to have been sustained. *Ransom v. New York*, 1 Fish. Pat. Cas. 252, Fed. Cas. No. 11,573.

So, in *Burdell v. Denig*, 92 U. S. 716, 23 L.

ed. 764, it was said that, in the absence of satisfactory evidence as to the profits of the owner of a patent infringed, no doubt the profits of the infringer may be resorted to as one of the elements on which the damages or the compensation may be ascertained, but it cannot be admitted that they are the primary or controlling measure of damages.

a. When profits of infringer may be made the criterion.

In the absence of a license fee, and when the owner of the patent does not make use of it by the manufacture and sale of the patented article itself, so as to make his loss of profits the proper measure of damages, and where the infringement consists of the use of a patented machine or process to perform labor or manufacture and sell in competition with the owner of the patent, the infringer's profits may be taken as a criterion of damages even in actions at law.

Thus, in *Sickels v. Borden*, 3 Blatchf. 535, Fed. Cas. No. 12,832, it was stated by the court in its charge to the jury that, if the owner of the patent infringed has not an established license fee, then the profits which the infringer has made from the use of the invention may be taken as the measure of the loss sustained by the owner.

So, in *Wintermute v. Redington*, 1 Fish. Pat. Cas. 239, Fed. Cas. No. 17,896, which was an action on the case for the infringement of letters patent for an improvement in hydraulic power, the court charged the jury to assess and return as their verdict the actual damages the plaintiff had sustained, if any, by the infringement, and that in estimating the actual damages the rule is to give the value of such use during the time of the illegal user; or, in other words, the amount of profits actually received by the defendant during such time.

And in *Case v. Brown*, 1 Blas. 382, Fed. Cas. No. 2,488, which was an action on the case for the infringement of a patent for an improvement in seed planters, it was said by Drummond, J., in charging the jury, that a clear and simple rule of damages is to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff.

And in *Wayne v. Holmes*, 1 Bond, 27, Fed. Cas. No. 17,303, it was said by the court in charging the jury that "the general rule of damages is the amount of profits made by the person infringing the patent from the unlawful use of the improvement."

And the same rule was charged in *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73, and *Hall v. Wiles*, 2 Blatchf. 195, Fed. Cas. No. 5,954.

So, in *Parker v. Hulme*, 1 Fish. Pat. Cas. 44, Fed. Cas. No. 10,740, which was an action on the case for the infringement of letters patent for an improvement in hydraulic power, the court charged the jury that the damages to be assessed should be compensatory, and that they were to take into consideration the loss sustained by the plaintiff, as well as the profit made by the defendant; that the price of a license was sometimes a fair guide, but not always, and that the verdict might be founded upon a full and liberal measure of the plaintiff's actual damages.

And in *Bell v. Daniels*, 1 Bond, 212, Fed. Cas. No. 1,247, it was said that the general rule in actions for the infringement of a patent is to give damages to the amount of the profits saved by the infringer by his unlawful use of the patented invention.

It is only where, from the peculiar circumstances of the case, no other rule can be found,

however, that the infringer's profits become the criterion of the patentee's loss caused by an infringement. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024.

The profit of the infringer of a patent is not the criterion of the damage of the patentee, where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly in making it for others. *Ibid.*

And while the inference that the owner of a patent would have made the profits made by an infringer, had it not been for the infringement, may be readily drawn where both parties are shown to have had equal facilities for the use of the patented machine, and the machine is in itself complete in all respects and new, and the inventor has elected to realize on his invention by manufacturing and selling the patented article, in most other cases proof that a defendant has made profits furnishes in itself no basis for a correct estimate of the injury sustained by the patentee in an action at law. *Royer v. Shultz Belting Co.* 45 Fed. Rep. 51.

So, in *Livingston v. Jones*, 3 Wall. Jr. 330, Fed. Cas. No. 8,414, it was said that "the only cases in which the measure of the patentee's damage is the amount of the infringer's profit are where the invention is of some new machine, or a new form of any kind of known machine, which, as itself a distinct species of machine or manufacture, is more valuable, or can be put into market cheaper, so as to supersede or exclude other machines or manufactures of the same genus, and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit, and in the exclusion of all competition. In such a case the only measure of damages in a court of equity is the amount of profits made by the infringer, and it is in such cases that the injured party should seek his remedy in a court of chancery, where he can have a decree for an account and an injunction to protect his monopoly." But the point in the case was as to the right of a court of equity to give treble damages for an infringement.

And in *Mowry v. Whitney*, 14 Wall. 620, 20 L. ed. 860, it was said that the profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages. But this was an action in equity for an accounting of the infringer's profits, and the question was as to the allowance of interest thereon.

But the rule that where a patentee elects to claim the profits made by the unauthorized use of his machinery it becomes material to ascertain how much of his invention was actually appropriated, in order to determine what proportion of the net profits realized by the infringer was attributable to its use, does not apply where the patentee of machinery who does not grant licenses claims damages from an infringing manufacturer who competes with him by selling the same class of goods in the same market. In such case the profit made by the infringer is a matter of no consequence, however large his gains; he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss, he cannot escape from liability to make full compensation for the injury which his competition may have occasioned. *United Horse-shoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561.

And the damages in an action on the case for the infringement of a patent for an improved

cylinder polisher do not depend on the profits the infringer may have made out of the cylinders and pumps polished. The mere profit upon polishing pumps with the improved machine is all that can be recovered, as it is the profits in polishing with this machine which constitute the injury from the infringement, the rule in such case being the profits which the defendant made by polishing the pumps, and not the profits lost to the plaintiff. *Cowling v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296.

See also *Royer v. Shults Belting Co.* 45 Fed. Rep. 51; *Serrell v. Collins*, 1 Fish. Pat. Cas. 289, Fed. Cas. No. 12,672, *infra*, IV. c. 3, §.

f. Separation of profits due to patent.

An infringement of a patent upon an improvement upon a machine is not governed by the same rule with reference to the measure of damages as an infringement upon an entire machine, where the patent is upon the improvement only and the inventor has not seen fit to exercise his monopoly by selling licenses to make or use his improvement.

One who procures a patent for a mere improvement upon an article open to the use or manufacture of everyone cannot claim that the profits of the whole article should be the measure of damages for infringement. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *McCormick v. Seymour*, 8 Blatchf. 209, Fed. Cas. No. 8,727.

The profits which a plaintiff is to recover in an action for the infringement of a patent must be only those which can be proved to have resulted from his particular improvement upon an existing machine or manufacture, and the burden of proof is upon him to show what his profit was. *Star Salt Caster Co. v. Crossman*, 4 Bann. & Ard. 566, Fed. Cas. No. 13,320; *Burdell v. Denig*, 2 Fish. Pat. Cas. 588, Fed. Cas. No. 2,142.

And where inventions covered by other patents were embraced in the infringing machines, and it is not shown how much of the profit therefrom was due to the other patents, or how much of it was manufacturer's profits, the complainant can recover nominal damages only. *Robertson v. Blake*, 94 U. S. 728, 24 L. ed. 245.

And the admissibility or inadmissibility of the evidence of the defendant in an action for an infringement of a patent is unimportant and need not be considered, where the plaintiff fails to give proper and adequate evidence apportioning the damages and profits, since no report is called for until the plaintiff has made out a case. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248.

Where a patent has been infringed, the extent of the monopoly must first be correctly defined, then the extent of the infringement ascertained, and from that basis the consequent profits or damages are to be found. *Ruggles v. Eddy*, 2 Bann. & Ard. 627, Fed. Cas. No. 12,116.

And the measure of damages for the infringement of letters patent is not the difference between the selling price of the patented article for the number of articles made and sold, and the expense of making and selling the articles, to the plaintiff, which he shows that he was prepared to do, where the invention was only on an improvement on the article, and not on an entire article, numerous parts of which were in use prior to the patent and were not claimed therein, but were free to be used by anyone. *Goulds Mfg. Co. v. Cowling*, 12 Blatchf. 243, Fed. Cas. No. 5,642.

Thus, where a patent time detector embodied in a watch is infringed, and the watch is open to the manufacture of everyone, the wrong

which the patentee suffers is the use of his invention, and it is the value of that use which he is entitled to recover in damages, and not the whole amount which he would have made upon watches in which the invention was embodied, had it not been for the infringement. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107.

And the owner of a patent for a single feature of a lock for traveling bags, who had granted no licenses, but had himself made and sold the locks separately and with bags, intending to supply the wants of the trade for them, cannot recover, in an action for an infringement, for the profits he would have made had he made the sales made by the infringer, where he does not show that his profits are due to the patented feature of the lock, in whole or in any definite part. *Roemer v. Simon*, 31 Fed. Rep. 41.

And the owner of a patented improvement in pulverizers for salt bottles, which is infringed, cannot recover for profits estimated upon the manufacture and sale of the bottles themselves, where there is nothing in the case to show how much of the profit on the bottles is due to the pulverizers contained in them. *Star Salt Caster Co. v. Crossman*, 4 Bann. & Ard. 566, Fed. Cas. No. 13,320.

And the owner of a patent for an improvement in tuck-markers consisting of minor combinations and devices employed in such machines, which consists simply of an improvement upon the old machines, rendering them more serviceable, is bound in an action for infringement to prove the proportion of profits justly ascribable to his improvements, and, in case of his failure to do so, can recover only nominal damages. *Bostock v. Goodrich*, 25 Fed. Rep. 819.

And evidence in an action for infringement as to the profits on the sale of articles containing the patented features, and of the profits on the sale of similar articles not containing the patented features, is not proper where the whole value of the machine as a marketable article was not attributable to the patented features. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248.

So, a patentee of an improvement upon a stone-crushing machine is entitled to recover only nominal damages for an infringement thereof, where no license fee is shown to have been charged therefor, and where, though it appears that he made a designated profit per inch on the width of the jaws of the machines he had sold, inventions covered by other patents were embraced in the machines, and it was not shown how much of the profit was due to other patents and how much of it was manufacturer's profit. *Blake v. Robertson*, 94 U. S. 728, 24 L. ed. 245.

And in computing the damages for the infringement of a patent for an improvement in washboards, the jury should exclude from their computation the increased facility for making washboards, due to inventions since the granting of the patent or its assignment to the plaintiff. *Wayne v. Holmes*, 1 Bond, 27, Fed. Cas. No. 17,303.

Nor can a patentee of an improvement in the apparatus of a common fire engine, which was not one which enabled the patentee to make profit by the monopoly of its use or a sale of a distinct machine, which was infringed by a city by applying the invention to a number of engines, recover more than nominal damages, where he does not furnish evidence as to the profits lost, or other proper data upon which a calculation of actual damages can be founded. *New York v. Ransom*, 23 How. 487, 16 L. ed. 515.

So, where the distinguishing character of a ruffle is found in an infringing ruffle, and the infringing ruffle contains the patented improvement which is embodied in the original ruffle, but the two ruffles are different in the eye of the trade and of the purchaser, the court should endeavor, in an action for the infringement, to ascertain the damages which resulted to the plaintiff from the unauthorized use of his improvement; and the fact that the defendant made a profit on the entire ruffle is not sufficient to warrant a determination that the plaintiff suffered the amount of such profit from the use of his patented improvement. *Magic Ruffle Co. v. Elm City Co.* 14 Blatchf. 109, Fed. Cas. No. 8,950.

Nor will the actual loss suffered by the owner of a patent on an improved machine for converting rawhides into leather be deemed to be commensurate with the infringer's gains, and damages for the amount of such gains will not be allowed for the infringement in an action at law, where the infringer manufactured by the use of the infringing device leather by a different process and differing from the product of the owner of the patent in a material respect, and of a superior quality and finish, which had advantage in the market over the product of the patent owner. *Koyer v. Shults Belting Co.* 45 Fed. Rep. 51.

So, in *Serrell v. Collins*, 1 Fish. Pat. Cas. 289, Fed. Cas. No. 12,672, which was an action on the case for the infringement of letters patent for an improvement in machines for making moldings, the court stated the rule of damages to the jury to be the profits which had been derived by the defendants from making moldings by means of the infringing machine over any other mode that the defendants had a right to adopt, deducting from them the agreed amount of expenses.

But when an invention relates to a new composition of matter, and the infringing article is made of the patented material, and that alone, the measure of the patentee's damage may be the entire profit which he would have made but for the infringement, to the extent of the sales made by the infringer. *Welling v. La Bau*, 34 Fed. Rep. 40.

And in case of the infringement of an entire article or of a new article of manufacture, the entire profits of which are attributable to the patented invention, it having been introduced into the market as a previously unknown article, manufacturers' profits are not deducted from the amount of damages recoverable by the owner of the patent for the infringement. *National Folding-Box & Paper Co. v. Elsas*, 30 C. C. A. 487, 57 U. S. App. 66, 86 Fed. Rep. 917, Affirming 81 Fed. Rep. 197.

So, nearly every patented device, in order to apply it or make it operative, requires the use, in connection with what is covered by the patent, of something which is old; and where the patent infringed consists of bottle-stopper fastenings, the use of a device for attaching a fastening to the bottle, not covered by the patent, is of no effect by way of reducing the amount of profits and damages which the patentee is entitled to recover. *Putman v. Lomax*, 10 Biss. 546, 9 Fed. Rep. 448.

And the principle that, when a patented thing is a mere improvement and part of the device, the proof of damages resulting from an infringement must be limited accordingly, does not apply to an infringement of a patent upon the tongue of a snap-hook for harnesses, so as to require an apportionment of the reduction in price between the patented and unpatented parts of the snap-hook, where the tongue is the distinctive and characteristic part of the device, and essential to the snap-hook of both the

owner of the patent and the infringer, and gives them their value as a finished article in the market. *Fitch v. Bragg*, 21 Blatchf. 302, 16 Fed. Rep. 243.

And one who invents a machine in the nature of a new combination of old elements, rather than a mere improvement upon an old machine, which patent is infringed, is not subjected to deductions in damages for the value of the prior machines, where the entire commercial value of his machine is due to a combination covered by his patent. *Fifield v. Whittemore*, 33 Fed. Rep. 835.

And in determining the damages for infringement of a combination which is entirely new, the jury should take into consideration the price of the machine, the nature, actual state, and extent of the use of the plaintiff's invention, and the particular losses to which he may have been subjected by the piracy,—all of which are to be weighed in estimating the damages. *Earle v. Sawyer*, 4 Mason, 1, Fed. Cas. No. 4,247.

So, a patentee of a plow who selects certain elements before known, and combines them and applies them to other parts of the plow, constructed after his own fashion, making the plow in question as a whole, owns the machine thus constructed, and is entitled to make, use, and vend the machines as a whole, and must therefore, on infringement, be allowed the profits on the whole machine. *Carter v. Baker*, 1 Sawy. 527, Fed. Cas. No. 2,472.

And where a patent for an improved breaking cart is infringed, and the invention practically introduced a new cart, for which a demand at once arose, and it would be impossible to introduce testimony to separate the value of the patented from the unpatented parts, and there is no evidence that at any time carts were constructed with the patented feature omitted, and it appears that there would be no demand for such a cart, and by reason of the competition of the infringers the price of the cart was reduced,—the measure of the damages of the owner is the entire amount of the reduction. *Holmes v. Truman*, 14 C. C. A. 517, 29 U. S. App. 572, 67 Fed. Rep. 342.

And where a patent upon a turning-bolt device used in a safe lock is infringed, and the turning-bolt device could not be sold unless it was embodied in a lock, and the manufacturer was enabled by the use of the device to make his profit on the entire lock, the infringement must be deemed to have caused the entire loss of the owner from a reduction of prices enforced by the competition of the infringement, after allowing a proper sum for any other patented device contained in the defendant's locks, and for any other causes which gave him an advantage in selling locks; and in such case the allowance of damages should be for the whole amount of reduction of prices on the locks sold by the owner, and not merely for the damages occasioned by the effect of the presence of the infringement. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. ed. 954, 6 Sup. Ct. Rep. 934, Affirming 17 Blatchf. 244, Fed. Cas. No. 12,366.

So, in determining the actual damages sustained by the use, by an infringer, of the invention of another, the patented portion of which covered the partitions of an elongated trunk or box for cleaning cotton, the jury should take into consideration the question whether a wire screen in the trunk was used before the plaintiff's invention, or whether or not he invented that use in the combination, in determining what the amount of damages should be. *Hayden v. Suffolk Mfg. Co.* 4 Fish. Pat. Cas. 86, Fed. Cas. No. 6,261.

It is for the plaintiff in an action for an in-

fringement of a patent to establish by satisfactory evidence what part of the profits lost by him through the infringement are to be assigned to the distinctive patented feature of the patented article. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

But one who has been adjudged an infringer of a patented improvement, which appropriated the invention of another and realized from its use large profits, and who shows such profits by the production of his books, is required to prove any deductions which he claims should be allowed because his machine was an improvement upon that of the complainant. *American Nicholson Pav. Co. v. Elisabeth*, 1 Bann. & Ard. 489, Fed. Cas. No. 809.

And while, if an infringer has improved the infringed machine, and if any of the profits are properly credited to the infringer's improvements, they do not belong to the owner of the original machine, as the infringer has wrongfully connected the original improvement with his own and caused the confusion of rights, if any portion of the profits are properly to be credited to the infringer's improvements the burden rests with him to show affirmatively that fact and how much of its profits ought to be credited to his improvements. *Carter v. Baker*, 1 Sawy. 512, Fed. Cas. No. 2,472.

The question as to what part of the profit lost to the owner of a patent because of an infringement is to be assigned to the distinctive patented feature is one of fact. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

As to separation of profits due to a patent, in actions in equity in which damages in addition to profits are sought to be recovered, the principles with relation to which are the same, see *infra*, V. d, and see also *Black v. Thorne*, 111 U. S. 122, 28 L. ed. 372, 4 Sup. Ct. Rep. 326, and *Blake v. Greenwood Cemetery*, 21 Blatchf. 222, 16 Fed. Rep. 676, *infra*, V. c.

And see also *United Horseshoe & Nail Co. v. Stewart*, L. R. 13 App. Cas. 401, 59 L. T. N. S. 561, *supra*, IV. c, 3, a.

V. The rule in equity under statutes authorizing damages.

a. Scope of subdivision.

Statutes exist both in the United States and in England, authorizing a recovery in equity for the infringement of a patent, of the owner's damages, in addition to or instead of the infringer's profits. In treating this subject, however, since a recovery of the profits or the infringer is not, in contemplation of law, a recovery of profits as damages, but a mere recovery of that which belongs to the owner of the patent in the hands of a trustee, cases in which the profits of the infringer only are sought to be recovered have been excluded as not within the subject of this note, and those included only in which a recovery for the damages or lost profits of the owner of the patent have been sought in addition to or instead of the profits of the infringer; and the rules of law sought to be shown are those with reference to such additional or alternative damages suffered by the owner of the patent, as distinguished from those applicable to the profits of the infringer.

b. The act of Congress of 1870.

The act of Congress of 1870 provides that upon a decree in equity rendered for the infringement of a patent the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.

Under this act the terms "profits" and "damages" are not convertible. Profits refer to what

the infringer has gained by an unlawful use of a patented invention, while damages are the losses sustained by the owner in consequence of the infringement. *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Bann. & Ard. 252, Fed. Cas. No. 5,600; *La Baw v. Hawkins*, 2 Bann. & Ard. 564, Fed. Cas. No. 7,961.

And profits are to be accounted for, in an action for the infringement of a patent under this act, whenever an infringement is found, and if the injury sustained by the owner of the patent from the infringement is greater than the gains and profits realized by the infringer, the owner is entitled to recover compensation for the excess of the injury beyond the amount estimated as the profits of the infringer. *Carew v. Boston Elastic Fabric Co.* 3 Cliff. 356, Fed. Cas. No. 2,397; *Simpson v. Davis*, 22 Blatchf. 113, 22 Fed. Rep. 444; *Willmantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865; *Royer v. Shultz Belting Co.* 45 Fed. Rep. 51; *Bancroft v. Acton*, 7 Blatchf. 505, Fed. Cas. No. 833; *Birdsall v. Coolidge*, 93 U. S. 64, 28 L. ed. 802; *Coupe v. Royer*, 155 U. S. 560, 39 L. ed. 264, 15 Sup. Ct. Rep. 169; *Emerson v. Sinn*, 6 Fish. Pat. Cas. 281, Fed. Cas. No. 4,443; *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Bann. & Ard. 252, Fed. Cas. No. 5,600.

And where a bill is brought for a discovery and other equitable relief on account of the infringement of a patent, and the ultimate object of the plaintiff is to obtain damages, the court, having granted the discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. *Magic Ruffle Co. v. Elm City Co.* 14 Blatchf. 109, Fed. Cas. No. 8,950.

And damages of a compensatory character may be allowed to a complainant in an equity suit for the infringement of a patent, where it appears that the business of the infringer was so improperly conducted that it did not yield any substantial profits. *Marsh v. Seymour*, 97 U. S. 348, 24 L. ed. 963.

In such case the only matter to be inquired into is the amount of damages which the owner of the patent sustained by reason of the infringement. *Willmantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865.

The provisions of law which give a complainant in equity whose right is established and has been infringed, the right to recover damages in addition to profits, appear to intend that he may have either profits or damages, as may be most for his advantage in the particular case; and to this end the profits may be assessed by the master, and if they prove to be less than the damages a sum may be added to make up the difference, which brings the decree simply to an assessment of damages. *Star Salt Caster Co. v. Crossman*, 4 Bann. & Ard. 506, Fed. Cas. No. 13,320. It was said in this case, however, that there is a noticeable reluctance upon the part of courts to add damages when the profits are a substantial sum, and very clear proof is required before the addition is made.

Gains and profits, however, are still the proper measure of damages in equity suits for infringement of a patent under the act of Congress of July 8, 1870, except in cases where the injury sustained by the infringement is greater than the aggregate of what was made by the respondent. *Willmantic Thread Co. v. Clark Thread Co.* 29 Fed. Rep. 865.

And the plaintiff cannot recover anything as damages, which he could not recover in an action on the case. *Bancroft v. Acton*, 7 Blatchf. 505, Fed. Cas. No. 833.

And it is not within the province of the

master in chancery, or of the court in an action in equity for the recovery of profits or damages for the infringement of a patent, to suggest any specific line of proof, either as proper or necessary to establish the infringement. The burden rests with the plaintiff to lay a basis by evidence for ascertaining the proper amount of damages. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248.

So, the execution of an assignment and a release, by one of the joint owners of a patent, of his right of recovery for infringement thereof, does not destroy his co-owner's right to recover his damages in an action for an injunction and for an accounting of profits and damages. *Lalancé & G. Mfg. Co. v. Haberman Mfg. Co.* 93 Fed. Rep. 197.

But the limitation contained in the act of Congress of March 3, 1897 (29 Stat. at L. 694, chap. 392), providing that in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and that such provision shall apply to existing causes of action, applies to rights existing at the time the action was brought, whether they arose under patents granted prior to or subsequent to the passage of the act, notwithstanding the fact that the act may be so construed that its terms may be effective as a condition precedent to the grant of subsequent patents, without having a retroactive effect upon prior patents. *American Pneumatic Tool Co. v. Pratt & W. Co.* 106 Fed. Rep. 229.

In the above case the question was raised whether or not the act of Congress of March 3, 1897 (29 Stat. at L. 694, chap. 392), above recited, was not unconstitutional in depriving a patentee who had contracted with the sovereign power under the pre-existing patent law, of some of the benefits of his contract; but the court refused to pass upon the question, upon the ground that it was the duty of an inferior court in a doubtful case to resolve the doubt in favor of the validity of the action of the legislative branch of the government, and to leave questions of constitutionality to be determined by the appellate court.

c. Estimation of damages under.

In the estimation of the damages in this class of cases, only those are considered which have been suffered by the owner of the patent in addition to or beyond the amount of the infringer's profits, for which he must account. With reference to those, the general rules as to remoteness and uncertainty, applicable to actions at law for infringement of patents, as well as to all actions for tort, seem to apply.

Thus, the damages in case of an infringement of a patent allowed under the patent act of July 8, 1870, § 55, substantially re-enacted in U. S. Rev. Stat. § 4921, giving to a successful plaintiff in an equity suit for infringement the damages which he has sustained, in addition to the profits to be accounted for by the defendants, must be confined to the direct and immediate consequences of the infringement, and not embrace those which are both remote and conjectural. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107.

And in applying the statute the use which the owner of the patent makes of his invention, and the question whether he retained a close monopoly of it, or whether he permitted its use for a fee, should be taken into consideration. *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Bann. & Ard. 252, Fed. Cas. No. 5,600.

So, the rules in actions at law, with refer-

ence to the measure of damages for infringement as affected by the mode of enjoyment of the patent, would also appear to be applicable.

Thus, the measure of damages for the infringement of a patent and the consequences of a recovery should have some relation to the mode of remuneration adopted by the patentee, and to the nature of the injury inflicted by the infringement. *Spaulding v. Page*, 1 Sawy. 702, Fed. Cas. No. 13,219.

And where the owner of a patent has fixed a royalty or license fee for the making, using, or selling of the patented article, the amount of such fee, or the royalty, will be the measure of his losses in case of infringement, and his damages can be ascertained by multiplying that amount by the number of infringing articles. *Creamer v. Bowers*, 35 Fed. Rep. 206.

The general rule in patent cases, as well in actions in equity to restrain the infringement as in actions at law for damages, is that established license fees are the best measure of damages that can be used. *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217.

While in actions at law for the infringement of a patent the inquiry is about the actual damages sustained by the patentee, and in equity the rule is that, when profits have gone into the infringer's pocket, he is regarded as the holder of property not belonging to him, but which he must restore to the lawful owner, in equity as well as in law if the owner's profit consists in having a license fee paid to him by all who use the invention, the amount of the license fee is his profit, which is recoverable for the infringement. *American Nicholson Pav. Co. v. Elizabeth*, 1 Bann. & Ard. 439, Fed. Cas. No. 309.

Where a patentee makes his patent available exclusively by the sale of licenses for its use at a fixed sum, such license fees furnish the just measure of damages in case of an unlicensed use of his infringement, and where the infringement was wilful, and the infringer, after having licensed the use of two machines, built six others, he is chargeable for the full license fee though he used four of them for the period of eighteen months only, and two of them for three years. *Stutz v. Armstrong*, 25 Fed. Rep. 147.

So, in *Star Salt Caster Co. v. Crossman*, 4 Bann. & Ard. 568, Fed. Cas. No. 13,320, which was an action in equity for the recovery of profits and damages for the infringement of a patent on an improvement for pulverizers for salt bottles, it was suggested by the court to the parties that they should assess the royalties without further reference.

But the plaintiff in an action for the infringement of a patent is entitled, under U. S. Rev. Stat. § 4921, to recover, in an action in equity for the infringement of a patent, profits made by the infringer, though he exercised his monopoly by granting licenses, where such profits exceed the amount of the licenses. In such case he is not limited to the license fee. *Wooster v. Taylor*, 14 Blatchf. 408, Fed. Cas. No. 18,041.

And the fact that the infringer of a patent made no profits by his infringement is no answer to an action in equity for the profits and damages of the infringement. *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Bann. & Ard. 252, Fed. Cas. No. 5,600.

And what the infringer of a patent would have been willing to pay as a license fee for the use of the patented machine is not a proper amount for recovery in an action in equity for the infringement, where it does not appear that the patent in suit covered all the mechanism of value in the machine, though it would be so if it were clear that the patent in suit covered

everything. *Porter Needle Co. v. National Needle Co.* 22 Fed. Rep. 829.

But if the owner maintains a close monopoly and is ready and able to furnish the whole market with the patented articles, he must prove by satisfactory evidence the advantages gained by the infringer in the unlawful use of the patent, over and above the advantages he could have derived from the use of similar articles unpatented and open to the use of the general public; or he must prove the losses or falling off of his own sales in consequence of the infringement, or a loss by the compulsory reduction of prices made necessary by the competition of the infringer, the rule varying with the special circumstances of the particular cases. *Creamer v. Bowers*, 35 Fed. Rep. 206.

And where the question is as to the loss or damages in excess of the defendant's profits, sustained by reason of the infringement, and the master finds that by reason of the infringement the owner of the patent lost specified sales, the damage is fairly estimated by the amount which the owner would have received for the goods, deducting the cost of manufacture and sale; and in the cost of sale the store expenses, such as clerk hire, storage, freight, etc., should be estimated upon sales of any large amount; but where it appears that such estimate was not made, but that most of the sales were made by one person in another place, and such expenses would add but a trifling amount to the expense of conducting the owner's business, the case should not be sent back to the master for a re-accounting. *Zane v. Peck Bros.* 13 Fed. Rep. 475.

The amount of profits, however, which the owner of a patent for an improved self-closing faucet would have made had he supplied purchasers which an infringer supplied, is properly chargeable as damages against the infringer, where such sales were made by the infringer to the old customers of the patent owner. *Ibid.*

And an interlocutory decree in an action for infringement of a patent for a design for a carpet, awarding a recovery for the profits and damages from the infringement, and ordering an accounting to be taken of the profits, is not improper because the infringement could be committed only by making, using, and selling carpets containing the patented design, where the profits and damages to be accounted for are described as only those of the infringement. *Dobson v. Dornan*, 118 U. S. 10, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

But where it appears in such case that the carpets of the infringer were so inferior in quality to those of the patentee that he sold them at a much less price, and that even at the less price he made no profits, it will not be assumed that the infringer's carpets displaced those of the patentee to the extent of the sales made by him, so as to warrant a recovery by the patentee of the entire profit which he would have received from a sale of an equal quantity of his own carpets. *Ibid.*

And only nominal damages can be recovered in an action for profits and damages for the infringement of a patent, over and above the profits made by the infringer, for the loss of the sale of the machines sold by the infringer, where it does not appear what profits were made on plaintiff's machines, or what it cost to make them. *Cornely v. Marckwald*, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 744.

And exceptions relating to the admission of evidence before a master in an action for the infringement of a patent are immaterial, where the plaintiff failed to give adequate evidence as to profits and damages, as in such case the defendant is not put upon his defense, and it is unimportant whether he gives competent evi-
51 L. R. A.

dence or no evidence. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248.

Nor can a patentee of a design for carpets, whose patent is infringed, recover in an action in equity for the infringement, where no profits are found to have been made by the defendant, the sum per yard which was the profit which the patentee would have made on the making and selling of carpets with the patented design upon the number of yards made and sold by the infringer, in the absence of evidence as to the value imparted to the carpet by the design. In such case only nominal damages are to be allowed. *Dobson v. Hartford Carpet Co.* 114 U. S. 439, 29 L. ed. 177, 5 Sup. Ct. Rep. 945; *Dobson v. Dornan*, 118 U. S. 10, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

So, that the defendant in an action for infringement of a patent on an improvement upon a trunk may have sold trunks which the plaintiff would have sold if it had not been for the infringement, and that the plaintiff thereby lost the profits of such sale, cannot be inferred in an action for the infringement, without proof. *Maler v. Brown*, 17 Fed. Rep. 736.

And if other methods in common use produce the same result as a patented article or machine with equal facility and cost, the use of the patented invention by an infringer cannot add to his gains or impair the just rewards of the inventor, so as to warrant a recovery of profits or damages by the inventor. *Black v. Thorne*, 111 U. S. 122, 28 L. ed. 372, 4 Sup. Ct. Rep. 326.

And to warrant a recovery in an action for infringement of a patent for an invention employed in a stone-crushing machine, it is not enough to show that the infringer derived an advantage from crushing stone by means of a machine in which the plaintiff's device was employed, instead of breaking his stone by another, where there were other crushers open to public use. The proof must go further and show the value of the advantage secured by the use of this particular device. *Blake v. Greenwood Cemetery*, 21 Blatchf. 222, 16 Fed. Rep. 676.

So, damages cannot be recovered by a patentee or owner of a patent in an action in equity for profits and damages, over and above the amount of profits made by the infringer on the ground that the plaintiff had been forced to lower his price to compete with the defendant, where the evidence does not show that the reduction in price by the plaintiff was solely due to the acts of the defendant, or to what extent such reduction was due to such acts. *Cornely v. Marckwald*, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 744.

And evidence in the shape of estimate, conjecture, and opinion afford no proper basis for a report of actual damages, in an action for the infringement of a patent, caused by a forced reduction of prices. *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040.

But where the damages suffered by a patentee from an infringement of his patent are more than the actual profits realized by the infringer, because he has sold at a lower price than the patentee would have been able to sell at, this circumstance should be considered on the question of damages, and the whole profits which the patentee would have realized should be given. *Carter v. Baker*, 1 Sawy. 512, Fed. Cas. No. 2,472.

So, in *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764, it was said that, in the absence of satisfactory evidence as to the profits of an infringer of a patent from its use, when they are the true criterion of damages, no doubt the profits of the owner of the patent may be resorted to as one of the elements on which the damages or the compensation may be ascertained, but

they are not the primary or controlling measure of damages.

With reference to the estimation of damages in actions at law for infringement of a patent, the principles with relation to which are here applicable, see *supra*, IV. c. 2 and 3.

d. Separation of profits and damages due to patent.

A patentee in an action for profits and damages for the infringement of his patent must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features of the patented article; and such evidence must be reliable and tangible, and not conjectural and speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature. *Dobson v. Hartford Carpet Co.* 114 U. S. 439, 29 L. ed. 117, 5 Sup. Ct. Rep. 945; *Garretson v. Clark*, 111 U. S. 120, 28 L. ed. 371, 4 Sup. Ct. Rep. 291, affirming 15 Blatchf. 70, Fed. Cas. No. 5,248; *Reed v. Lawrence*, 29 Fed. Rep. 915.

The infringer of a patent is accountable only for the portion of the profits resulting from the employment of the patented device in the articles manufactured by him, and if they embody other valuable features not covered by the patent, but which contribute to its market value, he is not liable for the use of such features. *Reed v. Lawrence*, 29 Fed. Rep. 915; *Porter Needle Co. v. National Needle Co.* 22 Fed. Rep. 829.

Where a patent is for a distinct improvement separable from the rest of the article to which it is applied, and the patentee makes and sells the machinery in which his invention is embodied, there will enter into the price, not only the cost of materials and the ordinary profits of manufacture, but also an amount of additional profits as compensation for the invention, and it is this additional sum which the inventor is entitled to recover as damages against an infringer; and an assessment of damages in such case, which embraces not only the profit derived from the sale of the patent privilege, but also the manufacturer's profits upon the materials and workmanship of the whole article, is erroneous. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107.

And in determining the amount of damages and profits to be recovered by the owner of a patented machine in an action against the infringer, where the infringing machines contain improvements under another patent, which add materially to the value of the machine, the master should inquire whether the infringer acted in good faith under another patent, and if he finds that he did so he should allow all necessary expenditures incurred in its use in reduction of the damages, including what the infringer had to pay for the latter patent, as well as expenses properly paid for advertising. *La Baw v. Hawkins*, 2 Bann. & Ard. 564, Fed. Cas. No. 7,961.

Thus, where in an action for the infringement of a patent an established license fee gives to the licensees the right to use the whole six claims of the patent, and the infringer in fact only used two of the six, it is the duty of the master to ascertain the relative value of the different claims as nearly as the circumstances of the case permit, and charge the infringer for the use of the claims infringed such proportion of the whole license fee as the testimony shows they were relatively worth in their contribution

to the efficiency of the whole patent, and the burden of proof rests with the complainant to show that the claims infringed embrace the vital mechanism of the invention. *Willimantic Thread Co. v. Clark Thread Co.* 27 Fed. Rep. 865.

So, the plaintiff in an action for infringement of a patent upon a design for a carpet, which can be infringed only by making, using, and selling carpets containing the patented design, must show in an action for the infringement what profits or damages are attributable to the use of the infringing design. *Dobson v. Dornan*, 118 U. S. 10, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

And one who infringes a patent dress-form, and attaches thereto an improved device for operating it, cannot be held liable, in addition to the profit which the owner would have made upon the number of dress-forms which he was deprived of selling by the infringer's sales, for the profits made by him upon the number of dress-forms sold by him in excess thereof. *Moran v. Union Form Co.* 39 Fed. Rep. 468.

And the patentee of an improvement upon a watch, consisting of a time detector, which patent is infringed, cannot recover, under the patent act of July 8, 1870, § 55, substantially reenacted in § 4921 of the Revised Statutes, giving to a successful plaintiff in an equity suit for an infringement the damages which he has sustained in addition to the profits to be accounted for by the defendants, the amount which he would have made upon all the watches sold by the infringer had he sold them himself, where the watches differed in structure and appearance, and it cannot be shown that those who bought the infringing article would have bought of the patentee had it not been for the infringement. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107.

In accordance with the rule in *Ross v. Hirsch*, however, the damages for infringement of a patented article previously unknown, where the infringement is of the entire article, it being a new article of manufacture, the entire profits of which are attributable to the patented improvement, are not measured by the profits of the infringer, but by the losses of the patentee, and are measured by the actual profit which the patentee would have made upon a sale of the number of articles which he was prevented from selling by the infringement; and where the infringement was deliberate, the amount of damages may be doubled. *National Folding-Box & Paper Co. v. Elsas*, 30 C. C. A. 487, 57 U. S. App. 68, 86 Fed. Rep. 917.

And the damages in an action for an injunction and the recovery of damages and profits for the infringement of an improvement in edgers must be adjudged on the basis of the entire edgers, where, though the patented device did not form the whole machine, it was the essential feature giving it the merit of a new machine, the edgers having no value or use and not being salable without it. *Tatum v. Gregory*, 51 Fed. Rep. 446.

And an infringement of a patent for an improved self-closing faucet, by adopting a combination thereof which had a peculiar utility, and gave the faucet its value and character, and had created a wide market for it, was held in *Zane v. Peck Bros.* 13 Fed. Rep. 475, to warrant charging the infringer with profits and damages with respect to the entire faucet, and not merely in respect to the particular improvement embodied therein, which was covered by the patent, though there were other parts of the faucet in common use.

In the above case *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248, *supra*, was distinguished on the ground that in that case

when the infringer took the combination he took that which had given the infringed article its value and success.

So, in *Fitch v. Bragg*, 21 Blatchf. 802, 16 Fed. Rep. 243, it was suggested by Shipman, J., that a reduction in price of a patented article, alleged to have been due to an infringement, might have been partially due to the commercial success and enterprise of the infringer in pushing his goods upon the market, and in effecting sales which the owner of the patent could not, but that no exception was taken to the master's report on that ground, and that the principle that the plaintiff must affirmatively show by satisfactory evidence how much of the damage was attributable to the infringement does not mean that after he has proved that the infringement was the sufficient operative cause of the entire damage, and has refuted all the suggestions of contributory causes which the defendant has made, he must disprove the existence of all the possible causes which might have existed, but which it is not suggested ever did exist.

As to separation of profits due to patent, in actions at law, with reference to which the rules are the same, see *supra*, IV. c. 3, f.

e. The English act of 1858.

The English act of 1858 (21 & 22 Vict. chap. 27, § 5), provides that in all cases seeking an injunction against the commission or continuance of any wrongful act the court may award damages to the person injured, either in addition to or in substitution for the injunction.

This act is applicable to suits to restrain the infringement of patents. *De Vitre v. Betts*, 42 L. J. Ch. N. S. 841, L. R. 6 H. L. 819, 321, 21 Week. Rep. 705.

And it was formerly held, in accordance with the rule under the United States statute, that damages could be awarded in addition to the profits of the infringer, when the loss of the owner of the patent was greater in amount than such profits. *Betts v. De Vitre*, 34 L. J. Ch. N. S. 289, 11 Jur. N. S. 9.

But it is now held that the power of the court of chancery, of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the court for granting an inquiry as to profits, and that the plaintiff must elect between the two inquiries. *De Vitre v. Betts*, 42 L. J. Ch. N. S. 841, L. R. 6 H. L. 819, 321, 21 Week. Rep. 705, *Reversing Betts v. De Vitre*, 34 L. J. Ch. N. S. 289, 11 Jur. N. S. 9, 37 L. J. Ch. N. S. 325, L. R. 3 Ch. 441, 18 L. T. N. S. 165, 16 Week. Rep. 529, *supra*, and in effect *Overruling Betts v. Neilson*, 3 DeG. J. & S. 82, 11 Jur. N. S. 679, 34 L. J. Ch. N. S. 587, 13 Week. Rep. 1028, 12 L. T. N. S. 719, 37 L. J. Ch. N. S. 321, L. R. 3 Ch. 431, 18 L. T. N. S. 159, 16 Week. Rep. 524, 6 New Rep. 221, and following *Neilson v. Betts*, 40 L. J. Ch. N. S. 317, L. R. 5 H. L. 1, 19 Week. Rep. 1121, *infra*.

A patentee who succeeds in an action for the infringement of his patent cannot have an account of profits, and also damages, as that is going on a different footing. If he takes profits he adopts that which was done by the infringers, and claims for himself the profits which have been made by the exercise of the invention. *American Braided Wire Co. v. Thomson*, L. R. 44 Ch. Div. 274.

An accounting for profits and an inquiry as to damages are not reconcilable in such an action under the English patent act, as by taking an account of profits the infringement is condoned, and the owner of the patent therefore should be called upon to elect as to which of the two remedies he will adopt. *Neilson v. 51 L. R. A.*

Betts, 19 Week. Rep. 1125, 40 L. J. Ch. N. S. 317, L. R. 5 H. L. 1, 19 Week. Rep. 1121, *Reversing Betts v. Neilson*, 16 Week. Rep. 524, 37 L. J. Ch. N. S. 321, L. R. 3 Ch. 431, 18 L. T. N. S. 159, 6 New Rep. 221.

So, in *Betts v. De Vitre*, 34 L. J. Ch. N. S. 289, 11 Jur. N. S. 9, it was said to be a proper course, in an action for the infringement of a patent, to give the plaintiff an injunction, with the usual account of profits, and if he chooses to waive that account, then to let him proceed at law for damages.

But while a plaintiff in an action for infringement of a patent cannot have an account of profits and also of damages against the same defendant, he may have both remedies as against different persons,—as, the maker and purchaser in respect to the same article. *Toronto Auer Light Co. v. Colling*, 31 Ont. Rep. 18.

And damages may be awarded in an action for the infringement of a patent, though not specially prayed for by the bill, since the statute vests a discretion in the judge, which he may exercise when he thinks the case a fit one without the prayer of the party. *Betts v. Neilson*, 37 L. J. Ch. N. S. 321, L. R. 3 Ch. 431, 18 L. T. N. S. 159, 16 Week. Rep. 524, 6 New Rep. 221.

But while a court of equity has jurisdiction in a suit for an injunction to restrain the infringement of a patent right and for an accounting, to establish the consequent amount of damages, and will order one where the account is simple, as, where licenses or royalties have been granted,—where the account is complex, a jury is a more fit arbiter than the court could possibly be, and where in such case a patentee has obtained his injunction to restrain the further infringement of his patent, and waives the usual accounting of profits, an action at law will be directed, in addition to the injunction, for the purpose of ascertaining the damages. *Betts v. De Vitre*, 11 L. T. N. S. 533, 5 New Rep. 165.

Though where a bill for the infringement of a patent prays in the alternative for an inquiry as to the damages or for an accounting of the infringer's profits, but no issue as to the damages is submitted to the jury, the court will not refer an inquiry to assess damages, but will grant the alternative prayer for an accounting of the profits. *Needham v. Oxley*, 8 L. T. N. S. 604, 11 Week. Rep. 852.

The mere fact, however, that a patent has expired pending a litigation for an infringement, during which the owner has succeeded in showing that he is entitled to an injunction to restrain such infringement, will not entitle the court at the hearing under the patent act to refuse him an inquiry as to damages. *Davenport v. Rylands*, L. R. 1 Eq. 302, 35 L. J. Ch. N. S. 204, 14 L. T. N. S. 53, 14 Week. Rep. 243.

But a court of equity will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent, when the bill is filed so shortly before the expiration of the patent as to render it impossible to obtain an interlocutory injunction. *Betts v. Gallais*, L. R. 10 Eq. 392, 18 Week. Rep. 945.

In the above case *Davenport v. Rylands*, L. R. 1 Eq. 302, 35 L. J. Ch. N. S. 204, 14 L. T. N. S. 53, 14 Week. Rep. 243, *supra*, was explained and distinguished, the court saying that while it entirely agreed with that case it did not think the court in that case ever intended to give countenance to an application in which it was utterly impossible to obtain any equitable relief before the patent expired.

VI. Effect of recovery.

A recovery for the infringement of a patent

covers past damages only, and does not license future infringement consisting of the manufacture or sale or use of the infringing article during the remaining period of the existence of the patent. A recovery, however, for infringement of a patent on an article procured or designed for individual use as distinguished from articles intended to supply the general market, covers the use of that particular article as long as it is capable of use, and a subsequent recovery cannot be had for the further use of the same article, though the rule is different when the recovery is merely nominal. So, the recovery of an established license fee covers the whole value of the patent to the patentee, and a recovery upon an election by the owner of the patent to take judgment for his profits is a bar to a subsequent action for damages as well as profits.

Thus, if no license fee has been adopted the general rule is that a recovery of the profits for the use of a machine, in an action for the infringement of a patent, does not vest the title thereto in the defendant, since a recovery based upon this rule of damages can only be for the use of the machine prior to the time of recovery, and does not ordinarily cover the value of the use for the entire period over which the patent right extends, or during which the particular machine is capable of being used. *Spaulding v. Page*, 1 Sawy. 702, Fed. Cas. No. 13,219.

And an account directed against an article infringing a patent does not license a use of that article in the hands of the purchasers; and the fact that bills to restrain the infringement have been filed against both the persons who manufactured and the persons who used the article, and that issues of fact have been joined thereon and found for the plaintiff, does not prevent him from proceeding for damages against the user of the article, as well as for an account against the manufacturer. *Penn v. Bibby*, L. R. 3 Eq. 308, 36 L. J. Ch. N. S. 277, 15 Week. Rep. 192.

So, the recovery in an action for an infringement of a patent, of \$1, and a tender of that sum to the owner of the patent, do not operate as a license to the infringer or his vendees, which will bar a recovery in another action for damages for an infringement consisting of a subsequent user of the same device. *Blake v. Greenwood Cemetery*, 21 Blatchf. 222, 16 Fed. Rep. 676.

And judgment for a payment of nominal damages, upon a bill in equity by a patentee without joining his licensee, against one who had made and sold a machine in violation of his patent, is not a bar to a bill in equity by the patentee and licensee together for the benefit of the licensee, against another person who afterwards uses the same machine. *Birdsell v. Shalloe*, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244.

But while a patentee may, if he choose, confine himself to a recovery for past infringements, and insist that the further use of the infringing machine be enjoined, yet if he elects as his measure of damages the full license fee established by himself, the payment thereof operates to vest in the infringer a right to use the patented machine during the term of the patent, or until that particular machine is worn out. *Stuts v. Armstrong*, 25 Fed. Rep. 147.

And the recovery of an established license fee covers the entire value of the patent to the patentee. *Spaulding v. Page*, 1 Sawy. 702, Fed. Cas. No. 13,219.

Nor can the owner of a patent who has recovered a decree against one who made and sold his patented machine, which decree has been satisfied, recover of the person to whom 51 L. R. A.

the infringer sold it the profits from the use of the machine. *Steam Stone Cutter Co. v. Sheldon*, 22 Blatchf. 484, 21 Fed. Rep. 875.

And where one who has a patent for a certain improvement in saws, consisting in inserting, in sockets fitted for the purpose, detachable teeth, and has sold no patent rights and established no royalty, but himself manufactures and sells saws and inserts teeth for others, supplying the market, deriving his profits therefrom, and another infringes his patent by making and selling his patent saw-teeth, and he claims and recovers from the infringer the profits he would have received had he made and sold the teeth himself, he receives the full compensation for the use of such teeth so long as they are capable of use, and cannot again recover of the purchasers of such teeth, with respect to their use of them. *Spaulding v. Page*, 1 Sawy. 702, Fed. Cas. No. 13,219.

And the owner of a patent infringed by the manufacture of an identical machine, who elects to take judgment for his profits, in an action for the infringement, which judgment has not been reversed, cannot subsequently prosecute an action in equity to recover damages as well as profits. *Child v. Boston & F. Iron Works*, 19 Fed. Rep. 258.

So, one who purchases an infringing article of the manufacturer, who was the infringer, and is proceeded against in an action for damages by the owner of the patent, is not entitled to set off against the damages the value of any infringing article delivered up under the judgment of the court, or any portion of a sum agreed upon as damages for infringement and recovered by the owner of the patent in a previous action against the manufacturer, although the period in respect to the rental payable by the purchaser as damages commenced at a date antecedent to the commencement of the action against the manufacturer. But if the damages against the manufacturer had been a subject of recovery at law, representing the full rental or royalty, instead of an agreed sum, the rule would be different. *United Telephone Co. v. Walker*, 56 L. T. N. S. 508.

And where the plaintiff in an action for the infringement of two patented devices capable of conjoint use offers to accept a specified amount for use of each of the two devices, and it is afterwards found that one of the patents had expired, and the decree is amended so as to exclude the profits and damages arising from that patent, he cannot recover more than the amount assented to for infringement of the other patent, where it does not appear that he had in view any compromise of his rights at the time he agreed to accept the specified amount. *Creamer v. Bowers*, 35 Fed. Rep. 208.

As to effect of recovery in case of infringement of a copyright, as a bar, see *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62, *infra*, VII.

VII. The rule in copyright cases.

In copyright cases it is hard to conceive any condition of affairs under which the owner of the copyright could suffer any damages or loss of profits from an infringement, which would not be compensated by an accounting for the profits made by the infringer; and as an injunction against the continuance of the infringement and the sale of the infringing publication is usually the most, if not the all, important part of the relief sought, and copyright cases are almost always within equity jurisdiction, the result is that there is a decided scarcity of actions at law for the infringement of copyright, which are the only ones within the subject of this note. Such actions will lie,

however, and it is thought that they are governed by the same rules as actions at law for the infringement of patents.

Thus, an author whose work is pirated before the expiration of twenty-eight years from its first publication may maintain an action on the case for damages against the offending party, although the work was not entered as provided for under the copyright act, and although it was first published without the name of the author, and notwithstanding the fact that a special statutory remedy in the way of the imposition of a penalty has been given for infringement. *Beckford v. Hood*, 7 T. R. 620.

So, the owner of the copyright of a pamphlet entitled, "The Answer. How to Sit—When to Sit—What to Wear—When Having a Photo Taken," who regarded it in the nature of an advertising dodger, and never sold or offered it for sale, and had never, prior to the infringement, had any estimate made as to its value or as to the terms upon which its sale would be undertaken, was not entitled to damages against an infringer, where he did not, after the infringement, attempt to distribute or sell the pamphlet, so as to enable the court by comparison to ascertain how its commercial value was affected by the publication of the infringing copy. *D'Ole v. Kansas City Star Co.* 94 Fed. Rep. 840.

Likewise, the owner of a copyright of a play, which copyright is infringed by the performance of another play including a scene taken from the former play, does not, by proceeding in equity, for an injunction and incidentally for an accounting of profits, make an election to recover profits, which will bar him from a subsequent recovery of damages consisting of the profits lost to him on account of the infringement, where the injunction was asked for on the ground that the injuries could not be accurately ascertained, and that the compensation for the injury could not be made by damages, and the accounting was asked for as a portion of the relief, and the court did not direct the master to ascertain anything in regard to the profits, and no evidence was offered on that subject, and no judgment or decree therefor was rendered. *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

The provision of the act of Congress of July 8th, 1870, § 55, however, that in a suit in equity when a decree is given for an infringement the plaintiff shall be entitled to recover, not only profits made by the defendant, but the damages he has sustained thereby, does not apply to copyrights, which are provided for in a separate section. And damages as well as profits cannot be recovered for the infringement of a copyright in a suit in equity, as no provision is specially made therefor. *Chapman v. Ferry*, 8 Sawy. 191, 12 Fed. Rep. 692.

Attention is here called to the fact that the English act of 1858, providing for a recovery in equity of damages, instead of profits, is general, and not confined to patent cases like the American act, and that therefore it would unquestionably apply to copyright cases, though no cases on the subject have been found.

The reason which renders actions at law for the infringement of copyrights so scarce probably also operated to cause the omission of copyright cases from the provision for the recovery of damages in equity for infringement, in addition to the infringer's profits. The owner of the copyright could not have been damaged beyond the amount of the infringer's profits. There could have been no loss of sale which would not be compensated for by the profits of the infringer's sales, and there could have been no reduction of price from the infringing sales, which would not also have resulted if the own-
51 L. R. A.

er of the copyright had made the sales made by the infringer, and a piracy could not damage the credit of the original work.

VIII. The rule in trademark cases.

In trademark cases, as in copyright cases, the remedy for infringement most sought after is an injunction and an accounting for the profits of the infringer, there being no circumstances imaginable under which the profits of the infringer would not be full compensation, except, perhaps, where the credit of the owner's mark and goods was injured by the use of the trademark on inferior goods; and the United States statutes extending authority to courts of equity to grant damages as well as profits in patent cases do not apply in trademark cases. Actions at law, therefore, and actions in which damages, as distinguished from profits of the infringer, are sought to be recovered, are the only ones within the subject of this note. And actions of that class, like actions at law in copyright cases, are scarce. But such actions will lie, and appear to be governed by the same rules as actions for the infringement of patents. It has been held, however, that an assessment of damages may be had in a proper case, in an action in equity, and the English act of 1858, authorizing courts of equity to award damages, applies to trademark cases.

Thus, one who has appropriated a particular trademark to distinguish his goods from other similar goods has a right of property in it which entitles him to its exclusive use, of such a nature that equity will protect it by injunction from invasion. And if it has been invaded, the wrongdoer is liable for the damage thereby caused to the party whose trademark has been adopted or illegally imitated, which damage will ordinarily be the loss of profits caused by the infringement. *Hostetter v. Vowinkle*, 1 Dill. 329, Fed. Cas. No. 6,714.

And one whose trademarks for his goods are used by others, and sold by them on their goods as and for his goods, is entitled to recover of them to the extent that he is damaged by the loss of sales and their profits. *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

So, the damages suffered by the owner of a trademark used upon flour manufactured by it, from the unlawful use of the mark by another, are measured by the extent to which the unlawful use of the mark has interfered with the sale of its flour. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217.

Though if the infringer realized a profit the owner is entitled to recover it, whether or not he would have realized it if his trademark had not been used. *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24.

If the infringer has made a profit the owner is entitled to it, and is not limited to the difference between the price for which the spurious goods would sell with and without the trademark. *Benkert v. Feder*, 34 Fed. Rep. 534.

And one who uses in full the trademark of another, consisting of labels used on bottles of bitters, and afterwards changes the name thereon from "Hostetter" to "Holstetter," is liable to the party whose trademark is infringed, not only in respect to the loss of profits on bitters which were sold prior to the change, while he was using the trademark in full, but also upon those which were sold after making such alteration. *Hostetter v. Vowinkle*, 1 Dill. 329, Fed. Cas. No. 6,714.

So, the measure of damages for violation of a trademark for a certain cosmetic, which the owner of the trademark had a right to manufacture and sell, and which he was prepared to make and sell to the extent that the infringer

made and sold it, is the price realized from the infringer's sale, less what it would have cost the owner to make and vend the quantity sold by the infringer; and proof of advertising done by the owner is competent to show what he had done to establish a market in sections where the infringer subsequently made sales. *Champlin v. Stoddard*, 20 N. Y. Week. Dig. 223.

And the inventor and manufacturer of metallic hones, who used certain envelopes for them, denoting them to be his, is entitled to recover some damages for the invasion of his rights by one who made hones, wrapped them in similar envelopes, and sold them as the inventors' hones, where he alleges that he was prevented from selling many of his hones, and that they were depreciated in value and reputation, though he does not prove that the wrongdoer's hones were inferior, or that he has sustained any specific damage. *Blotfeld v. Payne*, 4 Barn. & Ad. 410, 1 Nev. & M. 353.

And one whose trademark is infringed by the sale of other goods similarly marked as and for his goods is not confined in his recovery for the infringement to nominal damages because the infringing goods are equal in quality to his own. His right to recover for loss of profits and damages is as great as if the goods were inferior, except as affected by the fact that the credit of his mark and goods might not suffer as much from the infringement. *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

But the plaintiff in an action for the infringement of a trademark, who asks for an inquiry as to the damages sustained, as distinguished from an account of profits, is not entitled to recover the profits made by the infringer, where he does not prove that he has sold less goods affected by the trademark since the infringement, and it appears that the goods sold by the infringer were of an inferior quality and cheaper in price, and it does not appear whether or not anyone was prevented from purchasing from him on account of the infringement. *Leather Cloth Co. v. Hirschfield*, 13 L. T. N. S. 427, 14 Week. Rep. 78, L. R. 1 Eq. 299.

In such case it will not be assumed, in the absence of evidence, that the amount of goods sold by the defendant would have been sold by the plaintiff. *Ibid.*

In the above case, *Blotfeld v. Payne*, 4 Barn. & Ad. 410, 1 Nev. & M. 353, *supra*, was distinguished upon the ground that, while in that case no special damage had been proved, fraud had been proved.

And one who obtains an injunction against the use of his trademark used on cloth, and an inquiry as to damages, but fails to prove direct damages, and is only able to show the extent to which his trademark has been used, cannot claim damages equal to all the profits made by the defendants on all their sales of cloth under the infringing mark, where the defendants sold at a cheaper price than the plaintiff, and there is nothing to show that the customers who purchased of them would have purchased of him but for the infringement. *Leather Cloth Co. v. Hirschfield*, 13 L. T. N. S. 426, 14 Week. Rep. 78, L. R. 1 Eq. 299.

But evidence that an infringer of a trademark used upon bitters sold at least 200 dozen bottles thereof, and that the sales of the owner of the trademark in a particular place fell off, during the time the infringer was manufacturing and selling the imitation, to even a greater amount, is sufficient, in an action for the infringement, to justify a determination that the plaintiff's sales had been lessened at least to the extent of the 200 dozen bottles, so as to justify a recovery for the profits which would have been made if the plaintiff had sold the

200 dozen. *Hostetter v. Vowinkle*, 1 Dill. 329, Fed. Cas. No. 6,714.

So, the measure of damages in an action for violation of a covenant not to manufacture a specified article, contained in an assignment of a business, goodwill, and trademark, in which the only charges are that the defendant diverted the plaintiff's patronage and thereby injured and destroyed the goodwill of his business, and the profits made by the defendant on articles made in violation of his covenant are not claimed, is not what the defendant gained, but what the plaintiff lost, by the breach; and it is immaterial whether the defendant's profits were greater or less than the plaintiff's loss. *Pelts v. Elchele*, 62 Mo. 171.

But in ascertaining the plaintiff's losses which can be recovered in an action for violation of such a covenant, the defendant's profits may be given in evidence, in connection with the diversion of customers from the plaintiff by the violation of covenant, and the amount of his purchases, and the product of his factory, and the reduction in prices of the article sold, if any, in consequence of the unlawful competition of the defendant. *Ibid.*

An alien whose trademark for his goods is used by others and sold by them on their goods, is entitled, as well as a citizen, to recover to the extent of his damages by the loss of sales and their profits. *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

And an alien suing for damages for loss of sales of his goods and their profits on account of the infringement of his trademark and the sale of the goods of the infringer as and for his goods is not debarred from maintaining the action because that remedy is not reciprocally allowed to aliens in the country to which he belonged. *Ibid.*

So, it has been held that where it is found in an action for an injunction to restrain the infringement of a trademark on lead pencils, that the damages were equal to the profits which the plaintiff would have made from the manufacture and sale of the same number of articles as the defendant had sold under the spurious mark, an assessment of damages is not error. *Faber v. Hovey*, Cox Trade Mark Cases, 272.

The English rule is, like the rule in patent cases, that plaintiff in a case for the infringement of a trademark, as well as for infringement of a patent, is entitled, if he proceeds in getting an injunction, to take either of two forms of relief: He may claim the damage sustained by the wrongful act, or he may claim the profit which the infringer has made by his wrongful act. *Lever v. Goodwin*, L. R. 36 Ch. Div. 1, 57 L. T. N. S. 583, 36 Week. Rep. 177.

IX. Conclusion.

Damages in actions for the infringement of a patent, copyright, or trademark, like damages for any other tort, are distinctively matters for legal cognizance. Cognizance has been taken of such cases in equity, however, upon the theory that the infringer who makes a profit from the infringement has come into possession of something arising out of the use of the property of another, and that he should be held in equity to account therefor. But equity will not entertain such actions unless separate grounds of equitable jurisdiction exist,—as, the right to have the continuance of the infringement enjoined, and as the recovery in equity is not a recovery of the profits as damages, but rather as something held in trust, the principles of equity have been brought into this note only so far as they have a bearing on the recovery

of the profits as damages, and so far as they have been made applicable by statute.

In actions at law the measure of damages is compensation, and this in a large majority of cases consists of a recovery of the profits lost. The amount of these profits is ascertained by different methods, however, varying with the different methods of making use of the patented monopoly and the manner in which it was infringed. If the patentee or owner has enjoyed his monopoly by selling licenses or accepting royalties to the extent of forming a fixed market value, that will be taken as the measure of damages for infringement; and this is the rule in equity as well as in law, unless it is made to appear that the infringer makes much more, so as to furnish him with a temptation to go on infringing.

If the patentee or owner holds his patent as a close monopoly, himself supplying the demand for the patented article, an infringement is compensated by a recovery of the profits actually lost to him; and these are determined from a consideration of lost sales and reduced prices caused thereby. And to aid in the determination, the profits made by the infringer are sometimes open to consideration, not as damages, but as evidence of the probable amount of loss suffered by the patent owner from the diversion of trade to the infringer; and if the infringement is by the use of a patented machine or process in competition with the owner, the profits of the infringer may, in the absence of any other measure, be made the criterion of damages, as in such case the gain of the one might, as a general rule, be deemed equivalent to the loss of the other.

In any event, however, a patentee cannot recover for infringement of that which belongs to the public or to another; and the burden rests with him to show, either that his patent covered all that was of practical value in the

whole machine or process, or to separate the loss of profits, and show just what part of it was attributable to the infringement of his patent; and this rule is applicable in equity as well as at law. Both the United States and England have statutes authorizing a recovery in equity for damages of the patentee or owner, in addition to or instead of the profits of the infringer, where they do not constitute an adequate compensation; and these statutes have rendered it necessary to include equitable actions, since decided, in this note, where damages were asked for under the statute; such damages being the equivalent of the owner's profits lost, in addition to or instead of the infringer's gains.

The rules for the estimation of such damages follow the rules of law, and they differ in the two countries only in that in the United States the infringer's profits are allowed, and damages are allowed in addition to cover the owner's losses, while in England the infringer's profits or the owner's damages are allowed in the alternative.

Copyrights and trademarks appear to be governed by the same rules as patents, with reference to the recovery for profits lost for infringement, except that they are not covered by the United States statute extending equitable jurisdiction to include damages, though they would appear to be by the English act. But the remedy in equity has been deemed far more available in copyright and trademark cases, probably on account of the difficulty of making accurate proof as to the amount of profits lost in actions at law, and on account of the fact that in such cases the relief by injunction must be by far the most important, so much so that but few actions at law, especially with reference to copyrights, have been found. F. H. B.

MINNESOTA SUPREME COURT.

Conrad J. ERTZ, Appt.,
v.

PRODUCE EXCHANGE of the City of Minneapolis *et al.*, Repts.

(.....Minn.....)

- *1. The constitution and by-laws of a corporation regulated the credit to be allowed its members, discriminated in the price to be paid for produce against persons not members, controlled the delivery of goods, and provided a penalty by fine and suspension for offending and defaulting members. *Held*, that such an organization is a combination in restraint of trade, tends to limit and control the market price of produce, limits and interferes with the free and open purchase and sale of commodities, and is prohibited by chap. 359, Gen. Laws 1899.
2. The fact that a dealer in produce was a member of such an association, and participated in the adoption of such constitution and by-laws, does not prevent him

*Headnotes by LEWIS, J.

NOTE.—For earlier cases in this series on the withdrawal of patronage or boycotting by members of associations, see *Boutwell v. Marr* (Vt.) 43 L. R. A. 503; *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* (Minn.) 21 L. R. A. 337; *Jackson v. Stanfield* (Ind.) 23 L. R. A. 588; 51 L. R. A.

from maintaining an action against such association and its members for damages caused by the boycotting by them of his business after he was suspended for violation of such by-laws. The acts complained of having been performed after he ceased to be a member, and without his consent, the plaintiff is not *in part delicto*.

(January 4, 1901.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County directing a verdict for defendants in an action brought to recover damages for an alleged combination and conspiracy to ruin the business of plaintiff by not buying from or selling to him. *Reversed*.

The facts are stated in the opinion.

Messrs. James Robertson and M. C. Brady, for appellant:

If the respondents entered into a conspiracy or combination for either of the following purposes, and the evidence shows damages, then it must be true that the court

Macaulay v. Tierney (R. I.) 37 L. R. A. 455; *Brewster v. C. Miller's Sons Co.* (Ky.) 38 L. R. A. 505; *Hartnett v. Plumbers' Supply Asso.* (Mass.) 38 L. R. A. 104; *Doremus v. Hennessy* (Ill.) 43 L. R. A. 797; and *Inter-Ocean Pub. Co. v. Associated Press* (Ill.) 48 L. R. A. 568.

erred in directing a verdict for respondents: First, if they entered into a combination, agreement, or arrangement which was in restraint of trade in this state; second, if they entered into a contract, conspiracy, or combination to destroy, limit, or interfere with open and free competition in the purchase or sale of any of the commodities mentioned.

United States v. Trans-Missouri Freight Asso. 166 U. S. 324, 41 L. ed. 1021, 17 Sup. Ct. Rep. 540; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. Rep. 279.

While it is true that the Federal act affirmatively gives a right of action to the injured party, and the act of our state legislature does not, yet the doctrine is well settled that where a party commits an act which is criminal, and another suffers damages in consequence, a right of action accrues to the injured party.

Cooley, Torts, 88-124; 8 Am. & Eng. Enc. Law, 2d ed. p. 598; 1 Bishop, Crim. Law, 264; 2 Addison, Torts, 850; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924; *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1002.

Neither the doctrine of *pari delicto* nor *particeps criminis* applies.

Even if appellant was a member of the produce exchange during the period covered by the complaint, his rights are not cut off.

Mohney v. Cook, 26 Pa. 342, 67 Am. Dec. 422; Cooley, Const. Lim. 1st ed. 253; *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1002; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. 473; 2 Greenl. Ev. § 85; *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Stout v. Wren*, 8 N. C. (1 Hawks) 420, 9 Am. Dec. 653; *Bell v. Hansley*, 48 N. C. (3 Jones L.) 131; *Dole v. Erskine*, 35 N. H. 503; *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008.

Messrs. Stiles & Stiles, for respondents:

The right to refuse to sell to any person or persons, whether such refusal be based upon malice, caprice, or reason, is too well established to need any extended citation of authorities.

Bohn Mfg. Co. v. Hollis, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119.

No action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation.

Pom. Eq. Jur. § 940.

It is not enough that plaintiff should have suffered the same kind of injury as the public at large, only in a greater degree, because such injury does not give him a right of action but only some special injury or damage different in kind from that which the public in general may be supposed to have suffered. 51 L. R. A.

Peacock v. Terry, 9 Ga. 137; *Ellis v. Oloveland*, 54 Vt. 437.

Consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to.

1 Roscoe, Crim. Ev. 306; 1 Wait, Act. & Def. § 11, p. 344; Cooley, Torts, p. 163; *Galbraith v. Fleming*, 60 Mich. 408, 27 N. W. 583; *Beechley v. Mulville*, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428.

Lewis, J., delivered the opinion of the court:

The Produce Exchange Company of the city of Minneapolis is a corporation, and its by-laws provide certain restrictions and limitations as to the method of doing business by its members, the more important of which are as follows:

Collection Department Rules.

Art. 1.—City Customers.

Sec. 1. All bills for goods sold on credit the six preceding business days to Friday night of each week to customers doing business within the limits of the cities of Minneapolis, St. Paul, St. Anthony Park, Merriam Park, St. Louis Park, Hopkins, New Brighton, Hamlin, Wyzata, Lake Park, Robbinsdale, and all lake hotels shall be considered due and payable on the Monday next succeeding such sale, and unless paid on or before 2 P. M. of the succeeding Wednesday, the name of the person or firm owing such account shall be reported to the secretary of the produce exchange as delinquent in payment of the same.

Sec. 2. Any party being delinquent at three consecutive meetings shall be put on the permanent cash list, and shall be sold for cash only. Such party may, after paying all bills, make application in writing to the secretary to be taken off the list. A majority vote of the members at a regular meeting may remove such delinquent name from the permanent cash list.

Sec. 7. Any person, firm, or corporation, other than members of this exchange, now engaged or that subsequently engages in the wholesale fruit and produce commission or brokerage business in this city shall be considered on a parity with delinquents.

Art. 15.—Collection Department Rules Relating to Purchases from Nonmembers.

Sec. 1. All members of the collection department desiring to purchase butter or eggs of any parties, not members of this exchange, offering said goods for sale in this city, shall not pay within 1 cent per pound on butter and 1 cent per dozen on eggs of the official quotations of this exchange on the day of purchase. Nonmembers may register their names with the secretary, agreeing to sell their butter and eggs exclusively to members of the exchange; and, when such registration is reported by the secretary, the above rule will not apply.

Sec. 2. Any member violating § 1, art. 15, shall be subject to a fine of not less than \$5 nor more than \$25.

Art. 16.—Collection Department Rules.

The officers of this exchange are empowered at their discretion to enforce jointly any agreement entered into with the officers of the Produce Exchange of St. Paul for our mutual protection and benefit.

Art. 12.—Collection Department Rules.

Sec. 4. When goods are sold for delivery on the following Monday, any house delivering such goods before that day shall pay to the secretary a penalty of \$5 for each violation.

Collection Department Rules. Art. 12.—Penalties.

Sec. 6. Any member or firm guilty of wilful violation of any rule of the collection department, after investigation by the board of directors, shall be fined not less than \$5 nor more than \$25, or for repeated wilful violations of the rules shall be fined not less than \$25 nor more than \$100, and so reported by the board to a meeting of the collection department of the produce exchange, to be confirmed by a plurality vote of all members present. In default of payment of the fine imposed, said members shall immediately forfeit his or their membership to the exchange. It is further agreed and understood that all members shall immediately discontinue all business relations with said defaulting member until said membership has been fully restored.

Appellant, a commission merchant, was a member of this organization, and on the 5th day of July, 1899, was accused of selling produce contrary to the provisions of the by-laws, and he was fined \$25 under the penalty clause. Refusing to pay the fine, he was suspended, and ceased to be a member after July 19, 1899. This action is brought to recover damages from the corporation and its members for combining and conspiring to ruin his business by not selling to or buying from plaintiff any merchandise or produce, and in influencing others not to have dealings with him. The complaint was sustained as to a demurrer upon a former appeal. 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737. The cause coming on for trial in the court below, a verdict was directed for defendant, and the plaintiff appeals.

There are two questions presented for review: First, was the produce exchange organized as an illegal combination? and, second, was plaintiff *in pari delicto* by virtue of having been a member?

1. Gen. Laws 1899, chap. 359, is an act to prevent organizations and trusts, and to prevent the same under certain circumstances from doing business or enforcing contracts. Section 1 reads as follows: "Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into, which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country; or which limits or tends to limit

or control the supply of any article, commodity, or utility, or the articles which enter into the manufacture of any article [of] utility, or which regulates, limits, or controls, or raises, or tends to regulate, limit, control, or raise the market price of any article, commodity, or utility, or tends to limit or regulate the production of any such article, commodity, or utility, or in any manner destroys, limits, or interferes with open and free competition in either the production, purchase, or sale of any commodity, article, or utility,—is hereby prohibited and declared to be unlawful."

The by-laws of the company above quoted regulate the credit that shall be allowed its members, and provide a penalty for violation by removing the privilege of credit. This regulation also applies to dealers not members. Members are required to purchase produce from persons not members at a less price than that quoted by the organization. A penalty for a violation of this rule is a fine of \$5 to \$25. If any member deliver goods before the following Monday when sold for delivery on that day, a fine of \$5 is provided. If the fines are not paid, the offending member forfeits his membership, and "it is further agreed and understood that all members shall immediately discontinue all business relations with said defaulting member until said membership has been fully restored." Here we find a complete scheme to control the produce trade of Minneapolis, St. Paul, and vicinity in favor of the members of the organization. Persons not members, offering produce for sale, are discriminated against, which is illegal; and if any one of the members refuses to carry out such illegal purpose he is to be boycotted by all the other members. This is clearly a combination in restraint of trade, tends to limit or control the market price of articles of produce, and limits and interferes with open and free competition in the purchase and sale of commodities, and is prohibited by the act referred to. The trial court appears to have taken this view, and counsel for respondent does not contend otherwise.

2. But it is claimed the plaintiff was a member of this illegal combination at the time the by-laws were adopted and set into operation, and for that reason the law will not furnish him a remedy. This is not a case calling for the application of any principle analogous to the equitable rule that he who comes into equity should come in with clean hands. The authorities cited in support of the proposition that plaintiff cannot recover because he is simply suffering an injury caused by a means in which he participated are not at all in point. In the principal case cited—*Beechley v. Mulville*, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428—the court places the decision directly upon the fact that the revoking of the agencies held by the plaintiff was within the authority of the compact, and so plaintiff could not recover damages for the doing of that which he had agreed should be done. In that case the plaintiff directed to be done that which was done to him, and which would not have

been done had he not so directed. Hence he could not complain of the consequences of his own acts. In this case plaintiff does not ask damages for suspending him from the association and depriving him of its privileges. The acts complained of were set on foot after he ceased to be a member, and in which he in no manner consented to participate or is responsible for. It does not follow that, because plaintiff was at one time a member of the illegal combination with intent to injure in this manner defaulting members, after ceasing to be a member he must suffer without redress at the hands of his former co-conspirators. It is immaterial whether the plaintiff voluntarily set in motion the proceedings which caused his suspension, desiring in good faith to withdraw from the association, or whether he was expelled for reasons beyond his control; the result is the same. There is nothing in the record to charge plaintiff with acting in bad faith,—that he induced the boycott upon his business, thus laying the foundation for an action in damages. Under the conditions disclosed, the law presumes good faith on his part, and will treat him as a reformer and entitled to all the benefits of the reformation. The application of the principle invoked by respondent would place a burden upon reformation and a premium upon wrongdoing.

Order reversed, and a new trial granted.

Edwin MURRAY, *Respt.*,

v.

BOARD OF COMMISSIONERS of Ramsey County, *Appt.*

(.....Minn.....)

*Chapter 260, Laws 1897, entitled "An Act to Provide for the Treatment of Inebriates by Counties, and Prescribing Rules Governing the Same," is unconstitutional in that it is special legislation as to the affairs of counties, and is not uniform in its operation throughout the state.

(November 14, 1900.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a demurrer to the complaint in an action to compel payment for the treatment of an inebriate under a statute requiring the expense to be borne by the county. *Reversed.*

The facts are stated in the opinion.

Mr. F. W. Zollman for appellant.

Mr. Matthew Gallagher for respondent.

Start, Ch. J., delivered the opinion of the court:

The question presented by the record in

*Headnote by **START**, Ch. J.

NOTE.—For other cases in this series as to the maintenance of an institution to cure inebriates at county or city expense, see *Baltimore v. Keeley Institute* (Md.) 27 L. R. A. 646, and *Re House* (Colo.) 38 L. R. A. 832.
51 L. R. A.

this case for our decision relates to the constitutionality of Laws 1897, chap. 260, entitled "An Act to Provide for the Treatment of Inebriates by Counties, and Prescribing Rules Governing the Same." The defendant urges several objections to the validity of this act, but we find it necessary to consider only one of them, which is to the effect that the act violates §§ 33 and 34 of article 4 of the state Constitution, in that it is special legislation as to the affairs of counties, and is not uniform in its operation throughout the state. The act provides for the commitment to, and treatment in, a private institution for the cure of inebriates, at the expense of the county of their residence, of a limited number of indigent, habitual drunkards, on their petition, or that of some friend or kin, to the probate court. Whether an indigent inebriate shall be so treated is made by the act to depend upon his voluntary election. If he elects to avail himself of the proffered bounty, and makes or consents to the making of the proper petition, the probate court may act; otherwise not; and the county must pay for his treatment if he establishes the allegations of his petition, but no more than one inebriate a year for each 10,000 population of each county can receive such aid. The act, by its terms, is limited in its operation to counties having a population of 50,000 or more. A similar act which applied to the whole state was held by this court to be invalid because it attempted to confer powers and duties upon the probate judges beyond the jurisdiction authorized by the Constitution. *Foreman v. Hennepin County Comrs.* 64 Minn. 371, 67 N. W. 207.

By the act here in question an attempt was made to remove the objections to the prior act pointed out in the case cited. It may be conceded, for the purpose of this appeal only, that such objections were so obviated. But, the act being limited in its operation to a part only of the state, it is manifestly special legislation, and void, unless the attempted classification is a proper one. What is a proper basis of classification for purposes of legislation has been settled by this court, so far as it is practicable to lay down general rules upon the subject. The difficulty lies in the application of the rules to particular cases. A law is general and uniform in its operation which operates equally upon all subjects within the class for which the rule is adopted, provided the classification be a proper one. The legislature, however, cannot adopt an arbitrary classification; for it must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect thereto. Any law based upon such classification must embrace all, and exclude none, whose condition and wants render such legislation necessary or appropriate to them as a class. Legislation limited in its relation to particular subdivisions of the state, to be valid, must rest on some characteristic or peculiarity plainly distinguishing the places included from those ex-

cluded. *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. Courthouse & City Hall Comrs. v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State ex rel. Douglas v. Ritt*, 70 Minn. 531, 79 N. W. 535.

Classification on the basis of population is proper for the purpose of legislation upon certain subjects, but not upon all, and the precise question here to be determined is whether there is any apparent natural reason why the treatment of indigent inebriates at the expense of the public should be limited to the counties having a population of 50,000 or more, and all other counties excluded. Or, in other words, is there such a difference between urban and rural drunkenness, and its consequences to the drunkard, his family and the public, as to naturally suggest the necessity or propriety of a classification on the basis of population for the purpose of legislation upon the subject of the cure, at the cost of the public, of indigent inebriates? It would seem that this question must necessarily be answered in the negative. It is claimed, however, by the plaintiff, and such was the view of the learned trial court, that drunkenness is a greater evil to the public, and that the proportion of drunkards was likely to be larger, and that their families were more likely to become a public charge, in the cities and populous communities than in more sparsely settled rural districts; hence the purpose of the law was to protect the public in such populous centers rather than to benefit the inebriate, and for these reasons the classification was proper. This assumed difference between drunkenness in the city and in the country is one of degree, not a distinguishing characteristic. The evils of intemperance are not bounded by county lines. Possibly drunkenness in the large cities of the state is more general and a greater evil, and its consequences to individuals and the public more far reaching, than it is in less populous communities; but, if so, it affords no justification for the classification in the act here in question, for it is obvious, from the mere reading of the act, that the legislature intended by it to make provision in the nature of a bounty for the inebriate poor in a limited number of the counties of the state, and to exclude from the benefit of the act all the inebriate poor outside of such counties. *Foreman v. Hennepin County Comrs.* 64 Minn. 371, 67 N. W. 207.

The act leaves it optional with the drunkard whether or not proceedings shall be instituted to secure his treatment, and only one inebriate for each 10,000 population can be treated in any one year. If the primary purpose of the law was to protect the public from the results of drunkenness by curing the inebriate, why leave it optional with him, or limit the cure to one patient to each 10,000 of population? The purpose of the law being to provide a bounty to needy inebriates, to the end that they may be cured of their disease, and the public thereby incidentally benefited, there is and can be no reason, necessity, or propriety for discrimination against any of them. Hence the 51 L. R. A.

classification on the basis of population, for the purpose of legislating for the relief of such indigent inebriates, is purely arbitrary, and the act unconstitutional. It is as clearly so as would be a law providing for the care of insane persons or the poor of a limited number of counties at the cost of such counties, and excluding the insane and poor of all the other counties of the state from the operation of the act. While we hold the law unconstitutional for the reason stated, we are not to be understood as holding that if the primary purpose of this act had been to protect the public from the consequences of drunkenness, by curing the inebriates of the disease, there is such a difference in the wants and needs in this respect of the counties included within the act and those excluded as to justify the classification attempted in this act; for we are of the opinion there is not. Nor are we to be understood as holding that a general act, uniform in its operation throughout the state, providing for the treatment of inebriates at the expense of the public, would not be a valid law; for reclaiming the inebriate, who is incapable of self-respect or self-support, and restoring him to society, prepared again to discharge the duties of citizenship, directly promotes the public welfare. *State v. Cassidy*, 22 Minn. 321, 21 Am. Rep. 765. The act here in question being invalid, it follows that the complaint in this action fails to state a cause of action, and that the demurrer to the complaint should have been sustained.

Order reversed.

John B. SANBORN, Appt.,

v.

PEOPLE'S ICE COMPANY, Resp't.

(82 Minn. 43.)

- *1. Under the general law, all persons have the common right to enjoy the use of public waters for the ordinary purposes of life, such as boating, fishing, recreation, and domestic or individual uses, including the right to take ice therefrom.
2. Such ordinary uses constitute a right held in common by the public and riparian owners.
3. The cutting and removing of ice in large quantities annually for shipment and sale for commercial purposes from public waters, whereby their natural level is materially reduced, is not such a common right.
4. Riparian owners, by virtue of their ownership and possession, have certain

*Headnotes by LEWIS, J.

NOTE.—For earlier cases in this series as to right to cut ice generally, see *Brown v. Cunningham* (Iowa) 12 L. R. A. 583, and note; *Barrett v. Rockport Ice Co.* (Me.) 16 L. R. A. 774; *Concord Mfg. Co. v. Robertson, R. & Co.* (N. H.) 18 L. R. A. 679; *Marsh v. McNider* (Iowa) 20 L. R. A. 333; *Wright v. Woodcock* (Me.) 25 L. R. A. 499; *Eldemiller Ice Co. v. Guthrie* (Neb.) 28 L. R. A. 581; *Gehlen Bros. v. Knorr* (Iowa) 36 L. R. A. 697.

special interests in such waters not enjoyed by the public in general, the extent of which depends upon the nature of the shore land and the character and extent of the possession.

5. If such public waters are disturbed beyond their natural condition by the general public in the exercise of the right of common usage, neither a riparian owner nor other common user has a legal remedy to prevent the same.
6. A riparian owner may, by virtue of his special interest as such, enjoin an interference with such waters which disturbs their natural condition, provided such owner is peculiarly and specially affected and damaged thereby.
7. Chapter 410, Special Laws 1881, is a general law in its application, and need not be specially pleaded.
8. By the terms of this law the waters of White Bear lake are declared to be public waters, and it is made unlawful to artificially remove any water from the same for any purpose whereby the level of such water is materially reduced.
9. Cutting and removing ice for the purpose of shipment and sale in distant markets for commercial purposes is such an artificial taking and removing of water from such lake.
10. A riparian owner upon the lake may, under the provisions of this act, enjoin the taking of ice therefrom if such taking results in lowering the lake below its natural condition, provided such owner is damaged thereby, and such taking is artificial.
11. But neither a riparian owner nor a common user of the waters of such lake is entitled to invoke the benefit of such law in cases where the taking of such water is in the exercise of a common right.
12. It appearing from the complaint in this action that the lake in question was during twelve years lowered 2 feet below its natural outlet, and that the acts of defendant in cutting and removing ice therefrom were sufficient to reduce the volume of water one quarter of an inch annually, and to cause a further decrease by evaporation,—*held*, such taking was of substantial character, and entitles the shore owner to the right of injunction to restrain the continuance thereof, and that the complaint states a cause of action.
13. There is no defect of parties plaintiff in this action, for the reason that, as appears from the complaint, the other users of the waters were exercising the right of common usage, and that they were not specially damaged by the acts complained of.
14. There is no defect of parties defendant in this action for the same reason as above stated.

(*Lovely and Brown, JJ., dissent.*)

(December 19, 1900.)

APPEAL by plaintiff from an order of the District Court for Ramsey County sustaining a demurrer to a complaint filed to enjoin the removal of ice from a lake. *Reversed.*

The facts are stated in the opinions.

Messrs. John B. Sanborn, E. P. Sanborn, and Ross Clarke, for appellant:

Such a continual removal of ice and water
51 L. R. A.

for long and unlimited periods will evidently destroy the lake, and the maxim *De minimis non curat lex* has no application to such a case. This maxim is never applied to the positive and wrongful invasion of one's property.

Seneca Road Co. v. Auburn & R. R. Co. 5 Hill, 170.

In taking ice for commercial purposes, if injury results, an action will lie in favor of one entitled to complain.

Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; *Brown v. Cunningham*, 82 Iowa, 512, 12 L. R. A. 593, 48 N. W. 1042; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Bigelow v. Shaw*, 65 Mich. 341, 32 N. W. 800; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462.

The appellant, as a riparian owner on said White Bear lake, is entitled to invoke the aid of the statute to prevent the diminishing of the waters of the lake by the ice company, or any other person or corporation.

Flaten v. Moorhead, 51 Minn. 518, 19 L. R. A. 195, 53 N. W. 807.

The water taken by the ice company is lost to the lake forever, and has no relation whatever to the amount which comes into the lake by way of springs or melting snow or rains. The complaint in this case shows that the appellant, as a riparian owner, has suffered a special damage not common to the public, for which a private action to enjoin the respondents from interfering with such right can be maintained.

Potter v. Howe, 141 Mass. 357, 6 N. E. 233; *French v. Connecticut River Lumber Co.* 145 Mass. 261, 14 N. E. 113; *Page v. Mille Lacs Lumber Co.* 53 Minn. 492, 55 N. W. 608, 1119; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.* 79 Wis. 297; 48 N. W. 371; *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373; *Stadler v. Griesben*, 61 Wis. 500, 21 N. W. 629; *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229, 40 N. W. 809; *Patten Paper Co. v. Kaukauna Water Power Co.* 70 Wis. 659, 35 N. W. 737; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 934; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Higgins v. Flemington Water Co.* 36 N. J. Eq. 538; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 70 N. W. 1115.

Messrs. Durment & Moore, for respondent:

It is a well-known fact that the waters of our lakes are receding constantly, even in those not being used as ice fields.

Lamprey v. State, 52 Minn. 191, 18 L. R. A. 670, 53 N. W. 1139.

The waters of the lake are public waters, and belong to the state in its sovereign capacity.

Laws 1897, chap. 257.

The plaintiff has not any property right in the water, nor to have it wash his land.

The state may lower the water of the lake, drain the lake, or raise it to high-water mark, without making compensation to the riparian owner.

Minneapolis Mill Co. v. St. Paul Water Comrs. 56 Minn. 488, 58 N. W. 33; *Re Minnetonka Lake Improvement*, 56 Minn. 513, 58 N. W. 295; *Gniadok v. Northwestern Improv. & Boom Co.* 73 Minn. 87, 75 N. W. 894; *Red River Roller Mills v. Wright*, 30 Minn. 253, 44 Am. Rep. 194, 15 N. W. 167.

The state owns in its sovereign capacity, in trust for the common use of all the people. Consequently, the public have the same rights in the waters of the lake (so far as unrestrained by statute) as they would have in game if not restricted by statutory provisions, and therefore the defendant has a right, so long as the state does not interfere, to take ice from the lake.

Lamprey v. State, 52 Minn. 198, 18 L. R. A. 670, 53 N. W. 1139; *State v. Rodman*, 58 Minn. 400, 59 N. W. 1098; *People's Gas Co. v. Tynor*, 131 Ind. 277, 16 L. R. A. 443, 31 N. E. 59; *Townsend v. State*, 147 Ind. 628, 37 L. R. A. 294, 47 N. E. 19; *Westmoreland & O. Natural Gas Co. v. DeWitt*, 130 Pa. 247, 5 L. R. A. 731, 18 Atl. 724.

The taking of ice is a public use, and everyone is entitled to take ice in public waters, as of common right, so long as no trespass is committed in the taking, unless forbidden by statute.

Lamprey v. State, 52 Minn. 181, 18 L. R. A. 670, 53 N. W. 1139; Gould, *Waters*, 2d ed. § 191; 9 Am. & Eng. Enc. Law, 1st ed. p. 859 (d); *West Roxbury v. Stoddard*, 7 Allen, 170; *Hittinger v. Eames*, 121 Mass. 546; *Gage v. Steinkrauss*, 131 Mass. 222; *People's Ice Co. v. Davenport*, 149 Mass. 322, 21 N. E. 385; *Hickey v. Hazard*, 3 Mo. App. 480; *Wood v. Fowler*, 26 Kan. 689, 40 Am. Rep. 330; *Woodman v. Pitman*, 79 Me. 458, 10 Atl. 321.

A landowner's riparian rights are subject to the rights of the public to use the waters for lawful purposes, and one making such use of the waters, in the absence of negligence, is not liable for damages resulting to the riparian estate from such use.

Doucette v. Little Falls Improv. & Nav. Co. 71 Minn. 206, 73 N. W. 847; *Coyne v. Mississippi & R. River Boom Co.* 72 Minn. 533, 41 L. R. A. 494, 75 N. W. 748.

The state alone can prosecute such an action as plaintiff has brought.

West Roxbury v. Stoddard, 7 Allen, 158; *Swanson v. Mississippi & R. River Boom Co.* 42 Minn. 532, 7 L. R. A. 673, 44 N. W. 986; *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 502; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 385, 23 N. W. 538; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27.

Lewis, J., delivered the opinion of the court:

The complaint in this action alleges, in substance, that the plaintiff now and for twelve years has been the owner of, and in possession of, certain real estate bordering 51 L. R. A.

on White Bear lake, in the village of White Bear, Ramsey county, Minnesota; that the shore line of said premises along the lake is 175 feet; that plaintiff has made certain improvements thereon, consisting of a dwelling house, a stable, outhouses, etc., of the value of \$10,000, and that the value thereof consists mainly in the connection of the premises with the waters of the lake. It is further alleged that White Bear lake is naturally a large body of pure, clear, spring water, covering an area of 2,400 acres of land, contiguous to the cities of St. Paul, Minneapolis, and Stillwater, has a reputation as a health resort, and is largely patronized in the summer season for the purposes of recreation, pleasure, and health, to accommodate which demand many cottages have been built on the lake shore; that the waters of the lake are used by such occupants, including plaintiff, for the purposes of boating, fishing, bathing, general recreation, and for domestic and household purposes. It is further charged that defendant corporation has for more than twelve years annually cut and removed therefrom more than 75,000 tons of ice, and shipped the same to St. Paul and distant markets, and disposed of the same for commercial purposes, is still engaged in the act of removing large quantities of ice for such commercial purposes, and that, by the opening of large areas of water to the action of the air, great quantities of water evaporated annually. It is further stated that the action of defendant in so removing the ice for the period of twelve years has had the effect of reducing the waters more than 2 feet, resulting in exposing shoals and bars, causing weeds to grow on the exposed shores, and rendering the beach and shore unsightly, and unfit for pleasure and health. It is alleged that, since defendant commenced to take out the ice as stated, there has been no overflow from the same through the natural outlet, and that the water level has been reduced below the natural outlet by the said acts of defendant. As special damages thereby caused to plaintiff, it is alleged that plaintiff had constructed a bath house and pier for the requirements of bathing and boating, and that when so constructed the water at such points was 2 feet in depth, and as a result of defendant's acts, in so lowering the lake, there has been exposed in front of plaintiff's premises an unsightly bar of sand, in width 150 feet, and that in order to reach the water it is necessary to extend the pier, and that such improvements are being rendered useless, to defendant's damage of \$1,500. The action is brought to restrain defendant from further cutting and removing ice.

To this complaint defendant demurred upon four separate grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) defect of parties defendant; (3) defect of parties plaintiff; (4) that plaintiff has no legal capacity to sue. The court below sustained the demurrer, and plaintiff appealed.

In respect to all bodies of public water, in common with riparian owners, the public have the ordinary rights of usage. These include the right of boating, fishing, and the use of the water or ice for the ordinary purposes. In these respects, a riparian owner has no exclusive or peculiar privileges. There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land. Among such may be mentioned the right of accretions and the right of access. Again, there may be certain special rights peculiar to each shore owner according to the nature of his possession, which includes the character and value of his improvements. It is elementary that the shore owner may prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of low and high water mark, by artificial means, not in the exercise of rights common to all, unless such act be expressly authorized by law. The extent of the injury depends upon the condition of the shore land and the nature of the possession. If there is a remedy for an injury caused by the artificial raising of the water above the natural line, thus flooding a meadow, there is also a remedy to prevent exposure of an unsightly and unhealthy marsh by artificially drawing off the water below the natural level. It is immaterial for what purpose the shore land is used, if it be a lawful use. There is no distinction in this respect between a farm and a summer residence. Employment of contiguous land for the purpose of pleasure, recreation, and health, constitutes such a use of adjacent bodies of public water as to command a remedy for an interference with its natural condition. *Kimberly & C. Co. v. Hewitt*, 70 Wis. 334, 48 N. W. 373.

But, even if plaintiff is in a position to call upon the courts to redress an injury caused in this manner, it is claimed by defendant that it is justified in what it has done, and in continuing so to do in the future, because it is only enjoying the common privilege open to the public. Defendant is mistaken in its view of the nature of the common or public privilege of taking water or ice from the lake. Such privileges are limited to those rights which are enjoyed by the public in common with riparian owners. This privilege is based upon the consideration of its personal nature; such a right as may be ordinarily used. Any man, woman, or child is accorded an equal opportunity in the use of such advantages. The door is shut to no one, if the means of access have been provided. But the very purpose which has caused the development of the law establishing the right would be destroyed if the principle were extended to protect an unlimited traffic by shipment to a distant market. The taking of ice for the purpose of shipment to a distant market, for the purposes of sale, 51 L. R. A.

without regard to its effect upon the common user, is not the exercise of a common right. It is true that public waters are free and open to all for commercial purposes to the extent that common rights are not encroached upon. The taking of water or ice by common right may result in destroying the source of supply, and no riparian owner or other common user can complain. But when use is made of such water for commercial purposes, not of common right, then the right to so use ceases at the point where the conflict of interest with the common user commences. It is true that the public itself may grant the right to do that which could not otherwise be lawfully done. *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 33. But the defendant does not claim the benefit of any such statute. On the contrary, appellant invoked to his aid chapter 410, Special Laws 1881, which declares that White Bear lake shall forever remain free and open for the common and public use of all citizens of this state; and it is further provided that the waters of said lake shall never be lowered or diminished by any artificial means, and be connected with, used, or applied to any use or purpose, public or private, by any person, persons, or corporation, public or private. This is a public act, dealing with the interest of the general public, and it was not necessary to plead it.

While plaintiff has a remedy independently of this statute, he is nevertheless protected by its provisions. If there is any remedy under this act for the taking of the waters of the lake by the ordinary users by common right, the state is the only party which could enforce the remedy. But the law also prohibits the taking of water by artificial means, and if such taking by artificial means results in special injury to a riparian owner, as alleged in the complaint, then such owner may sue in his own name to enforce that which is declared unlawful by the statute. Within the meaning of this act, the taking of ice as a business, for shipment to a distant market for sale, is not an ordinary use of the waters by common right, but is an artificial taking.

After what has been written, it is evident that there is no defect of parties plaintiff in this action, since the plaintiff has shown himself specially affected by defendant's acts, on account of his peculiar relations to the water, not shared in common by other shore owners.

It is equally clear that there is no defect of parties defendant. So far as the complaint discloses, the use made of the waters by other persons is only such use as by common right they are entitled to.

We come now to the final position taken by respondent, and that is, conceding all other questions, still the complaint does not constitute a cause of action, because no substantial decrease in the water of the lake has been shown as a result of defendant's act in cutting ice. The learned trial judge seems

to have disposed of the case upon this theory. Taking judicial notice that a cubic foot of water weighs, in round numbers, 62½ pounds, and that water expands one eleventh in freezing, a computation shows that 75,000 tons of ice, when reduced to water, would amount to about one quarter of an inch, when spread over the entire area of the lake. In the twelve years, this would amount to 3 inches. So small an amount of water was considered trifling, and not likely to affect plaintiff's property. This computation, however, does not take into account the amount of evaporation caused by removing the ice, and thus exposing the water to the air. It is further claimed that the constant falling of the water was due to other natural causes, such as the effect of drainage and tilling of the land. In thus considering the question, an important consideration has been overlooked. It is positively alleged in the complaint that during the twelve years there has been no water flowing out of the lake, the water level always being below the natural outlet. If this be true, then all of the natural increase by rainfall, snow, and springs would tend to increase the volume, unless the increase were overbalanced by the natural decrease. To whatever extent the water was reduced by defendant, to that extent the level was reduced below the natural condition. In other words, if defendant had not removed the 3 inches of water, that much additional water, together with whatever, if any, was lost by the alleged artificial evaporation, would still be in the lake. It would be different in the case of a running stream, where the amount taken would be immediately supplied. Here plaintiff is entitled to the natural condition, and only asks that the result be not made worse by artificial means.

The amount of water taken up is not material. If the interference is persistent, and substantially reduces the natural level of the lake, it is sufficient. If there was a fall of 2 feet in twelve years, according to the mathematical demonstration submitted by respondent, defendant is charged with causing one twelfth of that amount. While such amount averages small for each year, yet it is definite, persistent, and, if continued, will be serious. Such an interference is not trivial. It is substantial. The amount of damages in such cases is not material, if it be some definite amount. *Potter v. Howe*, 141 Mass. 357, 6 N. E. 233. The complaint complies with these requirements, and states a good cause of action.

Lovely and Brown, JJ., dissenting:

The decision in this case is so at variance with the law as we understand it that we are unable to concur with the majority of the court. The substantial facts in this case are that plaintiff is the owner of a summer residence on the shores of White Bear lake, with extensive and valuable improvements thereon, and he seeks an injunction restraining defendant, a corporation en-

gaged in storing ice for sale to the people of St. Paul and other distant points, from cutting or removing ice therefrom, upon the asserted equitable claim that its acts in that respect lower the lake one fourth of an inch each year, and tend to render its shores unsightly and the lake unfit for pleasure. The court below held that the complaint presented no equities; that the damage resulting from a lowering of the lake one fourth of an inch each year, if amounting to a damage or injury at all, was too trifling to warrant the serious consideration of a court of equity,—and sustained the general demurrer to the complaint. The majority of this court hold to the contrary, and reverse the learned district judge. We think our associates are in error, both upon principle and authority.

In those courts where the title to the bed of navigable lakes and rivers is held to be in the state, the waters thereof are also held to be public property, held by the state in its sovereign capacity, as trustees for public use (*Lamprey v. State*, 52 Minn. 198, 18 L. R. A. 670, 53 N. W. 1139); and the right to take ice for use or sale, or use of the waters for fishing, boating, and other lawful purposes, is common to all, and in such waters or ice the riparian owners have no special or superior right. As said in *People's Ice Co. v. Davenport*, 149 Mass. 324, 21 N. E. 386: "It is too well settled to be disputed that the property in the great ponds is in the commonwealth; that the public have the right to use them for fishing, . . . boating, . . . cutting ice for use or sale, and other lawful purposes; and that the owners of the shores have no exclusive rights in them." Such is the law in this state, unless changed by this decision. *Lamprey v. State*, 52 Minn. 198, 18 L. R. A. 670, 53 N. W. 1139. In this case it was held, as a result of a careful review of the judicial *dicta* in England and in this country upon this subject, that "meandered lakes . . . are not adapted to, and probably never will be used to any great extent for, commercial navigation, but they are used, and as population increases, and towns and cities are built up in their vicinity, will be still more used, by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes, which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time," etc. 52 Minn. 199, 200, 18 L. R. A. 678, 53 N. W. 1143. We heartily concur in this view, and seriously anticipate the result of the majority opinion, in giving to riparian owners the power, by reason of their construction of expensive improvements for private use upon their shore property, to interfere with the common right of the people in these waters, will, as expressed by the learned judge (*Mitchell, J.*), in the case last cited, result in a great wrong to the

public for all time, the extent of which cannot perhaps now be enumerated, or even anticipated. It was distinctly held in *Minneapolis Mill Co. v. St. Paul Water Comrs.*, 56 Minn. 485, 58 N. W. 33, that the rights of riparian owners in and to public waters are subordinate and inferior to the public uses thereof. It was further held in that case (Collins, J.) that "the right to draw from them [public waters] a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized." Such we believe to be the law everywhere, except in Wisconsin, and perhaps some other states, where the title to the bed of such waters is in the shore owners.

The majority opinion gives faint recognition to this principle, but avoids its inevitable logical results on two theories, viz.: First, that the right to take ice from such waters is individual or personal, and must be limited to quantities sufficient for personal or individual use; and, second, that the riparian owner has in fact special and exclusive rights in such waters, measured and fixed by the character of his improvements upon the shore property. We regard both theories as unsound, fallacious, inimical to the public good, and the latter theory as judicial class legislation of a very pronounced type. The majority say, in speaking with reference to the rights and privileges of the people to take water or ice from public waters: "This privilege is based upon the consideration of its personal nature. Any man, woman, or child is accorded an equal opportunity in the use of such advantages." The effect of the holding in this case is to limit the privilege to personal necessities. None of the authorities make any such distinction. They all hold that ice may be taken for use or sale, and we have found no case where the right has been confined to personal or individual uses. The principle of law applicable to fishing or fowling is applied in the water and ice cases, and no court ever has limited the right to fish or hunt game to personal necessities.

But it is held in the majority view that a necessary distinction exists as to the limit of the use by the public, and that ice cannot be taken by the public from these lakes for such use in unlimited quantities, although we are left entirely in the dark as to what would be a proper or limited use, as distinguished from an improper and unlimited use. The legislature has not regulated this subject, and, if this court can do so, its conclusions must rest wholly upon the facts as alleged in the complaint,—that the quantity taken by defendant,—“more than 75,000 tons annually,—after storing a large portion of the same in ice houses for the time being, it has shipped away to St. Paul and more distant marts of commerce, and disposed of the same for commercial purposes, at remote points from the shores of said lake, where no part or portion of the same can be returned to the shores of said White Bear

lake.” And while other causes as set forth in the complaint, and conceded, have lowered the lake in question to the extent stated in the majority opinion, yet it was admitted by counsel on the hearing that the removal of ice therefrom by the defendant against whom the injunction is sought had only diminished the shore line, by its acts, one quarter of an inch each year, which seems to us an insufficient basis to entirely destroy a valuable business by injunction, simply because it might be unreasonable in a case where no limit has been fixed upon the common right.

The easy solution that suggests itself, by reason of the capacity of one person to take more ice than another, where no limits are prescribed in the law, is not by injunction to restrain a right which is common, and the effort to do so in this case gives to the shore owner a special privilege, which depends entirely upon the extent of his improvements, and this is the contention of the appellant, for upon no other ground can the relief granted be sustained. And the majority opinion is an adoption of the doctrine that the riparian owner, by reason of extensive improvements upon his property, placed there for comfort and pleasure during the summer season, has special rights and privileges superior to the public, and other, but less pretentious, shore owners, who have not made improvements of the same character.

We are unable to give weight to those considerations which control the majority of the court. We regard the public waters of this state as the common property of all the people to the extent of such natural and reasonable uses as the necessities of life require, and it seems to us that such uses by the common people are a reality rather than a legal myth, and paramount to the individual whims, caprices, and pleasures of those who adapt their own property to luxuries. Compared to the practical benefits which the use of ice affords to the inhabitants of the cities adjoining White Bear lake, the advantages and pleasures of any shore owner are insignificant. And when a step is taken in the direction of destroying the rights of the many for the exclusive benefit of the few, by means of an injunction restraining the cutting of ice which will result in lowering the lake only one fourth of an inch, it seems to us that there is a plain requirement for the application of the rule, *De minimis non curat lex*. If the right to take ice is a public right, as conceded, this court has no authority to say how much or how little any person can take for public use. In the absence of legislative regulation, if any unreasonable use is made of public waters, and a public injury follows, the remedy belongs to the public, as in other cases of public wrongs and nuisances. *West Roxbury v. Stoddard*, 7 Allen, 158-170. But to concede that ice may be taken from these lakes for common use by “every man, woman, and child,” and to hold that such right is limited, or, in this case denied, to the defendant, without fixing

the limit, is, in effect, to give to the public a privilege which they cannot enjoy. But if the necessity for the use is the test,—and we apprehend that the legislature and the courts can make no other,—there is nothing in the complaint that charges any unreasonable usage beyond such necessity, or extends such appropriation further than the natural and ordinary uses to which the commodity is applied, and we do not suppose that anyone will claim that an unnecessary or unreasonable use will be assumed where it is not alleged. If ice cannot be taken in the way adopted by defendant, as set forth in the complaint, for use by the residents of the large cities adjoining White Bear and other lakes in their vicinity, there would seem to be but one resource left,—to manufacture that commodity, as in southern climates,—which would be very expensive, and a deprivation of its benefits to many; and, if the complaint which is upheld in this case furnishes the criterion of limitation to be applied, the means even of ice manufacture must not be taken from the lakes or streams, but the consumer must depend upon the beneficence of heaven, rather than the bounteous earth, to furnish rain for that purpose, before it has fallen into these waters and become a part thereof. This rather far-fetched conclusion seems to us but the logical *reductio ad absurdum* of the claim presented in the complaint.

We should long hesitate to accept a rule that would work such an injustice to the inherent rights of our people, and we do not see any particular force in the distinction between the right of the individual living in the cities adjoining the lake to take water or ice therefrom personally, and forbids him the same right when derived through the customary methods. It requires no stretch of fancy to recognize the well-known fact that but few take ice from the public waters, and place the same in receptacles for their consumption. The use of ice by the citizen, which is almost as necessary as water, depends upon the intervention of those who are engaged in the business of cutting and storing it for delivery to private persons. In a measure, such persons are the agents of all who need ice, and upon whom the people rely and depend to obtain that necessity. Such a course reduces the price of the commodity, and furnishes benefits much more advantageously than if each individual was required to do that which many are not able to do. And if the private individual has a right to take ice for his own use, and several cannot do the same thing through another, it is, in the way we live and move and have our being at the present day, a very barren right to each.

We do not think there is any weight in the suggestion that there is no outlet to White Bear lake. It is conceded to be a public body of water, and the fact that it has no outlet is wholly irrelevant to the question. The truth undoubtedly is that this lake is fed by springs, and, like many others

of the public waters of this state, by reason of the cultivation of the soil, evaporation, and other causes, has to some extent receded in the quantity of its waters, although by acts of defendant to no greater extent than 3 inches in twelve years, or one foot in fifty years.

The principles which we have stated above are not new, but are supported by an unbroken line of authorities of the most respectable courts in this country. Gould, *Waters*, 3d ed. 191; *Brastow v. Rookport Ice Co.* 77 Me. 100; *Woodman v. Pitman*, 79 Me. 456, 10 Atl. 321; *McFadden v. Haynes & D. Ice Co.* 86 Me. 319, 29 Atl. 1068; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Hittinger v. Eames*, 121 Mass. 539; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Bosse v. Thomas*, 3 Mo. App. 472; *Brown v. Cunningham*, 82 Iowa, 512, 12 L. R. A. 583, 48 N. W. 1042.

The majority opinion is based in part on chapter 410, Special Laws 1881, and it is urged that the taking of ice from this lake amounts to an artificial lowering thereof, within the meaning of that law. While it is true that all public waters belong to the state as trustees for the whole people, and that the legislature may regulate their use, yet, if the statute referred to gives the right to prohibit the common use in opposition to those natural rights of man which transcend even the constitutional right of the citizen, it is invalid. Upon this subject we adopt the very vigorous and appropriate language of Mr. Chief Justice Beck in *Brown v. Cunningham*, 82 Iowa, 516, 12 L. R. A. 585, 48 N. W. 1043: "The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the streams for the benefit of His creatures, and has bestowed no power upon man or governments created by man to defeat His beneficence. Of course, the use of the water may be regulated by the state, but the state may not forbid its use to the people. As streams of water begin *ex jure nature*, they are subject, as to course and use, only to nature's laws." But it seems to us perfectly absurd to attribute to the legislature, in enacting this statute, an intention to prohibit or guard against the minor results that follow the cutting of ice, as is charged in the complaint. The cases cited in the majority opinion in support of the views of the court do not, in our judgment, sustain its conclusions. In the cases so cited it is held that a direct injury or trespass to the riparian owner, caused by the interference with the natural course of the water, is the subject of legal remedy. The distinction between those cases and the one at bar seems to us apparent. It is the broad difference between the act of a trespasser interfering with the natural flow of the water and a person exercising a common and natural right.

The order of the trial court should be affirmed.

MISSISSIPPI SUPREME COURT.

**ALABAMA & VICKSBURG RAILWAY
COMPANY, Appt.,**

**v.
Susan WILLIAMS.**

(.....Miss.....)

The mother of an illegitimate child cannot recover for his death under acts 1898, p. 83, giving a right of action to the mother and other specified relatives of one whose death results from wrongful injury.

(November 12, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Rankin County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her illegitimate child. *Reversed.*

The facts are stated in the opinion.

Messrs. McWillie & Thompson, for appellant:

It has been settled in this state that a bastard is not within Lord Campbell's act, or our statute (Laws 1898), the prototype thereof.

Illinois C. R. Co. v. Johnson, 77 Miss. 727, 28 So. 753.

In fact Code 1892, § 1549, much relied upon in the *Johnson Case*, on the subject of distribution and descent of estates, does not in any sense provide for inheritance by the mother from her bastard child; and the question of such inheritance is left by our statute exactly as it was at common law, and the mother does not inherit at all, does not inherit anything, from her illegitimate offspring. To permit such an inheritance would be contrary to the policy of the law; it would be counter to the policy of even § 1549 of the Code, for it would reward the guilty adulteress, when the statute intended only to remove an apparent, probably a real, hardship from the innocent child.

Messrs. Theodore McKnight and A. J. McLaurin for appellee.

Calhoon, J., delivered the opinion of the court:

There is no reason for overruling the case of *Illinois C. R. Co. v. Johnson*, 77 Miss. 727, 28 So. 753, *post*, 837, and the conclusion reached in that case should be the same in this. At the common law an illegitimate could not inherit from his own mother or anyone else, and he could not transmit by inheritance, except to the heirs of his own body. He might become the propositus of

NOTE.—As to right of action for death of an illegitimate child, see the earlier case in this series of *McDonald v. Pittsburgh, C. C. & St. L. R. Co.* (Ind.) 32 L. R. A. 309.

As to recovery for death of an illegitimate half-sister, see the case next following, *Illinois C. R. Co. v. Johnson* (Miss.) *post*, 837.

On the question of inheritance by, through, or from illegitimate persons, see the *note* to *Croan v. Phelps* (Ky.) 23 L. R. A. 753; and the later decision in *Johnstone v. Tallaferra* (Ga.) 45 L. R. A. 95.
51 L. R. A.

a new line of descent from himself, but, until a child was born to him in wedlock, he had no kindred, no father, no mother, no sister, no brother, and nothing which he did not acquire. All kinship was denied, and no blood connection recognized except that the courts, for the actual protection of his life, as a person in the body politic, would ascertain the natural mother, and, for the conservation of the morals and decencies of society, would look into his natural blood kinship in vindicating the statutes against incest. Statutes denouncing penalties reached him, as they did all other persons. But statutes could not be availed of which would improve his condition, unless they expressly included illegitimates in their terms. The reason was to discourage adulterous connections. In *Edwards v. Gauding*, 38 Miss. 165, our court announces the rule of strict construction, which runs through all our reports, of all statutes making innovations on the common law, and applies that rule of construction to a statute conferring rights on illegitimates. That statute was that "hereafter all illegitimate children shall inherit the property of their mothers, and from each other," etc.; and the court held that even the legitimate children of a bastard dying before the act could not inherit from an illegitimate uncle or aunt dying after its passage. Previously to this decision our court had been equally as explicit in *Porter v. Porter*, 7 How. (Miss.) 110, 111. It holds that bastards are not comprehended under the word "children" in our statute of descents; that those born out of wedlock are not numbered among children; that the word "children," in a will, where there were both legitimates and illegitimates, means legitimate children only; that illegitimates could not be the "stock through which consanguinity could be traced;" that they could not inherit from their mother; and that "it is the policy of the law to sustain the institution of marriage, as the surest and safest groundwork on which society can rest, and to make that the only source from which inheritable blood can flow." Discussion might well end here, on the decisions of our own state. But the doctrine is settled in the same way in nearly all the states, if not all, which treat of it. In Vermont a statute gave a right of action to anyone "in any manner dependent on" a person injured or dying by intoxicating liquors against the seller of the intoxicant. In *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, a man named Good died from intoxicating liquor; and Mary M. Good sued the seller, averring that she had lived with Mr. Good as his wife, but not in lawful wedlock, for many years, and had borne him eight children, and that he had acknowledged them as his, and her as his wife, in the community, though he was in fact married to another woman, who lived in Massachusetts, and who had long before been through the ceremony of marriage with another man. Mary M. Good was

joined in her suit by an illegitimate minor daughter of her unlawful connection with Mr. Good, also dependent on him for support. The court denied relief on the ground that the legislature, by the word "dependent," meant "legally dependent," which could not refer to an adulteress or an illegitimate, without express mention, and that the act, being an innovation on the common law, must be strictly construed, and so as not to violate the public policy of discouragement of illicit intercourse. This is an extreme case, but the ruling was manifestly right. In *McDonald v. Pittsburgh, C. C. & St. L. R. Co.* 144 Ind. 459, 32 L. R. A. 309; 310, 43 N. E. 447, Judge Monks collates the authorities on this subject, and they practically speak one voice. Last year the whole doctrine was commented on in *Citizens Street R. Co. v. Cooper*, 22 Ind. App. 462, 53 N. E. 1092 *et seq.*, with full approval. See also *Blair v. Adams*, 59 Fed. Rep. 243; 5 Am. & Eng. Enc. Law, New ed. p. 1095; *Williams v. Kimball*, 35 Fla. 49, 26 L. R. A. 746, 16 So. 783; and also the authorities cited in the briefs of counsel on both sides in the case at bar, and in the briefs and opinion in *Illinois C. R. Co. v. Johnson*, 77 Miss. 727, 28 So. 753, *post*, 837. If anything can be said to be settled on reason and authority, it is that statutory rights of action given kindred for injuries done another do not embrace illegitimate kindred, without express mention. Legislation must be presumed to be enacted in the light of the common law, and not to give or enlarge rights denied at common law to a class separated by it from the common mass, without express mention.

Counsel cite *Marshall v. Wabash R. Co.* 120 Mo. 275, 25 S. W. 179, where the right of the mother of a bastard to sue for his death was sustained. It will be seen on page 282, 120 Mo., page 181, 25 S. W., that the opinion in fact rests on two statutes of the state of Missouri, the first declaring the mother to be the natural guardian of her illegitimate child. We have no such statute in Mississippi. The second declares that the mother may inherit from her bastard child. We have no such statute in Mississippi. Here the mother of a bastard cannot inherit from him. Now, if we turn to the statute under which appellee sued (Acts 1898, p. 83), we see that it refers to the "widow, husband, father, mother, sister, brother" of deceased; and we hold that it refers only to the legal widow, husband, father, mother, sister, brother, because illegitimates are not expressly included. People unmarried can leave no widow, husband, father, mother, sister, brother, because they could have none at common law, and no statute enables them to have either. The collocation shows that legitimates only could have been referred to. Certainly the putative father was not meant, and the adulterer or adulteress could not be meant under the terms "husband or widow;" and we can imagine no process of reasoning by which the courts can interpolate the words "whether legitimate or illegitimate" before the words "father, mother, sister, or brother." Courts can only pro-

nounce what the law is, not what they may think it ought to be. The plaintiff below had no right to sue. If the right exists in anyone, it cannot possibly exist in any but the executor or administrator of the deceased.

Reversed and remanded.

Rehearing denied.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,

v.
Sophronia JOHNSON.

(77 Miss. 727.)

An illegitimate half-sister cannot maintain an action under Acts 1898, p. 82, entitling a sister or brother to sue for the death of a sister or brother.

(May 7, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Lincoln County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's illegitimate half-sister. *Reversed.*

The facts are stated in the opinion.

Messrs. Mayes & Harris for appellant.

Messrs. Cassidy & Cassidy, for appellee:

The legislature sought to abolish the harsh rule of the common law in the several codes and acts of our legislature from 1822 to 1892, by our several statutes of descent and distribution.

Under our statutes the rule of the common law that an illegitimate had no inheritable blood, that he was not included among the children of a common mother, nor was he a "child," nor could he be counted among the next of kin, has been abolished, and with it the reason for the rule.

Under our statute of descent and distribution, he has a mother, brothers and sisters, and kindred; and the mother being always certain, he inherits from her, her children, and her kindred.

The act of 1898 was meant to include all persons who bore that relationship at the time of the passage of the law, and who were recognized as such both by law and custom.

A bastard under our laws as they now exist is entitled to all and every benefit of the law as if he were legitimate, so far as the mother and her kindred are concerned.

The bastard sister can share in the estate of her bastard sister or her legitimate sister. She can transmit inheritable blood to her offspring.

Black, Stat. Constr. & Interpretation of Laws, p. 204; *Chase v. Lord*, 77 N. Y. 1.

But suppose the illegitimate sister is not included among the persons named in the statute, she could, under the statute of de-

NOTE.—In connection with this case, see the preceding case of *Alabama & V. R. Co. v. Williams* (Miss.) and footnote thereto.

scent and distribution, be her administratrix, and could have sued in that capacity. Being the only distributee of the deceased, she was the proper party to sue in either event, and it makes no difference whether it was in one name or another.

Illinois C. R. Co. v. Crudup, 63 Miss. 291; Black, Remedial Statutes, p. 309.

Calhoon, J., delivered the opinion of the court:

Under the laws of this state, can the illegitimate half-sister bring an action for damages against a railroad company for negligently causing the death of her illegitimate half-sister? Dora Beard, a young woman of illegitimate birth, was killed in the incorporated municipality of Brookhaven by the employees of the appellant company by what is known as a "kicking switch." Sophronia Johnson, the appellee, was the illegitimate half-sister of Dora Beard. They were both the offspring of the same mother by different fathers, and Sophronia brought this action, and recovered damages.

We look, first, of course, to the common law, and we cannot better define the condition of the deceased, or the rights of plaintiff, than we find in the brief of her accomplished counsel, who say: "At common law they [illegitimates] were the children of nobody, not even their own mother, and had no kindred. They could inherit nothing, nor could anyone inherit from them, save their own legitimate offspring. They were the beginning of their race; not even kin to human kind; monsters, so to speak, conceived in sin, and born in iniquity, with no rights, no name, and no people." We should be glad, if we had space, to follow by quoting the subsequent remarks of this very able brief, since they illustrate true eloquence,—the lightning of passion playing along the line of thought. But we must content ourselves with the ice-cold law, from which no friction will excite sparks. The common law must govern us, except where it is modified by statutory enactment. Accepting, as we do, the description of the status of bastards at common law furnished us by appellee's counsel, it may be noted that the basis of the rule was the discouragement of immorality in the promiscuous intercourse of the sexes, not sanctioned by the public contract of marriage. The effect of the law on the millions who were governed began, after the lapse of centuries, to dawn on the minds of the select few who governed them. These few, at occasional intervals between the numerous avocations of the multitudinous pleasures afforded by wealth, began to observe that bastardy continued to prevail; that illegitimacy of birth, notwithstanding the thunders of the law from parliament house, the right reverend clergy, and the wigs and gowns of the courts, continued to be, as it always had been before, a "condition, and not a theory." Bastards still dotted and spotted the kingdom as before, and, while the particular kingdom was in no worse situation in this shocking regard than the other kingdoms, empires, and suzerain-

ties of earth, still it was in no better, to say the least of it. It was seen to prevail still. So, the premises being well considered for 700 years or so, it finally dawned on the benevolent minds of a few of "my lords and gentlemen," who, we must assume, were not at all interested personally in the question, that the unoffending, unconsulted, and innocent offspring of unhallowed natural appetite ought to have some sort of consideration. Thereupon a law was enacted magnanimously recognizing that bastards were in its eye, as in fact, the children of their own mothers. The slow process of evolution has, up to the date of this opinion, on the doctrine of gradual deviation from the original type, developed § 1549 of the Code. This section, on the point now being considered, has these words: "Illegitimates shall inherit from their mother, and from her other children, and from her kindred according to the statutes of descent and distribution; and the children of illegitimates and their descendants shall inherit from the brothers and sisters of their father or mother, whether legitimate or illegitimate, and from their grandparents. But the children of illegitimates shall not inherit from any ancestor or collateral kindred if there be legitimate heirs of such ancestor or collateral kindred, in the same degree, to whom the estate would otherwise descend." This statute gives bastards something in the neighborhood of half a showing. The common law and the statute law being as stated, it is now necessary to show both on the subject of the rights of kindred to sue for damages for the wilful or negligent killing of one of their blood, premising the observation that there is nothing whatever in the statute of descent and distribution making any right of action inheritable either by legitimates or illegitimates.

By the wisdom of the common law, so profound as to be quite undiscernible, if a man was hurt by the negligence of another he might sue for damages, but if he was killed by the negligence neither his heirs nor his executor or administrator could sue at all; thus making it much cheaper to kill him than to hurt him. This was the law for 1200 or 1300 years or such a matter of time, when there was a sudden sportive variation of type shown by Lord Campbell's act of 1846, which gave the right to the personal representatives. This variation has, fortunately, been persistent. It has evolved a new type and has developed it into so improved a condition as that, in our own state, we find in Acts 1898, p. 82, a provision that "a sister or brother" may sue for the death of a sister or brother. It will be seen that the Code, in the chapter on descent and distribution, makes an innovation on the common law in favor of illegitimates in regard to inheritance, but nowhere in that chapter makes rights in action for torts transmissible by descent, and at common law they were not so transmissible. Lord Campbell's act, the progenitor of the act of 1898, and this act, give the right to sue to certain survivors, and these acts are also an innovation on the common law, which gave no

such right; and neither act deals with inheritance nor makes any mention of illegitimates. Now, it has been held under Lord Campbell's act, and on acts similar to ours, that the courts will not extend by construction so as to encourage immorality, and that when legislative acts enabling survivors to sue use the word "kin" they mean legitimate kin, and when they say "father" or "mother," "children," or "brothers" or "sisters," they mean only legitimate father or mother, children, brothers, or sisters. Black, Law & Pr. in Acci. Cases, § 109, and note 31; Tiffany, Death by Wrongful Act, § 85, note 15. Where a statute gave the right to a "parent," it is held that even the mother cannot recover for the death of her own illegitimate child, as Mr. Tiffany says; and he refers to *Harkins v. Philadelphia & R. R. Co.* 15 Phila. 286, and he says that the rule is the same under the Missouri statute, giving the right to sue for the death of a "minor unmarried child," whether natural born or adopted; and he cites *Marshall v. Wabash R. Co.* 46 Fed. Rep. 269. He also cites *Dickinson v. Northwestern R. Co.* 2 Hurlst & C. 735, and two other cases not accessible to us; and he refers also to *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, which holds that, under a statute giving action for death from liquor illegally sold, an illegitimate child cannot recover for the mother's death. We have verified all the cases he cites except the two not accessible, and they fully sustain the text. See also *Gibson v. Midland R. Co.* 2 Ont. Rep. 658. The only case to be found *contra* is *Muhl v. Michigan Southern R. Co.* 10 Ohio St. 276, and there it was the administrator who sued, as he might by the statute; and the court said, *en passant*, under a statute using the words "nearest of kin," that the nearness or remoteness of kin, where the mother was concerned, did not depend "upon the circumstances of his [the child's] being born within or without lawful wedlock." The court seems to assume this as being a matter without question, does not cite or discuss an authority, and, manifestly, had not examined into the question. It is certain that, in all those states applying strict construction to statutes innovating on the common law, it is uniformly held that illegitimates are never considered as being included unless they are expressly included, and that statutes giving persons remedies which they did not have at common law cannot be helped by reference to statutes of descent so as to take in the kin of bastards. Now, it is well known that no state has gone farther than our own in this line of strict construction of enactments changing the common law, so as to intend nothing not expressly mentioned changing that law. This rule runs through all our decisions, of which we refer to *Edwards v. Gaulding*, 38 Miss. 118, and *Porter v. Porter*, 7 How. (Miss.) 111, 112, as directly pertaining to the subject in hand. We feel compelled, much against our inclination, to declare, as the existing law of the land, that plaintiff below could not sue.

Reversed and remanded.

51 L. R. A.

Mrs. Eugene HIBBETTE *et al.*, Appts.,
v.

G. W. BAINS.

(.....Miss.....)

1. It is presumed to be for the best interests of a child to be in the custody of its father rather than in that of collateral relatives, unless the contrary is shown by reason of the father's unfitness or abandonment of the child.
2. Children about ten and thirteen years of age respectively should be given to the custody of their father, as against maternal aunts who claim them under a disposition made by their mother on her deathbed, where the father, although he has allowed them to live for years with their maternal grandmother until her death, has contributed about \$5,000 to their support, and is not only of good moral character, but of better financial condition and prospects than the aunts or their husbands, and with him the children will be together, while with the aunts they live in separate residences in the same inclosure, and are liable to be separated if their aunts should move to other premises.
3. A father cannot be deemed to have abandoned his children, so as to lose the right to claim their custody, by allowing them for years to remain in the custody of their maternal grandmother in accordance with an arrangement made by their mother on her deathbed, where he continues to make remittances to them from time to time, amounting in the aggregate to about \$5,000 in the course of about ten years.
4. A contract made by a mother on her deathbed, with the assent of the father, by which the custody of their children is given to relatives of the mother, is null and void on grounds of public policy.

(December 17, 1900.)

APPPEAL by defendants from a judgment of the Circuit Court for Attala County in favor of plaintiff in a habeas corpus proceeding to recover possession of two minor children. *Affirmed.*

This is a proceeding by habeas corpus, begun in November, 1899, by G. W. Bains against Mrs. Hibbette and Mrs. Land for the custody of his two children, Rosa and Willie. On November 10th, 1884, Mr. Bains married Miss May Armistead, of Vaiden, Mississippi, the daughter of Mrs. M. E. Armistead, now deceased, and the sister of Mrs. Hibbette and Mrs. Land. Mr. Bains and his wife after their marriage resided in Birmingham, Alabama, until her death,

NOTE.—For earlier cases in this series as to right to custody of children as between parent and others, see *Van Walters v. Marion County Children's Guardians* (Ind.) 18 L. R. A. 431; *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593; *Re Lally* (Iowa) 16 L. R. A. 681; *Sheers v. Stein* (Wis.) 5 L. R. A. 781; *Weir v. Marley* (Mo.) 6 L. R. A. 672; *Kelsey v. Green* (Conn.) 38 L. R. A. 471; *Stringfellow v. Somerville* (Va.) 40 L. R. A. 623; *Anderson v. Young* (S. C.) 44 L. R. A. 277.

As between parents, see *Nugent v. Powell* (Wyo.) 20 L. R. A. 199; *Ramsey v. Ramsey* (Ind.) 6 L. R. A. 682.

which occurred in July, 1889, at the residence of her mother in Vaiden. Two children were born of this marriage, Rosa, who is now in her fourteenth year, and Willie, who is now nearly eleven years of age. After the birth of the boy Mrs. Bains's health failed rapidly, and her husband brought her to her mother's home in Vaiden where she died. Rosa was about three years old at the time of her mother's death, and Willie was about four months old, pale and delicate, and not expected to live. A few hours before her death Mrs. Bains expressed the wish that the children should be given to her mother and her sisters Miss Lula and Miss Willie Armistead, in the presence of Mr. Bains and the members of the family, to which Mr. Bains assented.

Several days after the death of Mrs. Bains this arrangement and understanding was assented to expressly by Mr. Bains before his return to Birmingham. It was understood that the children were given to Mrs. Armistead and her two daughters, and that they were to have their care and custody, but Mr. Bains suggested that he would contribute to their support, to which Mrs. Armistead assented, with the assurance, however, that they were abundantly able and willing to care for them and support them, and that it would not be necessary for Mr. Bains to contribute except though that he might do so voluntarily and at his pleasure. In June, 1895, Mr. Bains married Mrs. Mary B. Perkins, who was a widow at the time, and has continued to reside in Birmingham, boarding at the residence of Mr. J. B. Dwyer. There have been no children by the second marriage. The court, after the first hearing, reversed the judgment of the trial court, whereupon a petition in error was presented, further argument had, and the opinion printed herewith was handed down.

Further facts appear in the opinion.

Messrs. A. A. Armistead, Green & Green, and S. S. Calhoun, for appellants:

Where are the happiness and welfare of the children; with their blood relations who have watched, cared for, trained, and educated them for years, and grown devotedly attached to them, and the children to their blood relations, who have known no other mothers; or with a bankrupt father, who has surrendered them for ten years, and a stranger stepmother who has expressed no desire to have them, and through whom all their comfort and advantages must come?

If there was a contract with the appellants as to the custody of the children, acted on for ten years, the appellants are entitled to the custody of the children.

The common-law rule as to the right of the father to the custody of the children was repealed by the Code of Mississippi, giving the chancellor the right to award their custody.

Cocke v. Hannum, 39 Miss. 423; *Foster v. Alston*, 6 How. (Miss.) 461.

The father's right is not absolute.

McShan v. McShan, 56 Miss. 413; 1 Parsons, Contr. p. 310; Tyler, Infancy & Coverture, 275, 276, 283, 284; 2 Kent, Com. p. 195. 51 L. R. A.

A voluntary contract to release infants to another is not revocable except for bad treatment.

9 Am. & Eng. Enc. Law, pp. 244-246; *Anderson v. Young*, 54 S. C. 388, 44 L. R. A. 277, 32 S. E. 448; 2 Kent, Com. p. 221, note A.

A voluntary placing of children by the father with grandparents (and aunts occupy same attitude), continued, will not be disturbed.

Fullilove v. Banks, 62 Miss. 11; Hurd, Habeas Corpus, pp. 543 et seq; *United States ex rel. Schneider v. Sauvage*, 91 Fed. Rep. 492; *Poul v. Gott* (Mass.) 14 Law Rep. 269; Schouler, Dom. Rel. 5th ed. § 251, note 4; *State v. Smith*, 6 Me. 462, 20 Am. Dec. Freeman's notes, pp. 333-337; *Re Goodenough*, 19 Wis. 275; *Kelsey v. Green*, 69 Conn. 291, 38 L. R. A. 471, 37 Atl. 679; *Sheers v. Stcn*, 75 Wis. 44, 5 L. R. A. 781, and notes, 43 N. W. 728; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Stringfellow v. Somerville*, 95 Va. 701, 40 L. R. A. 623, 29 S. E. 685; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308.

If there was no contract, the ten years' acquiescence in the custody of the children with appellants, as first placed by the father, by which the affections and attachments of the children have become engaged toward their adopted homes and their aunts, will prevent the father from disturbing their relations on account of the happiness of the children.

Schouler, Dom. Rel. 5th ed. §§ 246, 248, 251; Tyler, Infancy & Coverture, 275, 276, 283, 284; *Howse v. Potter*, 16 R. I. 374, 17 Atl. 129; *Marshall v. Reams*, 32 Fla. 499, 14 So. 95.

In states which hold contracts to surrender children void, the contract will not be ignored, but will be looked to to determine the happiness of the child, and if, under such contract the children have remained until their affections and attachments have been engaged toward their adopted home, the father will not be heard or permitted to disturb them.

Tiffany, Dom. Rel. pp. 249, 253, note 59; Church, Habeas Corpus, pp. 724, 725, §§ 444, 447.

The children have chosen their home, and they are of sufficient mental capacity and age to choose. Mental capacity, and not age, is the criterion for them to choose.

Hurd, Habeas Corpus, p. 536; *Cocke v. Hannum*, 39 Miss. 423; 9 Am. & Eng. Enc. Law, p. 246; *Re Goodenough*, 19 Wis. 275.

Would the minor's condition be improved? If not, the writ should be refused. This is a correct principle.

Maples v. Maples, 49 Miss. 393; *Cocke v. Hannum*, 39 Miss. 423, *Foster v. Alston*, 6 How. (Miss.) 407; *McShan v. McShan*, 56 Miss. 416.

Just as soon as Bains received the 25½ shares of Collier Drug Company stock from A. A. Armistead, which was the property of Rosa W. Bains, his little daughter, the dividend of which he had been appropriating under the guise of "G. W. Bains, Agt." he at

once transferred 20 shares of this same stock to his wife and took $5\frac{1}{2}$ to himself, which he can hold as exempt under the laws of the state of Alabama, thereby destroying her estate; and if he can gain her custody it will never be heard of again. He is not entitled to her stock or any other of her property.

Bedford v. Bedford, 136 Ill. 354, 26 N. E. 602; *Schouler*, Dom. Rel. § 255.

A man who permits the custody of his infant child to pass, in accordance with his wife's will, to her sisters, and allows the child to remain with and be reared and trained by them for five or six years though supported by a provision for the children made by the mother, will not be allowed to reassert his rights to the custody of the child if it is not for the welfare of the child.

Stringfellow v. Somerville, 95 Va. 701, 40 L. R. A. 423, 29 S. E. 685; *Kelsey v. Green*, 69 Conn. 291, 38 L. R. A. 471, 37 Atl. 679; *Sheers v. Stein*, 75 Wis. 44, 5 L. R. A. 781, and note, 43 N. W. 728; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308; *Re Snook*, 64 Kan. 219, 38 Pac. 272; *Com. ex rel. Berkheimer v. Berkheimer*, 4 Pa. Dist. R. 712; *United States ex rel. Schneider v. Sauvage*, 91 Fed. Rep. 492; *Brown's Estate*, 166 Pa. 253, 30 Atl. 1122; *Bently v. Terry*, 50 Ga. 555, 27 Am. Rep. 399.

On rehearing.

The "unfitness" of the father in this kind of a case relates to the happiness of the child in his custody, and not to his personal character.

Sheers v. Stein, 75 Wis. 51, 5 L. R. A. 781, 43 N. W. 728.

In the following cases restoration of custody to the father after release or abandonment was denied:

Verser v. Ford, 37 Ark. 31; *United States v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256; *Washaw v. Gimble*, 50 Ark. 355, 7 S. W. 389; *Marshall v. Reams*, 32 Fla. 499, 14 So. 95; *Smith v. Bragg*, 68 Ga. 652; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Janes v. Cleghorn*, 54 Ga. 9; *People ex rel. Curley v. Porter*, 23 Ill. App. 196; *Enders v. Enders*, 164 Pa. 266, 27 L. R. A. 56, and note, 30 Atl. 129; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Re Beckwith*, 43 Kan. 159, 23 Pac. 164; *Re Bullen*, 28 Kan. 781; *Ellis v. Jesup*, 11 Bush, 403; *State v. Smith*, 6 Me. 462, 20 Am. Dec. 333; *Com. v. Hammond*, 10 Pick. 274; *Curtis v. Curtis*, 5 Gray, 535; *Pool v. Gott* (Mass.) 14 Law Rep. 209; *Re Stockman*, 71 Mich. 180, 38 N. W. 876; *Corrie v. Corrie*, 42 Mich. 509, 4 N. W. 213; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *McShan v. McShan*, 56 Miss. 413; *Foster v. Alston*, 6 How. (Miss.) 416; *Re Waldron*, 13 Johns. 418; *Re Murphy*, 12 How. Pr. 513; *People ex rel. Johnson v. Erbert*, 17 Abb. Pr. 395; *Spears v. Snell*, 74 N. C. 215; *Richards v. Collins*, 45 N. J. Eq. 287, 17 Atl. 831; *Sturtevant v. State ex rel. Havens*, 15 Neb. 459, 8 Am. Rep. 349, 19 N. W. 617; *State ex rel. Hodgden v. Libbey*, 44 N. H. 324, 82 Am. Dec. 223; *State v. Barrett*, 45 N. H. 15; *Gishwiler v. Dodez*, 4 Ohio St. 617; *Clark v. 51 L. R. A.*

Bayer, 32 Ohio St. 209, 30 Am. Rep. 593; *Com. ex rel. Gilkeson v. Gilkeson*, 1 Phila. 194; *De Hautville's Case* Cited in 6 How. (Miss.) 460; *Howse v. Potter*, 16 R. I. 374, 17 Atl. 129; *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880; *Bonnett ex rel. Neumeyer v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *Drumb v. Keen*, 47 Iowa, 435; *Ex parte Schumpert*, 6 Rich. L. 347; *Gardenhire v. Hinds*, 1 Head, 402; *Legate v. Legate*, 87 Tex. 252, 28 S. W. 281; *Coffee v. Black*, 82 Va. 567; *Stringfellow v. Somerville*, 95 Va. 707, 40 L. R. A. 623, 29 S. E. 685; *Merritt v. Swimley*, 82 Va. 439; *Green v. Campbell*, 35 W. Va. 699, 14 S. E. 212; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308; *Sheers v. Stein*, 75 Wis. 51, 5 L. R. A. 781, 43 N. W. 728.

Messrs. Noel & Pepper, for appellee:

An infant has no controlling legal right of election as to its custody. It was never designed to subject the legal right of custody to the caprice of infant children, nor to emancipate them from the rightful custody.

Hurd, Habeas Corpus, chap. 8, 531; *Moore v. Christian*, 56 Miss. 409, 31 Am. Rep. 375.

Contracts for the disposal of children are not binding, being void as against public policy, according to the overwhelming weight of modern authority.

Schouler, Dom. Rel. last ed. § 251; *Church*, Habeas Corpus, § 444; 17 Am. & Eng. Enc. Law, p. 373.

The father is the natural guardian of his infant children, and, in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care, and education.

People ex rel. Nickerson v. —, 19 Wend. 16; *Schouler*, Dom. Rel. 5th ed. §§ 245-251; *Maples v. Maples*, 49 Miss. 393; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.

The findings of the circuit judge in this case are entitled to the same considerations and weight as the findings of fact of the lower court in any other class of cases.

Kuhn v. Breen, 101 Iowa, 667, 70 N. W. 722; *Shaw v. Nachtwey*, 43 Iowa, 663; *Drumb v. Keen*, 47 Iowa, 435; *Bonnett ex rel. Neumeyer v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *Franklin v. Carswell*, 103 Ga. 553, 29 S. E. 476; *Re Knowack*, 158 N. Y. 482, 44 L. R. A. 699, 53 N. E. 676.

Messrs. Sweatman, Trotter, & Knox, also for appellee:

The law presumes the child's interest to be in the custody of its father.

Weir v. Marley, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798.

Whilst the children's desire will be heard and weighed, it will not determine.

Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375; *Hurd*, Habeas Corpus, 531 *et seq.*

Nature gives to parents that right to the custody of their children which the law

merely recognizes and enforces. It is scarcely less sacred than the right of life and liberty, and can never be denied save by showing the bad character of the parent or some exceptional circumstances which render its enforcement inimical to the best interest of the child.

Moore v. Christian, 56 Miss. 408-410, 31 Am. Rep. 375; *Foster v. Alston*, 6 How. (Miss.) 406; *Ite Knowack*, 158 N. Y. 482, 44 L. R. A. 699, 53 N. E. 676; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798.

On petition for rehearing.

Messrs. **Stirling & Harris**, also for appellee:

The basis of the common law, as well as the statutory writ of habeas corpus, is an illegal restraint, and this fact must be admitted or proved to exist to warrant any further proceedings on the writ. But illegal restraint has a wider scope of meaning in this class of cases than it had in the original design of the use of the writ. The term "imprisonment" (says Hurd) usually imports a restraint contrary to the wishes of the prisoner; and the writ of habeas corpus was designed as a remedy for him, to be invoked at his instance, to set him at liberty, not to change his keeping. But, in the case of infants, an unauthorized absence from the legal custody has been treated, at least, for the purpose of allowing the writ to issue, as equivalent to imprisonment; and the duty of returning to such custody as equivalent to a wish to be free.

Church, Habeas Corpus, chapter, *Parent and Child*, pp. 423, 662; Hurd, Habeas Corpus, 2d ed. p. 453.

While in doubtful cases the wishes of a child of this age will be sought, and to some extent be observed, a boy of thirteen cannot be allowed, at pleasure, to abandon his filial duties, and select elsewhere a home more agreeable either to his desires or his worldly interests.

Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375; *Lovell v. House of Good Shepherd*, 9 Wash. 419, 37 Pac. 660; *Re Neff*, 20 Wash. 652, 56 Pac. 383; *Miller v. Wallace*, 76 Ga. 483; *State ex rel. Neider v. Reuff*, 29 W. Va. 751, 2 S. E. 801; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669; *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768.

Messrs. **Alexander & Alexander**, also for appellee:

The law governing this case is well settled by our own decisions. It was not necessary to go elsewhere. If we do look to the decisions of other states great discrimination must be exercised. For many of the cases touching the custody of children are cases between husband and wife, or are in states which limit the remedy of habeas corpus to cases of illegal restraint of the liberty of the child. In a few of the states contracts by parents for the custody of their children are permitted by statute. In a few states such contracts are held binding in the absence of a statute. In cases where the remedy of habeas corpus is limited, the wish of the child often controls.

51 L. R. A.

Enders v. Enders, 164 Pa. 266, 27 L. R. A. 56, 30 Atl. 129.

The rule is that the contract is void.

Whatever lack of regard for the natural rights of a parent appears in the decision of other states, his paramount right is distinctly recognized in this state.

Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375.

The absolute right of a worthy parent to his or her child is set out in a recent case in Tennessee.

State ex rel. Bethell v. Kilvington, 100 Tenn. 227, 41 L. R. A. 286, 45 S. W. 433; *Prieto v. St. Alphonsus Convent of Mercy*, 52 La. Ann. 631, 47 L. R. A. 656, 27 So. 153.

Whitfield, Ch. J., delivered the opinion of the court:

We are relieved of unnecessary fullness in stating the law which must govern this case by the consideration that there is little or no difference between counsel as to what that law is, and none in the well-considered cases. Undoubtedly, the father has primarily, by law as by nature, the right to the custody of his children. This right is not given him solely for his own gratification, but because nature and the law ratifying nature assume that the author of their being feels for them a tenderness which will secure their happiness more certainly than any other tie on earth. Because he is the father, the presumption naturally and legally is that he will love them most, and care for them most wisely. And, as a consequence of this, it is presumed to be for the real interest of the child that it should be in the custody of its father, as against collateral relatives, and he, therefore, who seeks to withhold the custody against the natural and legal presumption, has the burden of showing clearly that the father is an unsuitable person to have the custody of his child; or that, however moral a man he may be, he had abandoned his child, contributing nothing to its support, taking no interest in it, and permitting it to remain continuously in the custody of others, substituting such others in his own place so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the affections of the child and of the foster parents have become mutually engaged to the extent that a severance of this relationship would surely result in destroying the best interest of the child. In such case as this the law, and it may well be said nature, too, denies to the father the custody of the child, but the denial is based, not at all on any contract, but entirely and solely upon the situation as above stated, following the abandonment of the child by the father. There is much loose talk in the books about the best interest of the child, and more as to the right of the father. In the effort to escape from the arbitrary rule laid down by the common law as to the father's right, the danger is lest the pendulum swing too far, under modern decisions, the other way; and too much disposition is manifested in some cases to consult, not the permanent well-being of the

child so much as its immediate enjoyment; to stand, not at the center of the whole circumference of the facts making up the life of the child from childhood to manhood or womanhood, but in that segment of those facts relating merely to what will make the child happy at the age he may be at when the custody is determined. Parental authority and affection are not antagonistic to filial obedience and happiness. They are reciprocal and correlative.

Without more elaboration, we quote, to adopt as an accurate statement, the law announced in *Weir v. Marley*, 99 Mo. 494, 6 L. R. A. 672, 12 S. W. 798, a case cited by appellants' counsel. "In all civilized countries, in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being, for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness, to be returned to the parents again when they in their turn may need protection in their years of helplessness and of their child's strength and maturity. The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody, that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society. Conceding, however, that the primary object is the interest of the child, the presumption of the law is that its interest is to be in the custody of its parent. The law has made provision in two instances, whereby this presumption may be overcome, in the statutes providing for the adoption and apprenticing of children, when, for their interest, this right of custody is permitted to be transferred to another. In regard to all other contracts by parents for the custody of their children this presumption must obtain; and while the parent may, by his inability or failure to discharge properly his duty towards his child, forfeit his right to its custody, because the interest of the child demands it, yet, upon the trial of an issue involving such a forfeiture, he is entitled to the benefit of such presumption, and, unless the interest of the child does demand it, such forfeiture cannot take place. He cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature as well as by positive law, and essential to the discharge of the duties of that trust, by contract *per se*; otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties."

Such being the law applicable, let us examine each of the authorities cited by the appellants, analyzing carefully their facts. It is the facts of a case which make the case, 51 L. R. A.

and the expressions published, then, in cases, are to be interpreted, if we wish to reach correct results, strictly in the light of the very facts of each particular case. What, then, are the cases upon which appellants rely?

In the case of *Sheers v. Stein*, 75 Wis. 44, 5 L. R. A. 781, 43 N. W. 728, the facts were that the respondent was the sister of the father seeking to recover the custody of his daughter, about ten years old at the time of the application. This sister had nursed the child and its father through a dangerous illness, of which the mother had died, the child being then six months old; and, but for the aid of friends, the father and this infant daughter and a son about five years old at that time would have been dependent upon charity for support. The father never exhibited any affection for his daughter, though living in the family of his sister with her for three years, but avoided her, having very little to say to or to do with her. In 1886 the father married again, and moved to Nebraska. Neither he nor this wife had any affection for the child. The father never contributed anything for the support of the child, manifested aversion to it, and said he was not its father. The supreme court counted strongly on this last fact, saying (page 53, 75 Wis., page 784, 5 L. R. A., and page 731, 43 N. E.): "After the death of his wife, the mother of the child, he expressed to his brother the horrible belief or suspicion that his dead wife in her lifetime had played the harlot, and that he was not the father of the child."

In the case of *Verser v. Ford*, 37 Ark. 27, the facts were that the father had placed his infant daughter, at her birth, in the care of her grandmother and grandfather, the mother dying. The grandparents had kept the child for three years. It was very delicate in health. They understood its physical constitution, having nursed it. The father, marrying again, sought to recover the custody when the infant was only three years old. The order was merely temporary, the court remarking that the father might apply again when the child was more advanced in years; but at that early age "the infant needs female care, . . . which is better insured by the natural affection of a grandmother than by the inexperienced efforts of a father or the sense of duty of the second wife."

The case of *Unité States v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256, went off on a motion for an attachment against respondent because his answers were unsatisfactory. The case was disposed of by consent decree. It was a contract between father and grandfather as to the custody of an infant daughter, then attending a girls' college. Judge Story very properly remarks that the father's right is not absolute, "but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascer-

tain whether it will be for the real, permanent interests of the infant."

Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389, was a contest to recover the custody of a boy four and one half years old, brought by the father, from a man and wife not of kin, who had had its custody from birth, and is precisely like the case in 37 Ark. in the disposition of the case, the court simply saying that the order was temporary, and as the child advanced in years the father might apply for the child, but the application was premature.

Marshall v. Reams, 32 Fla. 499, 14 So. 95, was a contest between a humane master, to whom a boy sixteen years old had been apprenticed, and his uncle, to whom his mother intrusted his custody. The boy was an illegitimate child. He was sixteen years old at the time of the application, and expressed a strong preference against his uncle. The evidence showed that the uncle, in the language of the court, had inflicted immoderate and cruel punishment on the boy; had repeatedly whipped him,—once with a switch 3 feet long; had compelled him to fish by dragging his seine in cold weather, in ragged clothes, and shoes with his feet sticking through; and that he had soars on his body from a whipping inflicted by his uncle.

Smith v. Bragg, 68 Ga. 650, was a contest between a father, who had married again, and an aunt, for the custody of a boy nine years old, which boy the aunt had nursed at her breast, and always cared for, and which boy his mother and father had abandoned, contributing nothing to his support, and only seeking his custody when he got old enough to labor.

Bently v. Terry, 59 Ga. 555, 27 Am. Rep. 399, was a contest between the parents and a childless aunt over the custody of a girl then eight years old. Mrs. Terry, the childless aunt, took the child when it was about two years old, almost lifeless, nursed it into health, the parents contributing nothing to its support within the eight years. There was a contract there by the parents that Mrs. Terry should have it. Section 1793, Georgia Code, provides that "parental power is lost by voluntary contract releasing the right to a third person." The decision expressly rested on the ground that the statute makes such a contract valid. In the absence of such statute, such contracts for the transfer of children are universally held as against public policy, and we have no such statute.

Janes v. Cleghorn, 54 Ga. 9, is precisely like the case just analyzed, in that the decision rested expressly on the contract for the custody of the child, which the court held was valid under the Georgia Code, and was not revocable. The child was only three years old when the application was made, and the court animadverted severely upon some sharp practice by which Cleghorn kidnapped the child from the custody of Mrs. Janes and her husband, who had no children.

In *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321, the child was a girl only five and one half years old at the time of the trial, 51 L. R. A.

still in the period of helpless infancy. The court rested its decision upon this fact, and on the nature of the father, saying of him that there was a coldness, a lack of energy, and a shiftlessness of disposition which made him an unfit guardian for a warm-hearted child to develop under, and upon the significant fact that the father had not married again, and the child was the child of a disowned daughter-in-law and sister-in-law, and could not expect, therefore, from the aunt and grandmother, the sympathy such a child needed.

In *Re Beekwith*, 43 Kan. 159, 23 Pac. 164, the father was a drayman, and a poor man. living in a rented house, intemperate in his habits, even using vulgar and profane language in his family; and the mother had gone to a son with the boy the subject of the suit, and died there, requesting the son not to let his brother go back to the father. The father had with him one son and one daughter, both nearly of age, and the daughter declared her intention of leaving her father as soon as she got of age, and going to her brother, with whom two of his sisters were already living. It is perfectly obvious that the father's house was a storm center from which all the children fled as soon as they could, and that he was wholly unfit for the custody of the child.

In the case of *Ellis v. Jesup*, 11 Bush, 405, the contest was between the father and the sister-in-law to whom the girl, then thirteen years of age, had been given when she was about two years of age, and with whom she had remained during all that period; the father never having contributed one cent to her support, and visiting her very rarely. though living in an adjacent county, only 10 or 12 miles away from his sister-in-law. She and her husband were childless, and in every way were competent to give the child an excellent home and education. It also appears that the child had inherited some property, which, it would seem, the father was endeavoring to get control of, as it seems, by certain extraordinary proceedings, set out in the suit, having for their object the removal of her guardian from office, and the child herself to a distant state. Besides, the child was over thirteen years of age, very intelligent, and protested against any change.

In the case of *Com. v. Hammond*, 10 Pick. 274, the court refused to decide upon the relative rights of a mother and a grandmother as to the custody of an eleven-year-old girl, on the ground that the liberty of the child was not interfered with in any way, and it has no bearing on this case.

In the case of *Curtis v. Curtis*, 5 Gray, 535, the girl was then sixteen years of age, and the decision was rested upon two propositions; chiefly that she was old enough to judge for herself, and that the mother had lost her rights by indenture which estopped her. It is further to be noticed that the court did not award the custody of the girl, but left her at large, to go where she pleased. These two last cases are not in point under

our law. *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.

In *Re Stockman*, 71 Mich. 180, 38 N. W. 876, the contest was between paternal and maternal grandparents over the custody of Lucile, who was nine years of age at the time of the hearing. The maternal grandparents had had the custody of the child from the time she was seventeen months old, wholly supporting, maintaining, and educating her. She had been a very sickly child, and it was shown that the father entertained great hatred towards his wife's parents; yet even in this case Judge Campbell dissents.

Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213, was a contest between father and mother, who were living apart, for the custody of a daughter, Fanny, seven years of age at the time, and living with her mother in Detroit. The court found that the father was not a suitable person to have possession of his child, and denied his application upon that ground.

Weir v. Marley, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798, and the *Scarritt Case*, 76 Mo. 555, 43 Am. Rep. 768, cited by counsel for appellants, are the strongest sort of cases for appellee.

In the *McShun Case*, 56 Miss. 413, the father was attempting to recover the custody of two children of very tender years from the mother. He had deserted this mother in the state of Arkansas when one of these children was two and one half years old, and a few months before the birth of the other, taking with him all the money in the house, and leaving his wife a very small supply of provisions. She scrambled back to her father's house in Itawamba county, where they found a good home. He had contributed nothing to the support of these children in the meantime. One of the children, at the time of the application, was five years old; the other, three. The court rested its decision in refusing to disturb the custody of the children with the mother on the fact of their very tender age and the father's cruel and inexcusable conduct in abandoning his wife and children when and where he did.

The *Waldron Case*, 13 Johns. 418, like the two cases previously cited from Massachusetts, did not award the custody of the child, but simply held that her liberty was not restrained, she being with her mother and her grandfather, a man of wealth, all of whose property she was to inherit, and the father was utterly insolvent, and incompetent to provide for the mother and child.

Re Murphy, 12 How. Pr. 513, went off upon the notion entertained by the court that the father's gift of the child was legal under the statute of the state of New York at that time; the child being only nine years of age, and having spent all its life with an uncle and aunt, from whose custody he sought to take it.

In the case of *People ex rel. Johnson v. Erbert*, 17 Abb. Pr. 395, the father had turned over his three children (on the death of his wife), aged eight, six, and five years, to respondent, abundantly able to provide for them. The father failed to pay board as 51 L. R. A.

agreed to, and the children were legally indentured to the respondent. The father sought to recover these children after a second marriage. The court expressly decided the case upon the ground that the father's testimony in the case was perjured, and that he could not be believed, and that he was utterly insolvent, that he was the keeper of a drinking saloon in Chicago, and that his second wife's conduct in possessing herself fraudulently and forcibly of one of the children in defiance of the authority of the court showed her unfitness.

In *Spears v. Snell*, 74 N. C. 215, the contest was between an uncle, with whom the boy, then thirteen years old, had been all his life, and the stepfather. The uncle had been married for ten years, and had no children. The stepfather was a roving tenant cropper. The mother desired the child to remain with the uncle. The court expressly adverts to the fact that the stepfather was under no legal obligation to provide for the child, and that the mother wanted him to remain with the uncle.

In *Richards v. Collins*, 45 N. J. Eq. 286, 17 Atl. 831, the contest was between the parents and an uncle and aunt for the custody of a girl who was old enough to make a sensible choice as to which one she would go with. During all the years she had been with her uncle and aunt, the parents, either through inability or indifference, withdrew themselves from the child, and apparently contributed nothing to its support.

In *Sturtevant v. State ex rel. Havens*, 15 Neb. 459, 8 Am. Rep. 349, 19 N. W. 617, the contest was between the father, twenty-three years old, and the grandparents, over the custody of an infant girl just eight months old. The court very properly rested its decision on the age and sex of the child, expressly awarding custody to the grandparents "until such time as its age and condition would justify the father in assuming its custody."

In *State ex rel. Hodgden v. Libbey*, 44 N. H. 324, 82 Am. Dec. 223, the contest was between the father and the grandparents for the custody of a child then six and one half years old, which had been left with the grandparents four and one half years; and the court held that, as the father and stepmother were suitable persons, the custody should be awarded to the father. It is a strong case for appellee. This case also shows that *Pool v. Gott* (Mass.) 14 Law Rep. 269, was a case where a child had been given at its birth to grandparents, who kept the child for fourteen years, wholly at their expense, the father contributing nothing, and taking no interest in the child.

The case of *State v. Barrett*, 45 N. H. 15, holds the unsound doctrine, now almost universally repudiated, that a contract for the transfer of the child by the father binds the father. Such contracts are manifestly void as against public policy.

The case of *Gishwiler v. Dodez*, 4 Ohio St. 615, was a contest between a father on one hand and the mother and another woman, who was a fortune teller, and her husband,

who was a man of unsound mind, over the custody of an infant daughter four and one half years old. Father and mother were living apart by reason of the wife's fault. The wife was a drunkard, profane in her language, a notorious liar, had taught the little girl to swear, and was of very ungovernable temper. It certainly needs no argument to show that the father should have had the child.

The case of *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593, was a contest between worthless parents not able to provide for their children, both under five years of age, and their grandparents, to whom they had been surrendered by contract, and who had them for about a year, when they were kidnapped by the parents, who concealed one in Columbus, Ohio, and one in Cleveland, Ohio; and both were abused and mistreated and made feeble and sick by their custodians. In an action by the grandparents to recover \$5,000 damages the court held that the contract was valid, and that the grandparents had a right to sue.

In *Com. ex rel. Gilkeson v. Gilkeson*, 1 Phila. 194, the girl was fifteen years of age, and had been transferred by father and mother, under contract, to the custody of an aunt and uncle; the aunt and uncle agreeing to adopt her as their child. The court held the contract valid as against the father and mother, and the judgment was simply that the girl should be discharged from restraint, and left to go where she pleased.

In *Hoasie v. Potter*, 16 R. I. 374, 17 Atl. 129, an indigent widowed mother put her infant child in the care of her deceased husband's sister at the age of three months, and left it with her for nine years. The mother had three other children, whom she parceled out among her relatives. She then worked for her own support for four years, when she married Mr. Hoxsie. Then she brought suit for this infant. The child received no support whatever from her during these nine years, the mother never having seen the child but once in the nine years. The court in this case found that the mother did not give the child absolutely, but only until she could care for it herself, and under these circumstances the extent of the judgment was that the child should remain with its aunt until a change might make it proper to award the custody to the mother. The judgment was only temporary.

In *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229, the boy was of very tender years at the time of the application by the father to recover his custody from the maternal grandparents. It appeared that the father had no wife or home, worked by the month, went from place to place, and had no way to take care of the child, and since the death of his wife had been very often drunk, and had a violent temper. The court awarded the custody to the grandparents, to remain there, in the language of the court, "during the tender years of infancy at least."

In *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880, the contest was between father and two uncles over the custody of a boy ten years old and a girl eight years old. The mother of the children had been divorced from the father because he wholly failed to provide the necessities of life, was utterly worthless, and wholly unsuited for the care of the children, and the court awarded the custody to the uncles, as against him, on this ground. During the six years after the divorce until the death of the wife he never once came to see the children, and never contributed one cent at any time, except \$75 in the year 1881. He married a second wife, by whom he had another child, who was also with its maternal relations. He had no home of his own, and the court put its decision expressly upon his unfitness for their custody.

In *Bonnett ex rel. Neumeyer v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91, the contest was between the mother and the stepfather and the grandparents for the custody of an infant daughter four years of age, who had been with her grandparents most of the time since her birth. There was a contract in this case for the transfer of the child, and the court held it valid, and put its decision on that ground, and that the stepfather was under no legal obligation to support the child, and that the birth of children to the mother and stepfather would create new obligations; but the chief ground was the alleged validity of the contract.

In the case of *Drumb v. Keen*, 47 Iowa, 435, the contest was between the father and the grandparents for a boy five years old at the time. The father lived in the Indian territory, had no person to care for the child except an Indian or negro woman, and the grandparents had taken care of it from its birth under the claim of a contract for the custody of the child. The court held the contract valid in the sense the father meant it, not meaning to turn the child over to the grandparents permanently, but distinctly held that the judgment of the court below awarding custody to the grandparents should be modified so as to leave the father open to apply for his custody when he should have reached maturer years.

In the case of *Ex parte Schumpert*, 6 Rich. L. 344, the wife was compelled to leave her husband's home and go to her father's roof, taking with her an infant daughter, four years of age at the time of the last application by the husband. He had made two previous applications, when the child was about one year old and when about two years old. The court rested its decision upon the age and sex of the child, allowing the mother to keep it, and upon the unwarranted conduct of the father in forcing his wife from home.

In the case of *Gardenhire v. Hinds*, 1 Head, 410, it appears that the child was a female, frail and unhealthy, only eight years old, and had been principally reared by her grandmother, in every way able to care for her. The father had neither home nor property.

The case of *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, was a contest over the custody

of a little girl only two years old at the time, who had been placed with its foster parents since it was three months old. The court held that a contract for the custody of the child is not void, but did not decide to whom the custody of the child in the case should be awarded; the court answering merely questions certified to it.

In the case of *Stringfellow v. Somerville*, 95 Va. 701, 40 L. R. A. 623, 29 S. E. 685, the child was a girl six years old, placed in the custody of aunts by the will of the mother, acquiesced in by the father. The court, at pages 706, 707, 95 Va., page 625, 40 L. R. A. and page 687, 29 S. E., shows that the decision was put upon the immorality of the father, and the perfect fitness of the aunts, and the tender age of the child, and leave was expressly given in the judgment for the father to apply again if change of circumstances warranted it.

Green v. Campbell, 35 W. Va. 698, 14 S. E. 212, is a contest, on the one hand, between the father and stepmother and the grandparents for the custody of a boy five years old. The decision expressly rested on the ground that a contract for the custody of the child was valid.

In *Re Goosenough*, 19 Wis. 274, a little girl had been placed at six years of age with foster parents, and she had stayed there six years, the home being in every respect all it ought to be; and at the time she was placed there she and her mother were inmates of the county poor house, and the father a convict in the state prison; and there was no evidence to show that there had been any change in him morally, or that he was pecuniarily fitted to care for his child; and it was on this last ground expressly that the case went off.

In *Cunningham v. Barnes*, 37 W. Va. 756, 17 S. E. 308, the contest was over a child seven years of age, whose custody had been given by contract to the grandparents by the dying mother. These grandparents had wholly supported the child, the father contributing nothing. The father was shown to be immoral, high-tempered, without property. The court expressly held (pages 754, 755, 37 W. Va., page 312, 17 S. E.) that the contract was valid, and rested its decision on that ground and upon the unsuitness of the father. The stepmother, in this case, had made the father promise not to bring the child to her home, to which the court also refers.

The case of *Fullilove v. Banks*, 62 Miss. 11, was expressly decided upon the ground that the mother should not recover the custody of her illegitimate child from its alleged grandmother, because the mother was a common prostitute.

In the case of *Com. v. Addicks*, 5 Binn. 520, the father of two female children, aged, respectively, seven and ten years, was endeavoring to recover their custody from his former wife, from whom he had been divorced on the ground of her adultery with the man with whom she was then living, and with whom she had gone through a form of marriage. The court at that time,

on account of their tender years (as the court said), left these girls with their mother. Three years later, in *Com. v. Addicks*, 2 Serg. & R. 174, the same court (doubtless having discovered its error) delivered these children to their father.

What, now, are the facts of this particular case? A great and largely controlling fact is that the father is just as suitable a person morally, financially, and socially to have the custody of these children as the appellants. The finding of that fact makes it absolutely necessary that the evidence shall show clearly an abandonment by the father of his children, operating in law a forfeiture of his natural and legal right to their custody. Addressing the facts in this record to the solution of that inquiry, is there any such abandonment shown in this case? When the wife died, the father was prosperous, owned his home, and a partnership in four different drug stores. He never claimed anything from the Armistead estate, the income from which was about \$400 per year, and in which his wife owned a one-sixth share. After his wife died, leaving the children—a boy, a mere infant, about four months old, and a girl about three years old—with their grandmother, the father went to Birmingham, Alabama. He sustained, in common with a great many others about that time, great loss, as a consequence of which he was forced to take the benefit of the bankrupt law. Struggling on, he has succeeded in regaining his financial footing, has married a woman of large means and excellent character, who has built in Birmingham a new and elegant home. This lady, a widow when he married her, has always been childless, having no children by her present husband to divide her affection, though she has been married to her present husband since June, 1895. At the time of the death of the mother, Mrs. Hibbette and Mrs. Land were young ladies, about sixteen and seventeen years of age, respectively. The mother died at her mother's home, in Vaiden. In 1894, Mrs. Armistead, the grandmother, moved from Vaiden to Kosciusko, making that her home until the time of her death, November 25, 1899, after which the present suit was brought. A previous habeas corpus, brought a few weeks prior to the grandmother's death, was dismissed after her death. This first suit, though brought in the lifetime of the grandmother, we think is shown to have been brought by reason of certain adoption and guardianship proceedings. In the adoption proceeding begun September 16, 1899, it was asked that the children be adopted by the grandmother for her life, and at her death that the two aunts should succeed to her rights. On the 20th of September, 1899, the petition for guardianship was filed, which alleged appellee to be morally and socially unfit to have the custody of his children, and on the same day a decree was entered adjudging him morally and socially unfit to have his children, and the appellee states that he knew nothing of any of these proceedings until October 15, 1899.

and then learned of them accidentally. It should here be stated that Miss Willie Armistead, on October 21, 1896, married Mr. John Land, of Shreveport, Louisiana, and went to Shreveport to live. On October 26, 1897,—about a year later,—Miss Lula Armistead married Mr. Eugene Hibbette, of Shreveport, and also went to that place to live; the residences of the two sisters adjoining, and being in the same inclosure. After the marriage of her daughters, the grandmother for several years visited Shreveport on the invitation of Mr. Land, taking the children with her, remaining during the scholastic year only, returning with the children in the summer to her home and their home in Kosciusko. It is perfectly obvious that up to the death of the grandmother, two years after the marriage of one daughter and three years after the marriage of the other, these children had been in the exclusive custody of their grandmother. During Christmas, 1898, Mr. Bains and his present wife paid a visit to the children at Shreveport, Louisiana, and during this visit it is evident that the fact that Mr. Bains expected to reclaim his children after the grandmother's death begot trouble, as appears from the letters of Mrs. Armistead, the grandmother, of August 10, 1899, from Shreveport, and of A. A. Armistead, of August 21, 1899, from Kosciusko, and of Mrs. Armistead, from Shreveport, July 3, 1899, especially, and a letter of J. R. Land of August 21, 1899, from Shreveport. A letter from Mr. Bains from Birmingham, December 8, 1897, to Mrs. Land, shows, we think, conclusively that it was his purpose to reclaim the children only after Mrs. Armistead's death. He says therein: "I will accept your proposition in regard to my darling little ones for the present. I make this sacrifice for dear mamma's happiness. She is growing old now, and will soon be called to her home in Heaven. She has given to us the best part of her pure life, and now we all take pleasure in making her few remaining days as happy as we can; and, so long as my little ones are necessary to her happiness, and not burdensome by reason of the care that they are necessarily to her, she can keep them." This being the state of the case in the last of August, 1899, the grandmother returned to her home in Kosciusko, with the children, on a telegram from her son, Mr. Armistead, and soon after the adoption and guardianship proceeding referred to took place. It is obvious that the grandmother's trips to Shreveport with the children were visits for school purposes, the grandmother returning to her home every season; that Mrs. Land was in Shreveport for about a year before the children ever went there; that Rosa is staying with the aunt to whom she was not given, and the boy with Mrs. Hibbette. The circumstances above set forth sufficiently explain, we think, the bringing of the habeas corpus in the lifetime of the grandmother. From the wife's death, in 1889, until July, 1891, the father remitted monthly to Mrs. Armistead, for the children, \$25. He failed in

July, 1891, and sent for some months \$10. It is shown, we think, clearly, that Mr. Bains sent checks covering \$3,000 after July, 1891, and that he has spent at least \$5,000 from the death of his wife until the bringing of this suit on his children. There is an effort to show that the \$25 per month were dividends from stock it is alleged the father assigned to Mr. A. A. Armistead in trust for Rosa. This, if true, does not alter the fact that the father at last was the source of the bounty,—the principal,—and that he constantly remitted, which is the important thing in this inquiry. This included, not merely these monthly remittances, but the payment of many accounts for his children for drugs, clothing, etc. He never allowed a birthday of either child to go by without remembrances sent, and often did the like on holidays. In addition to this, he made frequent, and sometimes valuable, contributions to the grandmother and aunts; and, indeed, the relations all around, as evidenced by the letters in the record, were pleasant ones, up to the visit of appellee and his wife to Shreveport during Christmas, 1898. The present Mrs. Bains made some presents to the children, and she is shown by the testimony of two witnesses to have manifested for them affection and tenderness, and a desire to promote their happiness. What does the record show as to the state of feeling between the father and his children? The father came from Birmingham to see his children several times every year, except for one interval of two years; and was visited by his children at his home in Birmingham; and there was a regular correspondence kept up between him and the aunts and the grandmother, and letters were also regularly written or messages sent for the children to their father. These letters and messages on the part of the children breathe the tenderest affection. They called him "Darling Pops," and anticipated his visits with greatest pleasure. On his part his letters show the deepest and most constant affection and solicitude. We do not think the expression on the part of these children of a preference to remain with their aunts, made in the court below to the judge, entitled, under all the circumstances of this case, to much consideration. The trial judge was in far better situation to judge as to this particular point, seeing and hearing the children themselves, than we are, reviewing the cold page unilluminated by the manner and actions of the children at the time. The whole environments, all the history of the case, as well as the ages of the children, and the unlikelihood of their competency at so early an age to make a choice wise for all the years to come, are factors entering materially into the solution of this question. The child speaking out its choice of a custodian at ten or thirteen selects with reference alone to the continued furnishing of those things which make up happiness and joy for those ages. The horizon which bounds the child of ten or thirteen is not the horizon the whole perspective of which

is necessary to take into view in determining who shall have the training and character building of children. The vision of the little ones of ten and thirteen sees nothing beyond the horizon bounding those years. They cannot balance the advantages and disadvantages of different custodians, so as to correctly determine which one will guide it best, and fashion it most wisely into the make-up of perfect manhood and womanhood.

We have purposely left for the last the alleged contract in the adoption proceeding. It was prayed that the grandmother should have the children for her own during her life, and the aunts after her death. There is considerable conflict in the testimony as to what precisely did occur at the death-bed of the wife and mother. It was a scene of pathetic interest beyond power of words properly to describe. The very tenderness and silence and awful sanctity of that scene—the last interview between the husband and wife—would make it doubly hard for the husband to express any dissent if he felt it from her expressed wishes. The cold processes of reason, proper enough as tests of conduct in the ordinary transactions of life, are not the alembic by which to try the reasonableness of conduct in the pain and passion of such an hour. If, however, we should accept the appellants' version that the mother made in the presence and with the assent of the father a contract whereby she gave the custody of the children to their grandmother for her life, and after her death the custody of Rosa to one aunt and Willie to the other, the aunts being then about sixteen and seventeen years of age, respectively, it follows, as settled law, that the whole contract was null and void, as against public policy. But more than this follows. As a matter of fact, it follows that the custody during the grandmother's life from 1889 to November, 1899, was the exclusive custody, so far as the contract right is concerned of the grandmother. Indeed, the aunts, at sixteen and seventeen, were themselves of years too immature to constitute them custodians of the children; and this is not only the result of the contract, but it is actually what occurred, since one aunt lived for three years and the other two in Shreveport, Louisiana, the grandmother retaining exclusive custody of the children throughout that time. This is an exceedingly important result, both from the contract and from the facts in the case, in view of the fact that the appellants contend that they had had the custody and care of the children jointly with the grandmother during her life, and solely themselves after her death. It is obvious that this is not the fact. If it may be stated, in some necessary view, that the aunts cared for the children with the grandmother before their marriage, it yet remains true that for three years as to one, and two years as to the other, after marriage, the grandmother exercised exclusive custody and control. It is patent that on the contract alone, if it had been valid, neither aunt could predicate any

right while the grandmother lived. And so, if the right of the aunts is to be placed—as alone it could, in any case, be placed—upon the ground that they had stood, as a matter of fact, *in loco parentis* to these children from the death of the mother, and the other fact that the father, by his conduct, had abandoned them, and allowed the appellants wholly to provide for them, and the relations of parental and filial strength to grow up between the children and aunts, then it is clear that the facts in this record show no such abandonment in the first place, and, in the second, there was a break of three and two years in the custody and care of the aunts. It will not do to say that merely because the aunts have nursed tenderly these children, and cared for them most affectionately for seven or ten years,—seven of them in conjunction with the grandmother,—and because, therefore, they have come to love the children as if they were their own, and the children them as if they were their parents, so that the severance of these relations would bring great grief to both, the aunts should retain the custody. It might well be, and, indeed, it is, the case here, that, all this granted, there stands another figure on the scene,—the father,—who has most abundantly supplied their every want, who has kept up by correspondence and by visits the tie of filial and parental tenderness, who is conceded to be financially, socially, and morally as fit a custodian as the aunts, standing with arms opened calling his children home, and whose heart must bleed, we must believe, as sorely as the aunts', if these children are kept from his bosom. It must be remembered that he has no other children; that his present wife is childless. It must also be remembered that one of the aunts has a child of her own, and that the other has only been married two years, and may have children of her own. If these children are awarded to their father, they not only return to their natural and legal protector, but they return to one home, where—a matter of vital importance to their happiness—they will have the companionship of each other until mature years shall come; the ties of brotherly and sisterly affection will be knit so that time cannot break them. On the contrary, it is but the accident of the situation that the aunts live now on adjoining lots within one inclosure. One husband earns as his salary as district attorney about \$3,000 per year; the other about \$1,500 per year. The present Mrs. Bains is worth over \$30,000, and Mr. Bains is earning a salary of about \$1,200 a year, has a few thousand dollars in money and other property, and owns some stock in Collier Drug Company, of Birmingham, of which he is vice president. In the changing scenes of life, is it at all unreasonable to anticipate the time when these aunts may live in different homes, distant from each other; and, if that time shall come, will not there be as cruel a severance of affection's ties between one aunt and the boy and the other aunt and the girl, and also between the

brother and the sister? Again, one of the aunts has children of her own; possibly, also, the other. There would then be two sets of children in each household. It is not nature that the same affection could exist between the aunts and these children which would exist between the mothers and their own children. Most obviously, these gentlemen, Mr. Land and Mr. Hibbette, are entitled to the highest praise for their noble conduct in agreeing to take care of these children, and these aunts for their pure and unselfish love lavished upon them for years. But they are not legally bound for the maintenance and education of these children. If death should remove them,—as it removes us all in time,—where, then, would be the expectation of these children? Is it not clear that all they get from uncles and aunts while living is bounty merely, and that at the death of the uncles and aunts they cannot become their heirs if nearer kin be living? Shall these two children grow up with this sense of dependence embittering life? All this is wholly different under the father's roof. He is bound by the law of the land to maintain and educate these children. They become his heirs when he dies intestate. So far as this record discloses, they have experienced from the step-mother so far kindness alone. Every consideration would prompt her to continue that kindness. Love for the husband, if there were none for the children, would demand this, that there might be peace in the home. But the testimony is that she has manifested affection for them evidenced by substantial tokens.

Once more, what is meant by the best interest of the child? That which, in the whole view from the age at which the child is when the court is called on to decide to the years of majority, most surely will build into fine characters, and make them fit for the successful discharge of the duties devolving upon them as man and woman; not that which merely gilds with rainbow hues the childhood sky. At the base of that character which is to make real happiness when the boy shall have become himself a man (perhaps a father) and the girl a woman (perhaps a mother) lies by immuta-

ble moral law the duty of obedience to parents, the necessity of subjection to the firm and kindly discipline of the household, where son and daughter render the honor and reverence and the obedience which make them the joy of their parents' home, and prepare them to expect the like when they shall become fathers and mothers. It was not omitted to be penned that He who had for His business the redemption of the world remained to maturest years "subject to his parents." If "duty" is the sublimest word in our language, we should take care that, along with happiness and pleasure, its varying obligations to father and to mother, to sister and brother, are thoroughly learned where God ordained them to be learned,—in the play of household life from infancy to majority; so that, when it is correctly said that inquires like this the pole star is the best interest of the child, we have not solved the trouble until we have come to a sound comprehension of what the law embraces in the scope of that phrase, "the best interest of the child."

Summing up, then, our review of the facts touching the contract, two things seem to us clear: First, that, if the contract was as contended by appellants, they cannot claim any right under it, since it is utterly void; second, that, if you look at the contract as illumining the relations of the parties in connection with all the circumstances of the case, it is plain that the father has never abandoned these children, or lost his right to reclaim their custody. The duty which has been placed upon the court is an extremely embarrassing one, painful to the last degree. We could wish that all the asperities which have marked this litigation may be smoothed away, and kindness take the place of bitterness.

Pronouncing now the judgment of the law after the most painstaking consideration of this case, *we are constrained to affirm the judgment of the learned court below.*

Judge Calhoun being disqualified by reason of having been of counsel, the Honorable Frank Johnston was appointed as special judge in his place.

MISSOURI SUPREME COURT (Division 1).

City of ST. LOUIS, *Appt.*,
v.

CONSOLIDATED COAL COMPANY, *Respt.*

(158 Mo. 342.)

A city ordinance exacting from vessels having a coasting license under U. S. Rev. Stat. § 4321, a license fee for the privilege of towing boats or other water craft

NOTE.—As to power to impose local license tax on vessels licensed by the United States, see *Frere v. Von Schoeler* (La.) 27 L. R. A. 414, and *note*.
51 L. R. A.

into or out of the harbor or from one place to another within the harbor, although this fee is declared to be in lieu of all wharfage provided the boat or barge does not engage in any other than towing or transfer business, is in violation of U. S. Const. art. 1, § 8, giving Congress power to regulate commerce with foreign nations and among the several states, and art. 1, § 10, prohibiting states from laying any duties of tonnage without the consent of Congress.

(November 12, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for the City of St.

Louis in favor of defendant in an action brought to compel the payment of license fees for certain tugs employed in the harbor of the plaintiff city. *Affirmed.*

Statement by Valliant, J.:

This is a suit to recover the license charges for two steam tugs and a transfer barge operated by defendant in the harbor of St. Louis, which charges were established by an ordinance of the city which provides as follows: "It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into the harbor of this city, or from one place to another within said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city, without a license for such purpose from said city continuing in force." The ordinance then goes on to prescribe the amount of the license fee, grading it according to tonnage or capacity of the vessel, directing how it is to be collected, etc., and continues: "A reduction of 40 per cent from the rates of license established by this section shall be allowed to vessels owned by residents of St. Louis and returned and assessed for taxation within said city during the year commencing on the first day of June immediately preceding the day on which the license takes effect. The license required by this section shall not issue for a shorter period of time than one month, and the amount paid for the same shall be in lieu of all wharfage during the time that said license remains in force; provided said boat or barge does not engage in any other than towing and transfer business." A further provision of the same section made the running of a tug or barge without the required license a misdemeanor punishable by fine. The petition alleges that the defendant, an Illinois corporation, is indebted to the plaintiff city "in the sum of \$30 being the license charge imposed by said § 232 on the steam tug Gartside, owned by said defendant, and employed by it in towing boats into and out of the harbor of St. Louis, and from one place to another in said harbor, for the period of three months from," etc.; and in like terms it alleges that defendant is indebted to plaintiff in the sum of \$50 as license charge for the tug Alice Parker, and \$120 for the barge Louisa,—aggregating \$200 for the three vessels, for which judgment is prayed. This is the second appeal in this case. When it was here on the former appeal the only question that was raised by the defendant's answer was whether or not defendant was entitled to the 40 per cent reduction which the ordinance conceded to vessels owned by residents of St. Louis, and returned by them for taxation in the city. Defendant tendered with its answer then 60 per cent of the amount sued for. This court decided then that the defendant was entitled to the reduction, and reversed the judgment of the circuit court, which was contrary to that view, and remanded the cause for a new trial. *St. Louis v. Consoli-*

dated Coal Co. 113 Mo. 83, 20 S. W. 699. In the opinion delivered at that time we said that the ordinance was not in conflict with any provision of the Constitution of this state or that of the United States. But what was then said was in response to the issues then made by the pleadings. The only suggestion then made by defendant as to the constitutionality of the ordinance was that, if it was to be construed as discriminating against the defendant because it was not a resident of St. Louis, the ordinance was invalid. That decision was rendered December 19, 1892. Very shortly after the rendition of that decision, to wit, January 23, 1893, the Supreme Court of the United States, in *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306, decided that a similar ordinance of the city of Chicago was, on another point presently to be noted, in conflict with the Constitution and laws of the United States. In the light of that decision the defendant amended its answer by adding that its tugs and barge were at the time referred to in the petition duly enrolled and licensed in the district for the coasting trade under the provisions of title "L" of the Revised Statutes of the United States, § 4321, and were, under that authority, engaged in transporting freight upon the Mississippi river from the state of Illinois to the state of Missouri. Upon the pleadings so amended the cause came on for trial again in the circuit court, and was submitted for judgment upon an agreed statement of facts, in which, *inter alia*, it was admitted that the vessels were enrolled for the coasting trade under United States authority as pleaded, and that in pursuance of that license they were "engaged in transporting freight along and upon the Mississippi river, and from the state of Illinois to the state of Missouri, and that said tugs and barge were engaged in carrying principally coal, and incidentally freight, from the state of Illinois into the harbor of the city of St. Louis, and unloading the same into vessels that were moored at and tied to the improved wharf of the city of St. Louis." There were other paragraphs in the agreed statement designed to affect the amount the plaintiffs would be entitled to recover if the ordinance should be held to be not wholly invalid, and there were instructions asked by the plaintiff on the theory that the ordinance was valid; but as the plaintiff's whole case rests on the ordinance, and as we are satisfied that that is entirely invalid under the Constitution and laws of the United States, there is no necessity for setting out those other facts or the instructions asked predicated upon them. The trial court gave an instruction to the effect that "the license fees exacted by the ordinance were an interference with and obstruction upon commerce between the states, over which Congress has exclusive control, and that the plaintiff cannot recover." Judgment was accordingly rendered for defendant, and plaintiff appeals.

Messrs. B. Schnurmacher and Charles C. Allen for appellant.

Mr. Charles W. Thomas, for respondent:

When the city of Chicago, at its own expense, dredged and improved the Chicago river, which was wholly within its limits, and adopted an ordinance by which license fees were exacted from owners of tugs plying therein and licensed under title 50 of the Revised Statutes of the United States, it was held that the ordinance was void as an unwarrantable interference with commerce between the states.

Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

There is no distinction between this case and the case at bar, and that decision remains in full force.

Valliant, J., delivered the opinion of the court:

The contention on behalf of the city now is that the license fee required by the ordinance is a charge for the use of the city's wharf, and not a license tax for the privilege of navigating so much of the Mississippi river as is embraced within the city harbor. If that is a correct conclusion as to the fact, then the conclusion drawn by the learned city counselor as to the law of the case is correct. The Supreme Court of the United States has in several cases decided that a wharfage charge might lawfully be demanded of vessels licensed by the United States, as the vessels in this case were. In *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377, the court said: "If the charge is clearly a duty, a tax, or burden, which, in its essence, is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of the sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character." And further, in the same opinion, it is said: "No doubt neither a state nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized." In that connection the court referred to *Cannon v. New Orleans*, 20 Wall. 577, 22 L. ed. 417, in which it was held that a city ordinance was invalid which prescribed a rate per ton and

duration of moorage "for the levee and wharfage dues on all steamboats which should land or moor in any part of the port of New Orleans." Construing that ordinance, the court said: "We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring." In *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688, an ordinance which imposed a wharfage fee regulated by the tonnage of the vessel on every boat landing at the wharf in the city was held valid. In *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690, the doctrine of the cases above mentioned was reiterated, and the further point adjudged that the wharfage fee was valid, though imposed on a boat that did not land immediately against the wharf, but against a wharfboat which was against the wharf; the court holding that to use the wharfboat under those conditions was to use the wharf. In *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732, an ordinance of the city which imposed a charge on boats using its wharf was held to be valid, and that the fact that the charge was graduated by the tonnage of the vessel was immaterial. The court distinguishes in that case a duty on tonnage, as referred to in the Federal Constitution, and a charge for wharfage. "The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use." In *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313, the court sustained the validity of a statute of Illinois under which toll was charged for boats passing through locks and canals constructed in the Illinois river. It was there said of the Federal law in question: "It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight and the taking them on board, or for the repair of vessels." Other decisions from the same high source cited by the learned city counselor fully sustain his contention that the city may lawfully impose a reasonable charge on boats landing at its wharf, or landing against a boat that is moored at the wharf, but the cases above quoted from are sufficient to show the con-

dition of the law on that point. All of those cases are referred to and approved in *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306, but the court distinguishes them from that case, and they are to be distinguished from this. The Chicago ordinance which passed under judgment in that case was: "Section 1. No person or persons shall keep, use, or let for hire any tug or steam barge or towboat for towing vessels or craft in the Chicago river, its branches, or slips connected therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned." Then followed other sections indicating the amount of the license fee, the manner of its issuance, etc., and denouncing a penalty of a fine against anyone violating the ordinance. Now, let us lay the St. Louis ordinance by the side of the Chicago enactment, and see how they differ, if at all, in legal effect: "Section 232. It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into or out of the harbor of this city, or from one place to another within said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city, without a license for such purpose from said city continuing in force," followed by details as to amount and mode of issuance of license and penalties for its violation. Of the Chicago ordinance the court in that case said: "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge, or towboat towing vessels or craft for hire in the Chicago river or its branches shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign." It was a part of the agreed statement of facts in that case that the Chicago river had been deepened and improved for navigation by the city at its expense, and the contention was that the license fee was but a reasonable charge for that service. The court said: "The attempt is made to assimilate the pres-

ent case to those cases [*Huse v. Glover* and other cases] from the fact that it is conceded that the Chicago river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river." So, in the case at bar, the ordinance of the city of St. Louis does not exact the license fee on the ground of compensation for the use of its wharf, but it is for the privilege "of towing boats or other water craft into or out of the harbor, or from one place to another within said harbor." It is true there is a qualified provision in the ordinance that the amount paid for the license "shall be in lieu of all wharfage during the time said license remains in force," but that clause only more clearly distinguishes the license fee from a wharfage toll, and it simply means that the city will not exact wharfage from the owner of a vessel who has paid the city license for the privilege of navigating that part of the river embraced within the city harbor. But even that exemption does not apply to all vessels carrying the city license, but only to those that do "not engage in any other than towing or transfer business." The case is before us now upon totally different questions from those presented in the former appeal, and doubtless the decision in *Harman v. Chicago*, which, as we have seen, followed very shortly after our decision on the former appeal, suggested the changes. The defendant, in the light of that decision, discovered that its rights, under the Federal Constitution, as a navigator in the coasting trade, were being violated; and the plaintiff, to avoid the force of that charge, was compelled to take the position that these license fees were in fact compensation for wharfage. But that idea was not in this case from the beginning, and is not even now found in the plaintiff's petition. The statement in the petition is that the defendant is indebted to the plaintiff for a license fee imposed on the tugs owned by defendant and "employed by it in towing boats into and out of the harbor of St. Louis, and from one place to another within said harbor," and in that respect the petition closely follows the ordinance on which it is founded. The Constitution of the United States ordains that "Congress shall have power . . . to regulate commerce with foreign nations and among the several states" (art. 1, § 8); and "no state shall, without the consent of Congress, lay any duty or tonnage" (art. 1, § 10).

We are of the opinion that the ordinance of the city of St. Louis on which this suit is founded is in violation of those provisions

of the Federal Constitution, and therefore invalid. This is the view taken by the learned trial judge, and the judgment of the Circuit Court is affirmed.

All concur, except **Marshall, J.**, not sitting, having been of counsel.

Laura A. TRAMMELL, *Respt.*,

v.

Edward G. VAUGHAN, *Appt.*

(.....Mo.....)

1. A man engaged to marry, in whom there subsequently appears, without any intervening fault on his part, a loathsome venereal and contagious disease, which renders it unsafe or improper for him to marry, is entitled to postpone the marriage until he is cured if the disease is of a temporary character, and to refuse to carry out the contract if the disease is permanent.
2. A woman who breaks a contract of marriage in order to marry another man is not entitled to recover from the latter for his breach of promise any damages growing out of her wrongful act in breaking her promise to marry the former.
3. Exemplary or punitive damages, as such, cannot be recovered for breach of a contract of marriage by reason of the fact that the promise was not made in good faith, but was made without intent to perform it, for the purpose of humiliating and disgracing the other party, although this fact may constitute an aggravation of the compensatory damages.
4. An action for breach of promise of marriage is not prematurely brought when begun eight days after the day fixed for the marriage, and without waiting for the cure of a disease for which the defendant claimed to have postponed the marriage, where his acts and declarations sufficiently show that he did not intend to fulfil his contract, even after he was cured.

(November 12, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Audrain County in favor of plaintiff in an action to recover damages for breach of promise of marriage. *Reversed.*

Statement by **Marshall, J.**:

The plaintiff sues the defendant for damages for breach of contract of marriage. The petition is in two counts. The first count alleges a contract of marriage entered into between the parties on the 4th day of December, 1896, to be performed at Hartsburg, Boone county, on December 6, 1896; the procuring of the necessary marriage license, by the defendant, from the recorder of Cole county; the public announcement of the contract; the meeting of the parties at

NOTE.—As to disease as defense for breach of promise to marry, see *Shackleford v. Hamilton* (Ky.) 15 L. R. A. 531, and *note*; and *Sanders v. Coleman* (Va.) 47 L. R. A. 581.

As to right to recover, in breach of promise suit, for damages growing out of the breaking of an engagement to marry other person, see *Hahn v. Bettingen* (Minn.) 50 L. R. A. 669. 51 L. R. A.

the appointed time and place; the willingness and offer of the plaintiff and the positive refusal of the defendant to carry out the contract; and asks \$5,000 damages. The second count alleges that the defendant "willfully, falsely, fraudulently, and maliciously induced plaintiff to enter into said marriage contract" for the purpose of humiliating and disgracing her in the public estimation, and to prevent her marrying anyone else, but with no intention of performing the contract himself, and asks \$5,000 damages. The prayer of the petition is for \$5,000 actual damages and \$5,000 exemplary damages. The answer is a general denial and special pleas. The special pleas are: (1) An admission of the contract, the procurement of the license, the meeting at Hartsburg, and an inability to procure Rev. C. A. Mitchell to perform the ceremony. (2) A postponement of the marriage, by mutual consent, to an unstated time, the continuance of the defendant's visits to plaintiff, and the institution of this suit, eight days later, without notice to defendant of intention to sue, and without giving him any opportunity to carry out the contract. (3) That when the contract was entered into the defendant believed himself to be well, and physically in a proper condition to marry, but that, after procuring the license, and going to Hartsburg to carry out the contract, he discovered on the evening of December 5th that, without any fault, wrong, or negligence on his part done after entering into the contract, he became afflicted with a loathsome venereal and contagious disease, which rendered it unsafe, unwise, improper, and morally wrong for him to marry the plaintiff at that time. The reply is a general denial.

The facts developed at the trial were briefly these: The plaintiff and defendant had formerly been engaged for many years, but that engagement was canceled about eighteen months before, and the plaintiff had become engaged to one Brown. On December 4, 1896, the plaintiff and defendant met at a spelling bee at the Dry Forks school house, about 2 miles from her home. They rode to her home together that night, with the result that it was agreed that they should be married the next Sunday (December 6th) at the home of her brother-in-law, Mr. Bush, in Hartsburg. Accordingly the next morning the plaintiff started with her sister, Dollie, and Dick Foster, a young man who worked for plaintiff's family, for Hartsburg, which was 15 miles distant. The defendant overtook them, and the plaintiff thereafter rode with him. They reached Hartsburg about half past 11 o'clock A. M. The defendant telegraphed for Rev. Mitchell, and then the defendant and plaintiff's brother-in-law, Bush, went to Jefferson City, and procured the marriage license. Upon their return a telegram awaited him, saying Rev. Mitchell could not come. They discussed other ministers. That evening the defendant was sick, ate no supper, and went to bed early. The plaintiff and her sisters were engaged making her a wedding dress. During the night the defendant discovered

for the first time that he had the disease aforesaid. The next morning he kept his bed. The plaintiff carried him a glass of milk, which he drank. He then told her he was too sick to marry, and was going home to see his doctor. The plaintiff insisted on marrying, and he finally told her she did not know what was the matter with him, but to send her brother-in-law, Bush, into the room, and he would tell him, and he could tell his wife, and she could tell plaintiff. This was done. Then the brother-in-law, his wife, and the plaintiff returned to the room, and the plaintiff insisted upon the marriage taking place at once; said she would marry him as he was, and he could then go to St. Louis, or some springs, for treatment, for three weeks or a month, and she could stay with her sister; adding that she did not believe he was sick at all. He refused this proposition. That evening he drove to his home, a distance of some 15 miles. The next morning her sister, Dollie, saw the defendant as she passed his house on her way home, and asked him when he was going to marry the plaintiff, and he replied he was not going to marry her at all. That day the defendant drove to Fulton, a distance of 15 miles, and, when congratulated upon his marriage, he said to several persons he was not married; did not intend to marry; only went to Hartsburg to show Alfred Longley, Bill Gibbs, and Mr. Reynolds, who did not like him, or like plaintiff to associate with him, that he could marry the plaintiff if he chose. On the next day—Tuesday—the defendant went to Hartsburg again to see the plaintiff. The evidence is conflicting as to whether on Sunday, before he left her, it was agreed to postpone the marriage until he got well. He says she did. In her deposition, taken some time before the trial, she said she agreed to postpone the marriage upon the advice of her brother-in-law, but on the trial she denied agreeing to a postponement, and in explanation of her testimony in her deposition said she did not know the meaning of the word "postpone." At any rate, she says that on Tuesday, when he came to see her, he told her he came to tell her he was not going to marry her. She returned to her home the following Saturday, and the next day he came to see her, and told her he had been to see a doctor, and was going away the first part of the next week; that nothing was said about their marrying; that he asked her if she had heard from Brown, and she said no; that he then asked her if Brown was not coming out to see her that day, and she said no; that he said he was, and she replied she knew nothing about it; that she asked him if he was going to write to her while he was away, but he got on his horse, and rode off, and did not answer her. The next day she went to Fulton, and instituted this suit. Under instructions, hereinafter referred to, the case was submitted to the jury, and a verdict for \$1,000 compensatory damages and \$3,000 exemplary damages was returned for the plaintiff. The defendant then perfected this appeal.

51 L. R. A.

Mr. David H. Harris, for appellant:

Marriage differs in many particulars from ordinary, general, or commercial contracts. It is more than a mere civil contract; it is a matter of state concern, and the state is a party to the bargain which a man and woman make when they become husband and wife. And a contract to marry is assumed to be made for the purpose of mutual comfort and happiness.

Blank v. Nohl, 112 Mo. 159, 18 L. R. A. 350, 20 S. W. 477; *State v. Bittick*, 103 Mo. 183, 11 L. R. A. 587, 15 S. W. 325; *Dyer v. Brannock*, 2 Mo. App. 432; *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Duntze v. Levett*, Ferguson, 38.

As in the nature of the marriage status it cannot be in abeyance, the consent must be to present marriage, not depending on a future condition, or to be for an instant postponed.

1 Bishop. Marr. & Div. ed. 1891, 238.

It is implied as a part of every agreement to marry that any subsequent change in the mental or physical condition of either party without fault, so as to render it impossible in the nature of things to accomplish the object of the marriage relation, will release the parties from the agreement, at least for the time being.

Shackleford v. Hamilton, 93 Ky. 80, 15 L. R. A. 531, 19 S. W. 5; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863; *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; 2 Bishop, Marr. & Div. 582.

If either party should, without fault on his own part, become unfit for such a relation, and incapable of performing the duties incident thereto, then the law will excuse a noncompliance with the promise. The main part of the contract having become impossible of performance, the whole will be considered to be so.

Allen v. Baker, 86 N. C. 96, 40 Am. Rep. 444.

A mere request for a postponement of the marriage ceremony for an expressed and reasonable cause does not in law amount to a repudiation or renunciation of the contract.

Shackleford v. Hamilton, 93 Ky. 80, 15 L. R. A. 531, 19 S. W. 5; *Hall v. Wright*, El. Bl. & El. 745, 746; *Walters v. Stockberger*, 20 Ind. App. 277, 50 N. E. 763.

If defendant contracted the disease prior to the date of his engagement to plaintiff, did not know then that he would be thus afflicted, but afterwards and before the day set for the ceremony discovered his diseased condition, this was a valid excuse for at least a postponement of the marriage until the result of the disease could be known or he be cured of the same.

Allen v. Baker, 86 N. C. 91, 40 Am. Rep. 444.

A breach of promise of marriage is excused when, without any fault on his part, the prospective husband has developed a grave malady of such character as to endanger his life or health.

Sanders v. Coleman, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 621.

Communicating venereal diseases is a ground for divorce.

9 Am. & Eng. Enc. Law, 2d ed. p. 792; *Boughner v. Boughner* (Ky.) 41 S. W. 26; *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499.

Where the man refuses to consummate the contract to marry, and his refusal does not proceed from a disregard of the woman's feelings and his own plighted word, but from a consciousness, supervening his engagement, that he labors under a disease of such a nature as to render him unfit to enter into the marriage relation with anyone, he should be at liberty to refuse to perform the contract.

Allen v. Baker, 86 N. C. 91, 40 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L. R. A. 531, 19 S. W. 5; *Sanders v. Coleman*, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 621; *Atchinson v. Baker*, Peake, N. P. Cas. pt. 2, p. 103; Bishop, Marr. & Div. § 219; L'othier, *Traite du Marriage*, part 2, chap. 1, art. 61.

Exemplary or punitive damages are allowable only when there is misconduct and malice, or what is equivalent thereto.

Sutherland, *Damages*, 2d ed. § 393, p. 847; *Dupont v. McDow*, 6 Mont. 226, 9 Pac. 925; 3 Enc. Pl. & Pr. 689; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242.

Mr. I. W. Boulware also for appellant. *Messrs. A. Finley and D. P. Bailey*, for respondent:

The petition sufficiently avers bad motive and wantonness in the whole transaction. The evidence clearly shows it, and, if so, plaintiff was certainly entitled to punitive damages.

Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; *Southard v. Reaford*, 6 Cow. 254; *Grant v. Willey*, 101 Mass. 356; *Coolidge v. Neat*, 129 Mass. 146.

A disease of the kind set out in the answer was found by the jury to be curable in a reasonable time, and the evidence shows it was cured in a month. If so it was no defense. If it had been incurable it might have been a defense.

Sprague v. Craig, 51 Ill. 288.

This court will not disturb the finding unless it clearly appears that it was instigated by prejudice and passion.

Wilbur v. Johnson, 58 Mo. 600; *Douglas v. Gausman*, 68 Ill. 170; *Royal v. Smith*, 40 Iowa, 615.

It is no defense that plaintiff had previously promised to marry another.

Koper v. Clay, 18 Mo. 383, 59 Am. Dec. 314.

Nor that he broke his contract because he felt that marriage would not tend to the happiness of both parties.

Coolidge v. Neat, 129 Mass. 146.

The verdict of a jury in cases of this kind, as to amount of damages, will seldom be disturbed.

Wilbur v. Johnson, 58 Mo. 600; *Douglas v. Gausman*, 68 Ill. 170; *Royal v. Smith*, 40 Iowa, 615; *Denslow v. Van Horn*, 16 Iowa, 477; Affirmed in *Connell v. Western U. Teleg. Co.* 116 Mo. 42, 20 L. R. A. 350, 22 S. 51 L. R. A.

W. 631, and *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788.

The jury may give exemplary damages, if the defendant's conduct has been wanton or malicious, or if he has unnecessarily wounded the feelings of plaintiff.

Davis v. Slagle, 27 Mo. 600; *Coryell v. Colbaugh*, 1 N. J. L. 77, 1 Am. Dec. 192; *Connell v. Western U. Teleg. Co.* 116 Mo. 42, 20 L. R. A. 350, 22 S. W. 631.

Marshall, J., delivered the opinion of the court:

1. The principal question in this case is whether the defendant had a right to postpone the marriage upon the appearance of the disease between the date of the contract and the date appointed for its performance; in other words, stated broadly, whether the defendant would have been justified in marrying the plaintiff, even with her consent, while he had the disease. The proposition is stated thus broadly because it is incredible that the plaintiff would have been willing to marry him if she knew the nature and character of the disease. This, too, even if the consummation of the marriage was to be postponed until he could be cured. We prefer to believe she either did not know the nature and character of the disease, or else she did not believe he was so afflicted, and thought it was simply an excuse to keep from performing his contract. But there is no room for doubt upon this record that he had the disease, and there is no countervailing evidence that it made its appearance between the date of the contract to marry and the time appointed for the marriage, and without any intervening fault on his part. Fortunately there are few reported precedents for the conditions present in this case. It has been held that if a party to a marriage contract develops a disease which renders it unsafe or improper for him to marry, without intervening fault on his part, between the date of the contract and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known or he is cured. *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 621; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L. R. A. 531, 19 S. W. 5; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863. Of course, if the defendant entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him, and to treat his condition as a breach of the contract,—a fraud perpetrated upon her. Marriage is a contract, but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein. *Blank v. Nohl*, 112 Mo., *loc cit.* 167, 18 L. R. A. 350, 20 S. W. 477; *State v. Bittick*, 103 Mo. 183, 11 L. R. A. 587, 15 S. W. 325. Certain marriages are prohibited by law because of their detrimental effects upon society.

ty and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. "Wilfully to communicate a venereal disease is clearly cruelty, for it is misconduct tending to impair the health, and tends to render cohabitation unsafe;" and it is, therefore, a ground for divorce, whether specifically enumerated in the statutory causes for divorce or not. 9 Am. & Eng. Enc. Law, 2d ed. p. 792, and cases cited; and, as specially bearing on this case, *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499, and *Boughner v. Boughner* (Ky.) 41 S. W. 26. In *State v. Marks*, 140 Mo., loc. cit. 677, 41 S. W. 973, 43 S. W. 1097, it was said by Sherwood, J., that intercourse with a woman, though she was willing thereto, by a man who was infected with a venereal disease, would constitute the act a common assault, for the fraud vitiated the consent; and in support of the statement he cited the cases of *Reg. v. Bennett*, 4 Fost. & F. 1105; *Reg. v. Sinclair*, 13 Cox, C. C. 28; *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350. If the principles announced in the cases hereinbefore cited be correct, it is also true that it is legally as well as morally wrong for a man, while infected with such a disease, to marry; and a man, for such cause, is entitled to demand a postponement of the marriage until he is cured. If the thing to be performed becomes unlawful, without his intervening fault, after the contract is entered into, the performance is excused by force of law. *Sauner v. Brooklyn Phoenix Ins. Co.* 41 Mo. App. 480. The idea that the ceremony should be performed, and the consummation of the marriage postponed until he is cured, is not only intolerable, but obnoxious to a proper subservience of the public interests and morals. This, too, whether the woman knows his condition, and consents to such an arrangement, or not; for, though she may be willing to waive the defect, or be indifferent to the condition or its consequences to her and her children, the third party to the contract, the state, has a right to and does object. If the disease is of a temporary character,—such as was the case here,—and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; and, if the disease is of a permanent character,—such as was the fact in the North Carolina, Kentucky, and Virginia cases cited,—the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so.

2. The instruction given by the court of its own motion was to the effect that, if the disease was of a temporary character, and could ordinarily be cured in a reasonable time, and if the plaintiff knew its character, and consented to marry him, and that he should afterwards subject himself to proper treatment, then the disease constituted no defense in this case; otherwise if the disease was permanent, or rendered the defendant unfit for the discharge of marital duties. For the reasons given, this instruction is erroneous. The fifth and eighth in-

structions asked by the defendant and refused by the court, to the effect that under the circumstances of this case the defendant had a right to postpone the marriage temporarily,—that is, until he was cured,—whether the plaintiff consented to it or not, correctly state the law, and should have been given. The sixth instruction given for the plaintiff was also erroneous. It told the jury that if the plaintiff was engaged to Brown, and the defendant induced her to break that engagement, and promise to marry the defendant, he not intending in good faith to marry her, such conduct was an aggravation of the plaintiff's damages. If the plaintiff was engaged to Brown, and broke the contract, she was a wrongdoer, even though she did so to marry defendant; and she is not entitled to recover from defendant any damages growing out of her own wrongful act in breaking her promise to marry Brown. *Hahn v. Bettingen* (Minn.) 50 L. R. A. 669, 83 N. W. 467.

3. The second count of the petition alleges that the defendant entered into the contract wilfully, falsely, fraudulently, and maliciously, not for the purpose of marrying her, but to humiliate and disgrace her; and asks \$5,000 punitive damages therefor. The third instruction given for the plaintiff authorizes a verdict for punitive damages if such was the case, and the jury gave plaintiff \$3,000 exemplary damages: that is, three times as much for punishment as it gave her for her compensatory damages. This is, as far as we are advised, the first case on record for maliciously maintaining a suit in the courts of Cupid. If the defendant fraudulently entered into the contract, the plaintiff was entitled to withdraw from the contract, for the defendant's fraud vitiated her consent. If the defendant entered his suit in malice, and not in love, this aggravated the plaintiff's damages, and she is entitled to recover compensation therefor, but not punitive damages. The measure of damages in cases for breach of promise of marriage "is the injury to the plaintiff's feelings, affection, and wounded pride, as well as the loss of marriage (*Wilbur v. Johnson*, 58 Mo., loc. cit. 603); and the seduction may be given in evidence to aggravate the damages (*Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672; *Hill v. Maupin*, 3 Mo. 324; *Wilbur v. Johnson*, 58 Mo. 603; *Bird v. Thompson*, 96 Mo. 428, 9 S. W. 788)." *Liese v. Meyer*, 143 Mo., loc. cit., 562, 45 S. W. 282. The statements of the defendant to many persons after he returned from Hartsburg to the effect that he never had intended marrying the plaintiff, and had only taken the matter as far as he had to show Alfred Longley, Bill Gibbs, and Mr. Reynolds that he could marry her if he wanted to, were unmanly, cruel, and depraved, and were properly admitted in evidence to aggravate plaintiff's damages. But they do not constitute a separate cause of action, nor can exemplary or punitive damages, as such, be recovered for a breach of a contract of marriage. The law punishes the defendant for the breach of his con-

tract by making him compensate the plaintiff, whether his intentions when he entered into the contract were sincere or sinister. The plaintiff's second count, therefore, stated no distinct cause of action, and her third instruction was erroneous. The jury should have been told to consider these matters as an aggravation of her damages.

4. This action was begun eight days after the day fixed for the marriage, and before the time plaintiff was cured, or could reasonably have been cured. The evidence is conflicting as to whether the plaintiff consented to the postponement, but the defendant was entitled to postpone it until he was cured, whether she consented or not. Ordinarily, this would lead to the conclusion that the action was prematurely brought. But in this case the defendant's acts and declarations after the date set for the marriage af-

ford sufficient basis for the charge that he did not intend to fulfil his contract, even after he was cured. The plaintiff was therefore excused from going through the formality of waiting until he was well, and then demanding a performance of the contract, before instituting her suit; for his conduct subsequent to the postponement was a renunciation of the contract, and constituted a present and immediate breach of his contract, and her cause of action accrued then. *Gabriel v. Akinsville Pressed Brick Co.* 57 Mo. App. 520; *Claes & F. Mfg. Co. v. McCord*, 65 Mo. App. 507; *Lawson, Contr.* § 442.

For the reasons given, the judgment is reversed, and the cause remanded for trial anew upon the principles herein announced.

All concur.

OHIO SUPREME COURT.

Clinton C. WARD *et al.*, *Plffs. in Err.*,
v.

Catherine WARD.

(68 Ohio St. 125.)

*A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein.

(*Spear, J., dissents.*)

(June 19, 1900.)

ERROR to the Circuit Court for Richland County to review a judgment in favor of plaintiff in an action brought to set aside certain deeds executed prior to his marriage by her deceased husband. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bell & Brinkerhoff, for plaintiffs in error:

In the absence of positive fraud to such an extent as to deprive the consort of all rights, the deeds cannot be set aside.

Hamilton v. Smith, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276.

Neither husband nor wife has any interest in the property of the other, except as mentioned in §§ 3110 and 4188.

Rev. Stat. § 3111.

*Headnote by the COURT.

NOTE.—For other cases in this series as to conveyance in fraud of prospective wife's rights, see *Dudley v. Dudley* (Wis.) 8 L. R. A. 814, and note; *Murray v. Murray* (Ky.) 8 L. R. A. 95; *Stroup v. Stroup* (Ind.) 27 L. R. A. 523; *Murray v. Murray* (Cal.) 37 L. R. A. 626; and *Arnegard v. Arnegard* (N. D.) 41 L. R. A. 258.

51 L. R. A.

The rights of the widow or widower rest in property held during coverture.

At the time of the marriage of John Ward with Catherine Ward he held in fee simple 49 acres of land and no more.

A widow's dower rights vest in property held by the deceased during coverture, to which she has not released dower.

Miller v. Wilson, 15 Ohio, 108; 5 Am. & Eng. Enc. Law, p. 890.

Messrs. Lasear & Huston, for defendant in error:

Where a man in contemplation of marriage, which marriage afterwards takes place, voluntarily conveys his property without the consent of his future wife and without consideration, the conveyance is a fraud on the marital rights of the intended wife, although made to persons who have no knowledge of the fraud.

Beach, Modern Law of Contracts, § 1309, p. 1727; *Pom. Eq. Jur.* § 920, p. 1308; *Westerman v. Westerman*, 25 Ohio St. 500; *Stewart, Marr. & Div.* § 44; *Bishop, Contr.* § 305; *Arnegard v. Arnegard*, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797.

Minshall, J., delivered the opinion of the court:

The plaintiff below, as appears from her amended petition, being the widow of John Ward, deceased, brought suit to set aside certain antenuptial deeds that had been made by her husband to his children by a former wife, and to be endowed in the lands, on the ground that the conveyances were voluntary and in fraud of her rights as a wife; she being without knowledge of the facts at the time of the marriage. The case was appealed to the circuit court, and there decided in favor of the plaintiff. There is no finding of facts, the finding being simply in favor of the plaintiff, and that she is entitled to dower in the land. But a bill of exceptions was taken contain-

ing all the evidence and made part of the record. The material facts are, however, not in dispute. Prior to November 18, 1892, John Ward, a widower, living in Richland county, Ohio, was the owner of 106 acres of land, which he had acquired during the life of his first wife. He had five children, all grown and married,—three sons and two daughters. His eldest son, C. C. Ward, lived on the premises, and occupied a house on 7 and a fraction acres, which he had purchased from his father for \$300, but for which he had no deed. As to this tract, however, there is no controversy. On November 18, 1892, in contemplation of marriage, he executed and delivered to C. C. Ward a deed for 25 acres, including the 7 acres and a fraction. On the next day he executed a deed to H. N. Ward for about 13 acres, and on November 23, 1892, he executed a deed to his other son for 18 acres, and in the evening of the same day he married Catherine Stough, who is now his widow and plaintiff below. There is some controversy as to when these deeds were delivered, but we will assume that they were delivered, as claimed, before the marriage. She, however, had no knowledge of their existence at the time of the marriage, nor until after the death of her husband, when they were placed on record. They were, in each case, voluntary deeds, supported by no other consideration than the love and affection of a father for a son, except as to the 7-acre tract contained in the deed to the eldest son, and which, as we have stated, is not in question.

The question, then, arises upon this state of facts, whether the plaintiff is entitled to dower in the lands covered by these deeds, except the 7 acres. We think she is. They were all voluntary deeds, made in contemplation of marriage. It can make no difference in principle whether actual fraud was intended or not; their execution and delivery before the marriage, without her knowledge or means of knowledge, operated a legal fraud on what would be her rights in case of marriage. A desire to provide for the children of his former wife was both natural and proper, but, as they had no legal claims upon his bounty, before he could rightly, in contemplation of marriage, dispose of his property to them for such purpose, it became his legal duty to disclose his purpose to one who, by her intermarriage with him, would become vested by law with a legal interest in the property that could not be divested without her consent. A father's legal duty to his children in no case requires him to practise a fraud on his wife or anyone else. If after entering into a contract of marriage, if not before, he desires to make provision for his children by a former wife, it is his duty to communicate that fact to his intended wife, if thereby her rights are to be affected, that she may have an opportunity to say whether she consents to the disposition before consummating the agreement to marry. A failure to do this is, at least, a constructive fraud. In *Arnegard v. Arnegard*, 7 N. D. 51 L. R. A.

475, 41 L. R. A. 258, 75 N. W. 797, where the question has received careful consideration upon principle and authority, it is said: "Whatever view may have formerly been held, it has become settled law in these latter days that the purpose to deceive and defraud the other prospective spouse is imputed to the one who makes the antenuptial transfer, and conceals the fact until after marriage." In England, for reasons largely relative to the custom that there prevails of making a settlement in lieu of dower, called a "jointure," before marriage, less consideration has been given to antenuptial conveyances by the husband, while such conveyances by the wife are uniformly held invalid. But in this country no such distinction is made, and the decisions are, as said in the case just cited, practically unanimous that the mere fact that a secret transfer was made after the engagement is conclusive on the question of fraud so far as the right of dower is concerned. In some of the cases the element of actual fraud was shown to have existed, and some of the rulings are placed on that ground, but, as said in the case just referred to: "In the great majority of cases the broad rule is enunciated that a man owes to the woman to whom he is betrothed the utmost good faith, and that he cannot, consistently with that sacred obligation, secretly divest himself of property in which she would by marriage secure rights which would thereafter be beyond his control." This proposition is fully sustained by the decisions: *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Smith v. Smith*, 8 N. J. Eq. 515; *Youngs v. Carter*, 50 How. Pr. 410, Affirmed on appeal 10 Hun, 194; *Cranston v. Cranston*, 4 Mich. 230, 66 Am. Dec. 534; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Davis v. Davis*, 5 Mo. 183; *Gainor v. Gainor*, 26 Iowa, 337; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211. See also *Stewart, Marr. & Div. § 44*; *Beach, Modern Law of Contracts, § 1309*. In *Westerman v. Westerman*, 25 Ohio St. 500, it appeared that the wife, in contemplation of marriage with the plaintiff, and after she had entered into the engagement, conveyed certain of her lands to two sons by a former marriage without consideration. The land had not been fully paid for, and the husband was compelled by suit to pay the balance of the purchase money. The court held the conveyance to be a fraud on the marital rights of the husband; that the wife was primarily liable for the amount due, and substituted the husband, for the purpose of indemnity, to the place of the vendor as against the land. This case recognizes the principle that the parties to a contract of marriage are bound by the obligations of good faith, and that neither can thereafter by voluntary gifts affect such legal rights as either may acquire in the property of the other by marriage without the consent of the party to be affected. After adverting to the rule in England that permitted a man, after contracting marriage, to make antenuptial conveyances of

his lands, and the rigidity with which a like right was denied to the contemplated wife, and pointing out the reason for this difference, Daniels, J., in *Youngs v. Carter*, 10 Hun, 194, says: "There never was any good reason why the disability imposed in this respect upon the wife should not have been equally applied to the conduct of the husband. If it was inequitable for her to convey away her property in anticipation of marriage, in order to prevent it from becoming subordinated to her husband's anticipated rights in it, it was equally so for him to do the same. The principle that restrained her should be equally as effectual over him; for, if the act of one was a fraud, it was certainly no less so when it was performed by the other." In *Chandler v. Hollingsworth*, 3 Del. Ch. 99, the inability of the husband by an antenuptial conveyance to affect the wife's right of dower after the contract of marriage has been entered into, without her knowledge, is placed on the ground that dower is a property right, which she acquires by the marriage, and that such conveyance is as much a fraud on her rights as a conveyance to defraud future creditors. Speaking of the "unjust discrimination made by the English courts of equity, in withholding from the wife such protection as is given to the husband against secret antenuptial settlements," and the reasons therefor, the chancellor says: "But in this country clearly the same reasons do not apply. Her dower is the only provision made by law for the wife out of the husband's real estate. Practically it is a most important resource, and the only form of provision out of real estate enjoyed by her, except under wills. It does, in fact, to a large extent enter into the wife's expectations in contracting marriage, and properly so. It therefore ought to receive all the protection accorded to any marital right. To refuse it would, in this country, where jointures are unknown, render the right of dower precarious, if not wholly illusory."

It may be worth while to observe that the settlement of a jointure on a wife before marriage, in lieu of dower, freed the remaining lands of the husband from the marital right of the wife to dower in his remaining lands; and so antenuptial conveyances, under such circumstances, by a man under contract to marry, would not be open to the same imputation of bad faith as where no such settlement had been made. For the reason and origin of the rule in England as to antenuptial conveyances by the husband, see the intelligent account given by the chancellor in *Chandler v. Hollingsworth*, 3 Del. Ch., at pages 115, 116.

This announcement of the law does not interfere with the power of the contemplated husband to make provision for his children by a former marriage. It only requires that in doing so he shall not dispose of that which, by the law of marriage, the wife will acquire as a legal right incident to the relation. He may dispose of his property in this regard as he thinks proper, subject, however, to his wife's right of dower.

Judgment affirmed.

51 L. R. A.

Spear, J., dissenting:

I am of opinion that a widower who is contemplating a second marriage, and has entered into a contract for that purpose, has a legal, as well as a moral, right to convey a fair proportion of his real estate to his children by the deceased wife, and that love and affection is a sufficient consideration to support such conveyance. Nor is such conveyance in any sense an injustice to, much less a fraud upon, the second wife, and ought not to be even a disappointment to her. I am not ready to accept the implication of mercenary motives on her part which the opposite doctrine supposes. The statute gives the widow dower in the lands of which her late husband died seised. The deceased did not die seised of the lands in controversy in this case, and hence the defendant in error is not entitled to dower.

SECOND NATIONAL BANK of Sandusky,
Plff. in Err.,

v.
William BECKER et al.

(62 Ohio St. 289.)

- *1. Money obligations arising upon contract, express or implied, and judgments rendered thereon, are debts within the purview of § 15 of the Bill of Rights, which forbids imprisonment for debt in civil actions.
2. Section 5556 of the Revised Statutes, and provisions therein referred to relating to proceedings in contempt, must be so construed and restrained in their operation as to avoid conflict with the inhibitions of the Constitution, and, in so far as they are in derogation of personal liberty, should receive a strict construction.
3. An order made in a proceeding in contempt against sureties on an undertaking for the redelivery of attached property by the principal, requiring them to pay the judgment recovered against the principal, and directing that, in default of such payment, they shall be imprisoned in the county jail until they shall pay the judgment, is in contravention of their constitutional right of exemption from imprisonment for debt.
4. Judgment rendered against the sureties in such summary proceeding for the amount of the judgment recovered against the principal in an action to which they were not made parties is without due process of law, there having been no suit brought against them on the undertaking, nor opportunity given them to plead or defend according to the usual course of legal proceedings.

(March 20, 1900.)

ERROR to the Circuit Court for Erie County to review a judgment reversing a judgment of the Court of Common Pleas adjudging the sureties on a delivery bond guilty of contempt for failure to comply with

*Headnotes by the Court.

NOTE.—As to constitutionality of imprisonment for debt, see Carr v. State (Ala.) 34 L. R. A. 634, and note.

an order for redelivery of the property or payment of a judgment for which it was seized. *Affirmed.*

Statement by Williams, J.:

The Second National Bank of Sandusky, Ohio, commenced an action in the court of common pleas of Erie county against William Becker on two notes made by him amounting to nearly \$900, and at the same time sued out an attachment against his property. The writ was levied on certain chattel property of the defendant, which was inventoried and appraised at \$1,585. After the levy and appraisal, the property was delivered by the sheriff to the defendant, and W. W. Woodward and John Diest, as his sureties, executed and gave to the sheriff the following undertaking:

Know all men by these presents, that we, W. W. Woodward and John Diest, are held and firmly bound unto the said the Second National Bank of Sandusky, Ohio, plaintiff, in the sum of three thousand dollars (\$3,000.00), to the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Signed by us, and dated this 19th day of January, A. D. 1895. The condition of the above obligation is such that whereas, A. A. Magill, sheriff of Erie county, Ohio, has this day attached the following goods and chattels found in the possession of William Becker, on an order of attachment issued from the court of common pleas for said county of Erie in an action wherein the said the Second National Bank of Sandusky is plaintiff and the said William Becker defendant, as the property of the said William Becker, to wit: 2 wine presses, \$100 each, \$200; 11 wine casks, 1-300 gals. each, \$350; 4 wine filters, \$75; 19 wine casks, 2,000 gals. each, \$960; total, \$1,585; and whatever goods are contained in premises hereinafter described in said premises are situated in Kelly's island, county of Erie, and state of Ohio, and known as the property of William Becker. For a true inventory and appraisal of the within described property, see Schedule A, case No. 7,122, *Robert Hamilton v. William Becker*, which is made part of this bond. Which said property has been duly appraised at the sum of \$1,585. And whereas, the said sheriff has delivered the said property to the said William Becker: Now, if the said property so attached, or its appraised value in money, shall be forthcoming to answer the judgment of the court in said action, then this obligation to be void; otherwise, to remain in full force and virtue in law.

W. W. Woodward.
John Diest.

Signed in my presence, and approved by me, this 19th day of January, A. D. 1895.

A. A. Magill, Sheriff.

In that action, at the November term of the court in 1895, the plaintiff recovered a judgment against Becker for the amount of the debt, and obtained an order against him 51 L. R. A.

and the sureties on the undertaking for the redelivery of the attached property to the sheriff for sale. This order required the parties against whom it was directed to make the redelivery within three days after its service upon them, and, in default thereof, to "forthwith pay to the sheriff the amount of the plaintiff's judgment, with interest and costs." The parties having failed to comply with the order, the plaintiff instituted a proceeding in contempt against them, and obtained a rule requiring them, on a day therein named, to show cause "why they and each of them should not be punished as for contempt for disobedience and failure to comply with said order." This contempt proceeding came to a hearing at the April term, 1899, and at the conclusion of the hearing the court found the parties guilty of the contempt charged, and made and rendered against them the following judgment and order: "It is therefore ordered, considered, and adjudged that the said plaintiff recover from said defendants, William Becker, W. W. Woodward, and John Diest, the sum of \$867.92, with interest at 5 per cent on \$247.06 from the 4th day of November, 1895, and interest on \$620.86 from the 4th day of November, 1895, being the amount of said judgment and interest and the costs of this action, together with all increase costs, to which defendants except. It is further ordered and adjudged that the said defendants pay or cause to be paid said judgment against said William Becker, with interest thereon, as aforesaid, and the costs of this action, to the clerk of this court, within twenty-four hours from and after the date of this order, and execution is awarded therefor, and that, in default thereof, they and each one of them be committed to and imprisoned in the county jail of Erie county until said order is complied with, and that a warrant issue from the clerk of this court to the sheriff of Erie county, Ohio, for said commitment and imprisonment." The parties against whom the foregoing judgment and order were entered in due time filed their motion for a new trial, which was overruled, and they thereupon perfected a bill of exceptions, from which it appears, in addition to the facts already stated, that the amount of the undertaking in question could be made in execution against Woodward, who is solvent; that Becker, in 1898, made an assignment for the benefit of his creditors to George E. Reiter, who accepted the trust and took possession of all the property then within the control of Becker, and demanded of each of the sureties on the undertaking all property of Becker's in their possession; that none of the attached property had been lost or destroyed, but a portion of it, being perishable, was sold, and has passed out of existence; that the parties were unable to comply with the order of the court requiring the delivery of the property to the sheriff; and that they had no "intention to commit contempt of court, and were under the advice of counsel that, if they were liable to any person, they would be liable to no one but the assignee of William Becker."

The circuit court, on error prosecuted there, reversed the judgment and order of the common pleas, and the object of the proceeding in error here is to obtain the reversal of the judgment of the circuit court, and an affirmance of that of the common pleas.

Messrs. King & Guerin, for plaintiff in error:

Section 5550, Ohio Rev. Stat., provides: "The court may compel the delivery to the sheriff for sale of any of the attached property for which an undertaking has been given, and may proceed summarily on such undertaking to enforce the delivery of the property or the payment of the money due upon the undertaking by rules and attachment, as in cases of contempt."

It was the legislative intent in the enactment of that statute to provide an effectual and speedy remedy for the enforcement of just such obligations as exist in the matter in question.

The court has power to compel the delivery of property by proceedings in contempt.

White v. Gates, 42 Ohio St. 109; *Re Milburn*, 59 Wis. 24, 17 N. W. 965; 7 Am. & Eng. Enc. Law, 2d ed. p. 42, § 3; *State ex rel. Warfield v. Becht*, 23 Minn. 411; *State v. Burrows*, 33 Kan. 17, 5 Pac. 449; *Ex parte Grace*, 12 Iowa, 213, 79 Am. Dec. 529; *Re Concklin*, 5 Ohio C. C. 78.

Messrs. H. L. Peeke and George E. Reiter, for defendants in error:

Where a statute confers upon a court or magistrate the power to issue an arrest in a civil case upon certain conditions, the statute, being in derogation of personal liberty, is to be strictly construed; and a creditor availing himself of the remedy must comply with all the conditions imposed by it.

Spice v. Steinruck, 14 Ohio St. 213; *White v. Gates*, 42 Ohio St. 112.

A judge cannot enforce the payment of a debt, in the absence of all fraud, by imprisonment as for a contempt.

Union Bank v. Union Bank, 6 Ohio St. 254.

Contempt proceedings in Ohio can only be brought in the name of the state of Ohio.

1 Kinkead, Code Pl. p. 396; *State v. Clements*, 6 West. L. J. 538.

Williams, J., delivered the opinion of the court:

The principal question which the record brings before us is whether the judgment and order of the court of common pleas here under review are incompatible with § 15 of the Bill of Rights. The circuit court held them to be so, and on that ground reversed them. That section of the Constitution provides that "no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." The question here is not embarrassed by any feature of fraud, for it is disclaimed there was any fraud on the part of Becker in obtaining the delivery of the attached property to him by the sheriff, or any on the part of either of the defendants in error in incurring the obli-

gation upon which the judgment and order in question were founded. The property was delivered by the sheriff in pursuance of a provision of the statute, upon the acceptance by him of the proper undertaking with sufficient sureties, as therein provided. No bad faith or fraud is imputed to any of the parties in the transaction. Nor is it disputed that the judgment and order were rendered in a civil action. Imprisonment thereunder would be imprisonment on process in such action. The constitutional provision is not to be construed as confined to arrests upon writs. *White v. Gates*, 42 Ohio St. 109, 110. The point in controversy is whether imprisonment under the order would be imprisonment for debt, within the purview of the constitutional provision referred to. The proceeding in contempt was founded on the order of the court entered as part of the judgment recovered by the bank in its action against Becker on his two notes; and the primary object of that order was to procure the redelivery of the property attached in that action to the sheriff for sale for the satisfaction of the bank's judgment. Notwithstanding the sureties on the undertaking given by Becker for the redelivery of the property were not parties to that action, the order ran against them as well as Becker. It directed that they all should "within three days from the service of the order redeliver to the sheriff all of said property, or, in default thereof, that they should forthwith pay to the sheriff the judgment recovered by the bank against Becker, with interest and costs." Upon the hearing upon the rule issued in the contempt proceeding for failure to comply with that order, the court, presumably, was satisfied, as indicated in the bill of exceptions, that the parties were unable to comply with that part of the order which required the redelivery of the property, for it simply rendered a general judgment against all of the parties for the amount of the judgment which the bank had theretofore recovered against Becker, and entered an order against all of them that, if they did not pay the judgment within twenty-four hours, they should "be committed to and imprisoned in the county jail" until they should pay it. It is this judgment and order which the circuit court reversed.

It seems undisputable that the money due the bank on its judgment against Becker is a debt. Payment of that debt was the only means, under the order complained of, by which the defendants in error could escape imprisonment in the county jail. The end sought by the order, and its sole purpose, was to coerce payment by imprisonment. The first judgment against Becker acquired no additional force by the rendition of the second one against him for the same debt, nor any additional means or remedy for the enforcement of its collection, except by his imprisonment for its nonpayment; and the order against his sureties had no other object than to enforce performance by them of their obligation for the principal, by subjecting them to imprisonment for the principal's default in making payment of the

judgment against him. The observation is pertinent here that the obligation of the sureties on the undertaking is not to redeliver the attached property to the sheriff, nor that Becker should redeliver it. By its terms the undertaking binds the obligors for the payment of a sum of money to the sheriff, and the forthcoming of the property, according to its condition, to answer the judgment that should be recovered in the action, is merely a mode provided for discharging the money obligation. It is clear the sureties did not contract to undergo incarceration in prison for any default of the principal in the performance of the condition of the undertaking and that their liability upon it is a debt arising upon contract. The constitutions of most of the states contain a prohibition against imprisonment for debt, substantially like that in ours, and the authorities hold with general unanimity that the word "debt," within the constitutional inhibition, includes not only debts of record, judgments, and specialties, but generally all obligations arising upon contract, express or implied; and some of the courts give the word a still larger meaning. The real contention of counsel for the plaintiff in error is that the judgment and order under consideration are justified by § 5556 of the Revised Statutes, and other statutory provisions therein referred to. That section provides that "the court may compel the delivery to the sheriff for sale of any of the attached property for which an undertaking has been given, and may proceed summarily on such undertaking to enforce the delivery of the property or the payment of the money due upon the undertaking by rules and attachment as in cases of contempt." And it is provided by §§ 5640 and 5646, which relate to proceedings in contempt, that disobedience of, or resistance to, an order or judgment of a court may be punished as for a contempt; and that, when the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it. It is unnecessary in this case to hold these statutory provisions, or any of them, unconstitutional; but, to avoid that result, they should be so construed and restrained in their operation as not to bring them in conflict with the inhibition of the Constitution, and their provisions, so far as they interfere

with personal liberty, must receive a strict construction. *Spice v. Steinruck*, 14 Ohio St. 213; *White v. Gates*, 42 Ohio St. 109, 112. It is not in every case of contempt that imprisonment may be imposed as a punishment. There are many orders and commands of courts, other than those for the payment of a debt, or the enforcement of a judgment upon a money obligation, to which the statutes may have appropriate application. Of this class, it has been held, are orders to deliver property in the possession of a party, or turn over moneys in his hands, to a receiver (*Re Milburn*, 59 Wis. 24-31, 17 N. W. 965), orders not to transfer or dispose of property pending a litigation (*Re Perry*, 30 Wis. 209), and others of a like nature. But the order complained of in this case was not of that character. It was not to deliver any of the attached property then in the possession of the defendants. They had none in their possession. Nor was it to turn over any money in their hands belonging to the plaintiff. They were not the custodians of any fund. It was strictly an order for the payment of a debt, namely, for the payment of a specified amount of money in satisfaction of a judgment rendered against them, and, in default of such payment, to stand committed. This order was therefore erroneous, and was properly reversed; and we think the judgment rendered against the sureties was also. As has already been noticed, they were not parties to the original action against Becker, nor before the court, either by process or appearance, when the order was entered in that action requiring them to redeliver the attached property to the sheriff, or pay the judgment then rendered in favor of the bank against Becker. The court was, therefore, without jurisdiction to make the order that was then entered against them. That order was the foundation of the subsequent proceeding for contempt. In that proceeding they were only notified to show cause why they had not redelivered the property in compliance with the previous order. No suit was brought against them on the undertaking, nor opportunity given them to plead or make defense to any claim of liability thereon, or be heard according to the usual course of legal proceedings. It can scarcely be claimed that this was due process of law.

Judgment affirmed.

RHODE ISLAND SUPREME COURT.

Re Maria H. WILLBOR et al.

(20 R. I. 126.)

1. In case of death by the same disaster,

NOTE.—Presumption of survivorship among those who perish in a common calamity.

- I. Introduction.
- II. The civil law.
- III. The common law.
 - a. The English cases.
 - b. The American cases.
 1. In general.
 2. Exceptions.

51 L. R. A.

ter, of sisters who left wills in each other's favor, with no circumstances appearing from which it can be inferred that either survived the others, the rights of succession

I. Introduction.

This topic has been an attractive one, and extensively treated by jurists in the cases, textbooks, and more ephemeral publications. The modern prospector will find readily a mine of authorities at every hand, from which he may extract the principles now generally accepted. Such departures from these principles as have occurred have not been numerous, nor, fortu-

to the estates will be determined as if death occurred to all at the same moment.

2. Upon the death by the same disaster, with nothing to show which survived, of sisters who left wills each giving all testatrix's property to her sisters, or to either of the survivors, and to their heirs and assigns forever, giving certain specific legacies upon the death of the last survivor, the property after payment of the specific legacies will be distributed as intestate.

(June 8, 1897.)

CASE stated for the opinion of the court as to the construction of certain wills. *Distribution of property as in case of intestacy.*

The facts are sufficiently stated in the opinion.

nately for litigants, especially distracting. The conflict sometimes observable has arisen because of the diametrically opposing theories of the civil and the common law.

As the rules of the civil law, except in two states, have never been adopted in the United States, nor in England and its dependencies, not much space need be devoted to that branch of the subject, and, in the main, only the authorities will be cited from which further knowledge may be gathered if desired. It is believed, however, that so far as the subject of this note alone is concerned, no case reported to date, in England or the United States, has escaped attention, and that all of these elsewhere scattered through many treatises and notes will be found collated below. It may be as well to say, however, that no attempt has been made to review any cases outside the main topic, even where closely analogous and governed by the same principles, as, for instance, the cases where death is presumed from an absence beyond the seas for seven years and upwards without tidings, and the problem to be solved is when the death thus presumed actually occurred. Nor has there been any attempt to decide between the cases where, although recognizing and adopting the accepted correct principles regarding survivorship, the property in question has been disposed of by the decisions in opposite directions; as in the case of the proceeds of an insurance policy upon the life of one for the benefit of another of the commorlent persons.

II. The civil law.

By the Roman law there was no presumption that those who perished in the same disaster all died at once. When in battle or shipwreck a father and son died together, it was presumed that the son, if above the age of puberty, outlived the father, and that he died first if not come to puberty. If all the dead were over sixty years of age the youngest was presumed to have survived. If all were under fifteen, then the eldest was deemed to have lived the longest. As between the sexes in the same class the presumption of survivorship was in favor of the male. Dig. lib. 34, title 5: *De rebus dubis*, l. 9, §§ 1, 3; Id. l. 16, 22, 23; *Menochius de Presumpt.* lib. 1, Quæst. x. n. 8, 9. *Vide* 1 Greenl. Ev. chap. 4, § 29; 24 Am. & Eng. Enc. Law, p. 1027.

In France, by the Code Napoleon (bk. 3, title 8, chap. 1, arts. 720-722) substantially the same presumptions were adopted as providing for "succession in the order of nature." Duranton, *Cours de Droit Français*, tom. vi. pp. 39, 42, 51 L. R. A.

Mr. Daniel W. Fink for parties in interest.

Matteson, J., delivered the opinion of the court:

This is a case stated for an opinion of the court, as follows: Three sisters, Charlotte Willbor, Martha T. Willbor, and Eliza Ann Willbor, late of Newport, deceased, all perished in the same calamity,—the burning of their house in Newport. They left instruments in writing, purporting to be their last wills and testaments, which have been duly admitted to probate. By these wills each testatrix gave and devised all her real and personal estate to her two sisters, or to either of the survivors, and to their heirs and assigns forever, and then, having first directed that, after the decease of the last sister, the necessary debts should be paid,

43, 48, 67, 69. And see 2 Kent, Com. 435, and note; 1 Greenl. Ev. § 29, *supra*; 2 Best, Ev. § 410; 24 Am. & Eng. Enc. Law, p. 1028.

The French law governed the territory of Orleans when it was ceded to the United States (Digest of Civil Laws of Territory of Orleans, arts. 60-63), and in substance its provisions upon this subject were afterwards incorporated in the Code of Louisiana (arts. 930-933).

It was at one time proposed to embody a set of presumptions as to survivorship among the victims of the same catastrophe when proof was not obtainable, in the law of New York (Proposed Civil Code, § 1780, title 8), and Mr. Taylor in his treatise on the Law of Evidence (§ 202) mistakenly supposes that to have been done; but that part of the system of codification devised by David Dudley Field failed of enactment. In California, however, its substance was adopted into the statute law. *Vide* Cal. Code Civ. Proc. § 1963, subd. 40.

In Italy and Spain, it is said, similar rules slightly modified obtain. 24 Am. & Eng. Enc. Law, p. 1027.

On the other hand, other countries have provided by statute that where relatives die in the same calamity there is a presumption that all expire at the same moment of time. Such is said to be the law of India. Baillie, *Mahometan Law of Inheritance*, 172, as cited in 1 Greenl. Ev. chap. 4, § 29, by Van Vorst, J., in *Newell v. Nichols*, 12 Hun, 604, and in *Cowman v. Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64.

Such, too, was the ancient Danish law, according to Greenleaf, citing Ancher, *Lex Cimbrica*, lib. 1, chap. 9, p. 21; and Prussia and Austria are also said to provide by statute for the presumption of a simultaneous death where evidence is lacking. 24 Am. & Eng. Enc. Law, p. 1028.

The Civil Code of Holland (§ 878) contains the like provision. Van Vorst, J., in *Newell v. Nichols*, 12 Hun, 604.

III. The common law.

It may be taken as settled, wherever the common law applies, that where two or more persons perish in the same disaster, and there is no fact or circumstance to prove which survived, there is no presumption whatever upon the subject. None arises from considerations of age or sex, and the law will no more presume that all died at the same instant than it will presume that one survived the other. It treats the case as one to be established by evidence, and lays the burden of proof on him who claims survivorship; and, if there is no proof, as an

proceeds to give to her two nieces, Emily N. Willbor and Maria H. Willbor, \$500 each, and to Thomas W. Smith \$200. The legatee Emily N. Willbor died before the testatrices. The only heirs at law of the testatrices are Abbie R. Richards, Ann Elizabeth Clarke, Mary H. Adams, Sarah T. Bliven, and Maria H. Willbor.

Upon these facts, the questions propounded are: (1) What is the amount of the legacies to which Maria H. Willbor and Thomas W. Smith are respectively entitled under the wills? (2) What portion of the estate of the testatrices passed to their heirs at law?

As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded

unascertainable fact, which, not being established by him who has the *onus*, results in his failure to meet a condition precedent to his success.

It is often said that this is exactly equivalent to a presumption of synchronous death, and indeed such is the almost invariable result of the application of the rule as stated; nevertheless it is well to maintain the distinction to avoid confusion of thought.

a. The English cases.

The earliest case in which the question of survivorship between persons dying at the same time arose was in 1596, and there was evidence by which the fact could be and was determined. *Broughton v. Randall*, 1 Cro. Eliz. 502, Noy, 64. In this case a father and his son were both hanged from the same cart. They were joint tenants in certain real estate, and the widow of one of them claimed and established her dower right upon the ground that her husband lived longest. The two reports differ as to whether it was the son who lived longest and his widow who succeeded, or whether the father survived to the benefit of his widow; but both agree on the determining piece of evidence, namely, that one victim was noticed to move his feet or shake his legs after the other's muscles were stilled in death.

In the next case, nearly a century and a half later and antedating by thirty years Lord Mansfield's celebrated undecided case, Lord Chancellor Hardwicke plainly indicated the rule which now commands general acceptance. This was *Hitchcock v. Beardsley*, 1 West Ch. 445, a suit by residuary legatees to obtain £1,200 on a bill of exchange payable to their testator, and received by him on his marriage with the daughter of the drawer in consideration of the bridegroom's covenant to settle that sum upon his bride within three or four years after marriage. Before the time was up, husband and wife were lost at sea with all on board a vessel bound for Corunna. Defendant was the administrator of the daughter, and claimed the bill of exchange as her marriage portion. The cause was compromised. The parties divided the £1,200 between them. The Lord Chancellor added the following note to the report:

"*Semble*, that the husband having by the bill of exchange the legal right to the money, and not being obliged to settle it on his wife within three or four years, and she dying within that time, the representative of the husband had the stronger right, and the rather because, in order to make a trust arise for the wife so as to give her representative any right to take away the

as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. *Underwood v. Wing*, 19 Beav. 459, 4 De G. M. & G. 633; *Wing v. Angrave*, 8 H. L. Cas. 183; *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213; *Goods of Wainwright*, 1 Swabey & T. 257; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518; *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132; *Newell v. Nichols*, 12 Hun, 604, 75 N. Y. 78, 31 Am. Rep. 424; *Re Hall* (Ill.) 9 Cent. L. J. 381; *Russell v. Hallett*, 23 Kan. 276; *Ehle's Will*, 73 Wis. 445, 41 N. W. 627, 24 Am. & Eng. Enc. Law, pp. 1027-1032. If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the sisters, or either of the survivors, did not take

legal interest, it should be shewn on their part that she survived. It is incumbent upon them to prove their equity to take away the legal property vested in the husband."

This was followed by Lord Mansfield's famous undecided case of *King v. Hay*, 1 W. Bl. 640, which arose out of the death of General Stanwix, his daughter, and his second wife while crossing the Irish channel from Dublin, in the loss of the vessel at sea, without any account of the manner of her destruction coming to light. In the report cited there was an application by the nephew and next of kin of General Stanwix for administration, and it was opposed by a brother of the General's first wife, as next of kin of the daughter who died with him. *Thurlow* and *Dunning* in opposition contended that the civil law applied, and by that the daughter was presumed to have survived the parents; while *Blackstone* for the motion argued that, supposing such to be the universal rule, and that the rule of the civil law ought to govern in the case, both of which were very much to be doubted, yet that could only be a question under the statute of distribution, and his motion was for administration only. Administration was granted to *Blackstone's* client, but the real controversy in the case was never decided, Lord Mansfield declaring, according to *Sir William Scott* (*vide Wright v. Sarmuda*, 2 Phillim. Eccl. Rep. 261, note) that there was no legal principle upon which he could decide, and so the parties entered into a compromise on his recommendation. See note to *Mason v. Mason*, 1 Meriv. 311. The reader who wishes to pursue the matter will find a full report, with the arguments *pro* and *con*, in *Fearne, Posthumous Works*, p. 38. A modern writer (see *Hamilton, 1 Legal Medicine*, 234) says of this case: "The learned court was so impressed with the force of the arguments upon both sides that it confessed its inability to arrive at any conclusion, and the case is authority for nothing except for the complexity of the problem." Yet so far as it went, *i. e.*, as to administration, the result accords with modern views.

It is significant that the leading counsel upon the other side, Lord *Thurlow*, when the question came before him to decide, a score of years later, in *Bradshaw v. Toulmin*, 2 Dick. 633, should have said that "if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs."

The question next came before the courts in *Wright v. Netherwood*, note to *Lugg v. Lugg*, 2 Salk. 598, more fully reported *sub nom.* *Wright*

effect, there being no interval of time, as between the deaths of the three, during which titles to property could vest; and the wills therefore stand as if they contained only the bequests to the legatees subsequently named, to wit, Maria H. Willbor and Thomas W. Smith, the other legatee, Emily N. Willbor, having deceased without issue before the death of the testatrices. We are therefore of the opinion (1) that, after the payment of the debts of each testatrix,

Maria H. Willbor and Thomas W. Smith are entitled to the legacies of \$500 and \$200 respectively bequeathed to them in each will, to be paid out of the personal estate of each testatrix, if the personal estate is sufficient, and, if insufficient, that such legacies shall abate proportionately; (2) that the residue of the personal estate, if any, and the real estate, of each testatrix, if any, passes, as intestate estate, to her next of kin and heirs at law.

v. Sarmuda, 2 Phillim. Eccl. Rep. 261, note, in a controversy over a will in favor of his wife by a testator who had remarried after her death, and, with her children, his second wife, and a child by her, had embarked at Jamaica for England on a vessel never afterwards heard from and admitted to have been lost with all on board. The first report is taken up chiefly with a discussion of the question whether the second marriage revoked the will or not, and upon the point of survivorship all that is given is, "As there were neither wife nor children at the death of the testator I am clearly of opinion that the court ought to pronounce for the validity of the will." In the second report the court (Sir William Wynne) puts the matter thus: "I desired the priority of the death of the parties to be considered. I always thought it the most rational presumption that all died together, and that none could transmit rights to another. . . . Then, what are the circumstances of his death? He had neither wife nor children; therefore there is nothing to raise the implication of revocation at that time. Under these circumstances, therefore, considering that great part of the property lapsed,—which would raise a great doubt whether the revocation was to take place,—and taking into consideration the other circumstances that there was no wife or child at his death, I pronounce for the will."

In *Taylor v. Diplock*, 2 Phillim. Eccl. Rep. 261, the controversy was between a testator's brothers and sister on the one hand, and his wife's mother on the other, he having left a will making his wife sole executrix and residuary legatee. The testator, together with his wife, perished in Falmouth harbor by the wreck of *The Queen* transport, in which both were returning from Portugal. Both sides attempted to prove survivorship, but the testimony was inconclusive. Sir John Nicholl in deciding the case said: "Thinking, as I do, that it is incumbent on the next of kin of the wife to prove her survivorship, . . . there is no evidence direct as to the point." He commented some upon the circumstances and inferences to be drawn, and strongly inclined toward the view that there was a natural presumption that the man had outlived the woman because of superior strength, yet he avoided so concluding, closing by saying: "Upon the whole I am not satisfied that proof is adduced that the wife survived. Taking it to be that both died together, the administration is due to the representatives of the husband. I assume that they both perished at the same moment. . . . I am not deciding that the husband survived the wife."

In *Mason v. Mason*, 1 Meriv. 308, one of the early cases, it has been said (8 Alb. L. J. 187) that Sir William Grant "struck the true keynote." The question was over a legacy of £5,000 given by a father in his will to a son. If the father survived the son it lapsed and went into the general residue distributable to sons only; if the son survived his father, his sisters, the testator's daughters, would share in it. The testator and the son embarked on a voyage to England on board *The Calcutta*, which was

lost with all on board. The master's decree stated these facts, and that "he was unable to decide whether" the son "survived his father or not." Evidence of survivorship was wholly lacking. The master of the rolls said: "There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. In *General Stanwix's* case I thought the stress of the argument to be in favor of the representatives of the father. . . . In the present case I do not see what presumption is to be raised, and since it is impossible you [the claimants of the son's survivorship] should demonstrate, I think that if it were sent to an issue you must fall for want of proof."

In *Colvin v. H. M. Procurator-General*, 1 Hagg. Eccl. Rep. 92, an application was made by a creditor in the sum of £1,982 for administration upon the estate of a late captain in the East India Company service, who was drowned with his wife and child by the upsetting of a boat in the river Ganges. The estate was but £250, and the representatives of the wife were not cited, nor did the King's proctor appear. In granting the application it was said: "In strictness the representatives of the wife ought to have been cited, but as the *prima facie* presumption of law was that the husband survived, and as the property was small and the debt large, the decree might pass." A palpable but harmless error in the particular case.

In *Goods of Selwyn*, 3 Hagg. Eccl. Rep. 748, a husband and wife voyaging from Liverpool to Bangor were drowned in the loss of *The Rothery Castle*, and there was no proof of the time that either died. Their bodies were found floating near the shore a few days after the wreck. The court said: "Instances have occurred where, under similar circumstances, the question has been which of two persons survived; but in the absence of clear evidence it has generally been taken that both died at the same moment."

In *Goods of Murray*, 1 Curt. Eccl. Rep. 596, the testator, his wife, and child were drowned while voyaging from Dublin to Quebec on the barque *Emerald* of London. When the ship first struck, testator was on deck, but went below to his wife and child, who were in the cabin, and then the vessel struck a second time and went to pieces. The testator had bequeathed all his property to his wife. The court granted administration to the next of kin of the testator, as having died a widower, there being nothing to show that the wife survived, and her representatives consenting.

In an ejectment suit where the question was when the presumed death of a seven years' absentee occurred (*Doe ex dem. Knight v. Nepean*, 5 Barn. & Ad. 86), one of the counsel, in citing cases to support his contention that courts "never decided upon mere presumption, but have considered that the fact of survivorship was to be proved by that party whose claim accrued by it," referred to the case of a woman at Portsmouth who left all her property by will to her

housekeeper, and, with her legatee, was murdered under such circumstances that it could not be ascertained whether mistress or maid survived. And Parke, J., interjected, "The difficulty of proof there would operate against the person who claimed under the servant."

In *Satterthwaite v. Powell*, 1 Curt. Eccl. Rep. 705, a lady, her husband, and four children were drowned together in St. George's Channel while voyaging in a packet boat from Bristol to Cork, and the next of kin of the husband sought administration upon the property of the wife. There was no evidence of survivorship, but, here for the first time in an English court, the presumption under the civil law was on the side of the applicant. But the court, Sir Herbert Jenner, declined to yield to such presumption, and respecting the devolution of property under such circumstances laid down the true rule (8 Alb. L. J. 187) as follows: "It appeared to me that this point was settled; the principle has been frequently acted upon that where a party dies possessed of property, that the right to that property passes to his next of kin unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property, which was vested in the wife; that claim must be made out, it must be shown that the husband survived. The property remains where it is found to be vested unless there be evidence to show that it has been devested. The parties in this case must be presumed to have died at the same time, and, there being nothing to show that the husband survived his wife, the administration must pass to her next of kin."

Notwithstanding this clear statement and the cases *ubi supra*, Vice Chancellor Knight Bruce went astray in *Sillick v. Booth*, 1 Younge & C. Ch. Cas. 117, 6 Jur. 142. He felt called upon to decide which survived of two brothers, James, aged twenty-nine, master, or Charles, aged twenty, the second mate, of the merchant vessel *Thames*, which left Dominica for England Christmas, 1828, and was never afterwards heard of. It was not necessary to decide this question, since the property in litigation had been bequeathed to the two brothers, their sister, and a grandchild of the testator, with the benefit of survivorship among them, and the sister took as last survivor. But the vice chancellor said: "I am of opinion that, the two brothers having perished by shipwreck under circumstances of which there is no evidence, it is not necessary to be taken that they died at the same instant" (a statement in itself beyond criticism). "By the law of England, evidence of health, strength, age, or other circumstances may be given in cases of this nature, tending to the judicial presumption that one party survived the other. Therefore if the matter were open I should hold with the master, that, having regard to the age and condition of the two brothers, it is to be presumed and decided that James survived Charles." This case, it has been said (Taylor, Ev. § 203) "cannot be relied upon as an authority, since it is opposed to a long current of decisions," and it is further weakened, because, as was said by Sir John Romilly (Underwood v. Wing, 19 Beav. 459-466, 1 Jur. N. S. 159, 24 L. J. Ch. N. S. 293, 4 De G. M. & G. 633, 3 Week. Rep. 228, 3 Eq. Rep. 794), it does not appear that there was any decision on the point of survivorship, because the particular fact found by the master was not excepted to, and all the reported cases are the other way.

In *Durrant v. Friend*, 5 De G. & S. 343, 21 L. J. Ch. N. S. 353, 18 Jur. 709, the controversy was over insurance money collected by executors for the loss of certain chattels specifically bequeathed to the claimants by the testator in his 61 L. R. A.

will. The testator was a master mariner and lost at sea, with his vessel and the chattels in question, under circumstances unknown. Sir George James Turner, V. C., in deciding the case said it was clear that if the testator had died before the destruction of the chattels an interest in them would have vested in the legatees, and the executors would hold the insurance money in trust for them, but if the chattels were lost before the master the insurance would fall into the general estate and be lost to the legatees. As the testator and chattels had perished together it was difficult to deal with such a case. But it was essential to the right of the legatees that they should have some interest in the chattels, but as these were destroyed at the same time the testator lost his life, the legatees never had any interest in them, and their claim must therefore fail.

All debate over the question in England ended with the great case of *Underwood v. Wing*, 19 Beav. 459, 1 Jur. N. S. 159, 24 L. J. Ch. N. S. 293, 4 De G. M. & G. 633, 3 Week. Rep. 228, 3 Eq. Rep. 794, and, on review, 4 De G. M. & G. 633, 1 Jur. N. S. 169, 24 L. J. Ch. N. S. 293, and in another phase in the House of Lords as *Wing v. Angrave*, 8 H. L. Cas. 183, 30 L. J. Ch. N. S. 65. All the English cases since have merely followed and rested upon its authority. In that case Mr. and Mrs. Underwood, their two sons, and a daughter embarked for Australia on the ship *Dalhousie*, which was wrecked off Beachy Head. Of all on board only a single sailor survived, and he told the story of the catastrophe. After the ship struck, husband, wife, and the two boys were grouped on deck; the husband had his wife in his arms and the boys were clinging to their mother. A minute later a great wave washed them all together into the sea. The daughter was separated from the group, and afterwards seen alive and lashed to a spar, but later she too was swept into the sea and perished. Sir John Romilly, M. R., in the first instance, after reviewing the testimony and concluding that the daughter survived her parents and brothers a short time, proceeded: "The question . . . is whether I can come to the presumption that the husband survived the wife. . . . I have no evidence whatever upon this subject. . . . It is possible to speculate to an unlimited extent, but to come to a safe conclusion or to a definite result is in my opinion totally impossible. With the exception of *Sillick v. Booth*, 1 Younge & C. Ch. Cas. 117, 6 Jur. 142, . . . all the reported cases concur in this, that in such a state of things it is impossible for the court to come to any conclusion as to which died first. The result is that, it being impossible in the absence of any evidence on the subject to come to the conclusion that one died before the other, no decision can be made founded on the assumption that either was the survivor. . . . The defendant has not made out that the contingency has arisen on which his title depends, and I must decree accordingly."

On the appeal from this decree, heard before Lord Chancellor Cranworth and Wightman and Martin, JJ., it was affirmed and held that the *onus* was on those claiming under the will to show that the testator survived; that positive evidence was requisite to compel such a decision; and that, as there was no such evidence produced, the claimant failed. By the law of England the question of survivorship is a matter of evidence, not of positive regulation and enactment as in the French Code, and in the absence of evidence there is no presumption of law upon the subject. Lord Cranworth in his opinion took occasion to correct a possible false inference that there was any presumption whatever upon the subject by saying: "In the re-

port of the case before the master of the rolls, his honor is represented in one passage to have said that he must assume that Mr. and Mrs. Underwood both died together. From personal communication with his honor I know that he is not aware that he ever used such an expression, and all that he ever meant to say was that the property must be distributed just as it would have been had both died at the same moment. It cannot be assumed to be proved, or probable, or possible that two human beings should cease to breathe at the same moment of time, . . . and to adjudicate on such a principle would, I think, be proceeding on a false data; but the real ground to proceed on is that it cannot be proved which died first."

When the question came before the House of Lords concerning the same disaster and victims (*Wing v. Angrave*, 8 H. L. Cas. 183, 30 L. J. Ch. N. S. 65), although Lord Chancellor Campbell differed in some points from the other judges (*Cranworth*, *Brougham*, *Wensleydale*, and *Chelmsford*), all agreed that (1) there is no presumption of survivorship from age or sex among those perishing in a common disaster; (2) none that they all died at the same time; (3) that the question is always one of fact depending wholly on evidence, in the absence of which it is unanswerable; and (4) that the burden is always on him who asserts a survivorship to prove it.

These principles have since been applied in *Goods of Wainwright*, 1 Swabey & T. 257, 27 L. J. Prob. N. S. 2, where a husband, wife, and child perished together in the Cawnpore massacre, and administration was awarded, and the oath that deceased was a widower without child waived, to the husband's mother, "as there was no evidence to show that deceased's wife survived;" in *Goods of Ewart*, 1 Swabey & T. 258, where husband and wife escaped from Cawnpore only to be later murdered on the Ganges, and there was the same order for the same reason; in *Goods of Wheeler*, 31 L. J. Prob. N. S. 40, where husband and wife having been killed in a railroad collision, administration on the wife's estate was refused the husband's representative, there being no evidence that he had survived her; in *Barnett v. Tugwell*, 31 Beav. 232, where a testator and two natural children of his brother were lost by the foundering of the Bengal on a voyage from Calcutta to England, and it was held that the two children took naught because it could not be proved that they survived the testator; and also in *Goods of Carmichael*, 11 Week. Rep. 462, 32 L. J. Prob. N. S. 70, where a master mariner and his son, who was entitled to the remainder of his estate upon the death or remarriage of the widow, sailed together for Copenhagen and were never again heard from, and it was held, the widow having remarried, that the legacy to the son never became operative, as he could not be shown to have survived his father, the testator.

In *Re Green*, L. R. 1 Eq. 288, a husband, wife, and child were in India when the mutiny broke out. He was at once murdered. The child was last seen four days later with a native nurse. The wife escaped into the bush, and was slain five months later, having been heard from by letter in the meantime. The evidence was deemed sufficient to establish that the wife had survived her husband, while the representatives of the child were held to have failed in their proof to show survivorship of the child over her mother.

In *Goods of Grinstead*, 21 L. T. N. S. 731, was an application for administration on the effects of a master mariner, whose vessel, containing himself, his wife, and three of his children, while on a voyage to Portsmouth, was seen laboring heavily in a gale in such a posi-

tion that escape appeared impossible, and was never afterwards heard of. The order and decision were the same, for the same reason, as in the cases of *Goods of Wainwright*, 1 Swabey & T. 257, 27 L. J. Prob. N. S. 2, and *Goods of Ewart*, 1 Swabey & T. 258.

There is a sound dictum by Lord Penzance, in *Goods of Nicholls*, L. R. 2 Prob. & Div. 461, where he says: "Some cases were cited in which the question of survivorship of husband and wife was discussed. But those were cases in which [they] the husband and wife had perished by drowning or some other disaster about the same period, and it was not possible to know which of them survived the other. The mode in which . . . courts . . . deal with such a state of things is to say that those whose claim is founded on the survivorship of either must prove it affirmatively."

In *Scrutton v. Pattillo*, L. R. 19 Eq. 369, 44 L. J. Ch. N. S. 249, 32 L. T. N. S. 140, 23 Week. Rep. 379, the controversy was between claimants under a husband's will and his wife's representatives, over a sum of money which she had on deposit before her marriage, and which, though he had never reduced it to possession, the husband assumed to dispose of by will. Husband and wife were drowned together at sea. The fund was awarded to the wife's representatives, *Malins v. C.*, saying to their opponents: "You must either prove that she died before him, or that he reduced the property into possession during his life. . . . Conjecture will not do; you must have proof of the fact."

In the remaining English cases the same principles control. In *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213, 216, 24 Week. Rep. 360, 34 L. T. N. S. 171, 172, it was held, where a husband and wife sailing from Liverpool to Madeira on *The Liberia*, which was never afterwards heard from, and beyond doubt was lost with all on board, that the legal representatives of each were entitled to the property of each, as property was left where found vested until there was proof of transfer by survivorship.

In *Elliot v. Smith*, 81 Week. Rep. 336, L. R. 22 Ch. Div. 236, 52 L. J. Ch. N. S. 222, 48 L. T. N. S. 27, a clause in a will transferring a legacy to others in the event of the legatee dying was construed to mean in the event of the legatee dying in the lifetime of the testator; and where both legatee and testator were drowned together in the Thames, by the sinking of a steamer, and "as the deceased legatee is not shown to have died before the testator the legacy falls into the residue, to one third of which the Crown is entitled."

In *Re Alston* [1892] P. 142, a husband and wife, having made wills by which each appointed the other sole executor and legatee, sailed from Liverpool to Peru, in the ship *Roman Empire*, which, after being once spoken at sea, was never again heard of. It was held that both must be considered as dying intestate and neither as surviving the other.

And finally, in *Goods of Johnson*, 78 L. T. N. S. 85, in the case of two brothers, one a master the other a passenger on the City of Philadelphia from New York to San Francisco, that never reached port, and which, inferentially, was wrecked in a heavy gale at the Falkland Islands, leave was given to aver the death of both on or after the date of the wreck, and that there was no reason to suppose that either brother survived the other.

In *Hartshorne v. Wilkins*, 2 Old. (Nova Scotia) 278, a testator in his will gave to trustees a fund, the income of which was to be paid to his natural daughter for life, and upon her death the principal was to go to such of her then living children or grandchildren as she des-

ignated; and should she die without leaving any lawful issue, such principal, subject to any legacies not exceeding a stated sum, as she might, dying without issue, bequeath in spite of coverture, was to be equally shared by testator's two nieces. After the testator's death the daughter, having married, made a will under the power, bequeathing £600 to her husband, her executor. Afterwards she and her three children perished together at sea under circumstances wholly unknown. The common-law general rule respecting survivorship among commoriant victims of a common disaster was applied in a controversy between the husband and the nieces. The husband could not take the fund as heir of the children, because they took only in case they survived their mother, and this could not be proved. Because of the mother's illegitimacy, both her title and her children's title depended on the will entirely. The husband could take through neither. Nor could he take the legacy in his wife's will, because her power to make the will depended, by the terms of the testator's will, upon her not leaving lawful issue surviving, and the husband could not prove that she outlived her children. Neither could the fund be given to the nieces, as their title to it depended wholly upon the death of the testator's daughter without leaving lawful issue, and they could not show that she survived her children. Accordingly the fund in question was assigned to the testator's next of kin, as if he had died intestate.

b. *The American cases.*

1. *In general.*

Except in the two states of Louisiana and California, as above noted, the rules of the civil law have never, and the rules of the English common law have always been applied in the United States when questions arose of survivorship among those who perished in a common disaster.

On the night of June 14, 1838, the steamer *Pulaski*, having just left Charleston, South Carolina, for Baltimore, Maryland, was destroyed by the explosion of one of her boilers. Out of that calamity grew the two earliest cases in the United States wherein the courts were called upon to decide the question in *Re WILLBOR*,—one in South Carolina, the other in Massachusetts. *Pell v. Ball*, Cheves, Eq. 99, sprang from the fact that, among the passengers on that steamer who perished, there was a family consisting of Mr. and Mrs. Ball and their adopted daughter, and that Mr. Ball left a will under which it became material to determine whether Mrs. Ball survived him. The evidence was slight, but the court deemed it sufficient to prove that the wife outlived her husband. She was seen and heard calling for him some time after the explosion, while her husband was neither seen nor heard, unless he was an unidentified man who dropped a coat marked with his name into a boat, and at once disappeared. The court held that where there was any evidence whatever, even though it was but a shadow, it must govern the decision of the fact. "There is nothing," it was said, "which more distinguishes the common law than the preference which it constantly gives to evidence over all artificial presumptions, unless it be those which are essential to the judicial institution itself and to the preservation of social order." The case was said to be not one of unknown calamity, nor one withdrawn from observation, nor one where the calamity was of instantaneous operation, but it was a case for testimony, to be decided on testimony; and while the burden was upon those who claimed through the wife to show that she had survived her husband,

—they must make out a case or the rights of the husband would remain as they were,—yet the evidence need not amount to a demonstration. While the court expressly declined, because it was unnecessary, to resort to the bare fact that the wife was the last person seen, or to determine whether that fact alone was not sufficient to raise a presumption of survivorship in analogy to the doctrine which it says obtains in cases of absence without tidings, it is plain that such view is strongly inclined to. As it declared that it preferred to put the case on the probability arising from the evidence, and that it is certain that the wife survived the explosion, and not certain that the husband did, the question may be said to have been settled on the facts.

The other case which issued from this disaster was *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518. In this case it was a grandfather, his granddaughter, her husband, and a grandchild who perished, and it was agreed that no evidence was obtainable tending to show which of these four persons actually survived. There were no circumstances from which facts might be inferred, and the case had to be determined without aid from these. "We are therefore," said the court, "brought directly to the inquiry whether in the case of several persons perishing at sea in one common disaster, the question of survivorship can be settled by any legal presumptions deduced from the single fact of difference in age and sex." The plaintiff claimed in the right of the daughter as survivor, and the court held that he was bound to show by evidence that she had survived, and that in this he had failed. "We do not," it was said, "feel authorized to say that this fact was satisfactorily established. For aught that appears . . . they may both have perished together. This being so, and no arbitrary presumption being authorized by law, in such cases, arising from age or sex, the consequence is that those who seek to enforce their rights as heirs of . . . [the daughter] must fail."

In *New York, in Moehring v. Mitchell*, 1 Barb. Ch. 284, a husband, wife, and child sailed to Europe on the steamship *President*, which was never afterwards heard of, and doubtless was lost with all on board. The wife had procured a policy on her husband's life, which she attempted to dispose of by will. The surrogate had refused to admit the will to probate because of testatrix's disabilities through coverture, and the question came up on appeal from his decision, which was affirmed. The effect of this was to award the insurance money to the representatives of the husband, rather than to the wife's legatee, and the disability attached to the testatrix unless she survived her husband, *i. e.*, unless she was a widow when she died. If her husband survived her, or if he and she both died at the same time, then the testatrix labored under the disability of coverture, and her will was invalid. In discussing the question of survivorship, Chancellor Walworth plainly leans to the view that there was a legal presumption that the husband survived, and thinks the weight of authority sustains him, but he does say: "But as there is no presumption of the survivorship of the daughter, . . . and the probability is that they both perished at the same moment, it becomes immaterial to inquire whether it must be presumed that the husband survived his wife. It is sufficient for this case that there is no legal presumption that she survived him."

This case is disapproved in *Newell v. Nichols*, 12 Hun, 604, 617, *infra*, upon the question of presumptive survivorship.

In *Smith v. Croom*, 7 Fla. 81, a husband, wife, two daughters, and a son perished to

gether in the wreck of the steamship Home, and a controversy arose between the grandmother and aunt on the maternal side of the children on the one hand, and the brothers and sister of the husband on the other. It was decided on the facts. There was proof that one daughter was seen alive after her father had been swept into the sea, and testimony that the son had gained a part of the wreck which carried the survivors ashore, and was the last of those lost to drown. This was deemed sufficient to establish the right of the grandmother and aunt claiming through the children as surviving their father. The court said the legal presumptions recognized by the civil law, founded on the circumstances of age, sex, and physical strength, concededly did not obtain in Florida, either by common law or statute. But here were presumptions arising from the circumstances proved, producing conviction of the asserted fact, and in these certainty was not required, but only a reasonable degree of probative force; that though the burden of proof was on the complainants to show survivorship of one of the children, the evidence showed the precise time of the son's death, and the circumstances led to the inference of an earlier death of the father. The court also invoked the principle, as founded in reason, that where evidence traces two parties into a common danger that proves fatal to both, the last one seen or heard within the operation of the cause of death must be adjudged the survivor, unless there is something in the nature of the circumstances to rebut the presumption; and cites thereunto *Pell v. Ball*, Cheves, Eq. 99, where the point was favorably entertained.

In *Kansas P. R. Co. v. Miller*, 2 Colo. 442, an action for negligently causing death, the intestate, his wife, and children were killed together when a train in which they were passengers went through a broken trestle; and it was insisted that, conceding the death of the wife, there was no evidence to show when she expired, and nothing inconsistent with the theory that she survived her husband; if she did, but for a moment only, then it was claimed the action could not be maintained. But the court said that when two persons, husband and wife, are killed in the same accident, and there is no proof on the subject, the presumption of law is that they died instantaneously.

It has been seen that there is no such presumption. It is only true that neither is presumed to have survived the other. But, as the court added, "the right of action does not depend on the existence or nonexistence of the wife," and the error was immaterial.

Out of the wreck of the steamship Schiller, on a voyage from New York to Europe, when off the Scilly islands in 1875, grew much litigation in New York. Mrs. Ridgway and her two grandchildren, Mary and Joseph Walter, and their father, all perished. *Stinde v. Goodrich*, 3 Redf. 87, was an application to the surrogate by the brothers and sisters of the deceased father to compel the administrator of the children to account. And Calvin, Surrogate, held that in the absence of any testimony upon the subject there was no legal presumption as to which of the children survived.

Stinde v. Ridgway, 55 How. Pr. 301, was an action by the heirs at law and next of kin of the children for the construction of the grandmother's will. It was held that the plaintiffs could not maintain such an action. In deciding it, Van Vorst, J., adverted to the facts. The testatrix and her two grandchildren, with their father, were in the pavilion on deck after the disaster to the ship. The waves broke over the deck and washed the grandmother out of the pavilion, but whether she was carried to an-

other part of the deck or borne out to sea did not appear. A quarter of an hour later, the children and their father were alive when the pavilion and its inmates were swept away. It may be, said the court, that the evidence is sufficient to justify the conclusion that the children survived their grandmother, as they were last seen alive. Citing *Pell v. Ball*, Cheves, Eq. 99.

The facts indeed were closely parallel to those in *Underwood v. Wing*, 19 Beav. 459, 4 De G. M. & G. 633. 1 Jur. N. S. 159, 24 L. J. Ch. N. S. 293, 3 Week. Rep. 228, 3 Eq. Rep. 794, where the daughter was held to have survived her parents and brothers.

In *Re Ridgway*, 4 Redf. 226, Calvin, Surrogate, expresses the opinion that the survivorship of the children over their grandmother was not satisfactorily proved. Such, however, was the inevitable inference in the case before him, if the English decision just referred to is sound, as the facts in this regard cannot be distinguished. The surrogate, perhaps wisely, refuses his assent to the point favorably referred to in *Pell v. Ball*, Cheves, Eq. 99, and adopted in *Smith v. Croom*, 7 Fla. 81, that, as the children were last seen alive, the conclusion that they survived their grandmother was justified, and holds that where two persons are lost in the same calamity at sea it does not follow that the one last seen alive was necessarily or probably the survivor. But in the case before him the children were seen alive after a wave had swept their grandmother away.

Newell v. Nichols, 12 Hun, 604, Affirmed in 75 N. Y. 78, 31 Am. Rep. 424, was an action for the construction of the will of Mrs. Walter, the daughter of Mrs. Ridgway, and mother of the two grandchildren. The testatrix died more than four years before the wreck of The Schiller. It may be regarded as the leading case in the United States upon the question discussed in this note. The action was tried before Van Vorst, J., at special term, and his opinion was adopted *in toto* on appeal, both in the supreme court *in banc* without addenda, and in the court of appeals with some supplementary observations. The question to be determined was whether or not there was any survivorship between the two children, the mother, and the husband of the testatrix, in order to decide in whom the remainder vested. If they all died at the same moment it vested in one set of persons; if any survived, it vested in another. The learned trial judge states the provisions of the civil law and foreign codes applicable to the question of survivorship, and then carefully and quite fully reviews the cases at common law, in order, as he states, to deduce the rule of law applicable to cases of this character. And he concludes that the decisions establish that there is no presumption of law, arising from age or sex, as to the survivorship among persons whose death is occasioned by the same cause: nor is there any presumption that they all died at the same time; and that the burden of proof is on the party asserting survivorship.

In the court of appeals (75 N. Y. 78, 31 Am. Rep. 424) Church, Ch. J., writing, concurs fully with this opinion and the views upon all the points expressed therein. The points upon the question under annotation there decided are (1) that the appellants who claim through a survivorship must prove a survivorship; (2) that there is no presumption in law of survivorship among those who perish in a common disaster,—as in this case by shipwreck,—without other evidence tending to prove the fact, and hence that the party on whom the *onus* lies fails to establish it. The chief judge adds that he would be content to adopt the opinion without further remark, but for considerations which

had suggested themselves to some of the members of the court in respect of the question of survivorship. This was that, conceding the burden of proving the survivorship to rest upon the appellants, and that there was no presumption that either particular child survived, yet, as the law will not presume that they died at the same time, a presumption may be indulged that there was a survivor, and that it makes no difference which child survived, as he would inherit the share of the other, and create a new line of descent for that share. The answer given is that the suggestion, though apparently plausible in statement, cannot be sustained; that, assuming the presumption, the burden of proof must still be met, and a party cannot successfully claim that as he is entitled to one thing or another, and as they are alike, he will take either; it was accidental that these shares were alike; if they had been different, or one money and the other lands, a claim in the alternative could not be maintained; he who holds the affirmative must establish his claim to some specific share or interest. As to the daughter's there was a failure of title because it did not appear that the son survived her, and the same was true conversely of the share of the son. That is to say, although one may be clearly entitled to a part of an estate definitely known beyond mistake, he cannot have it, if, without fault of his own or any mistaken choice, he cannot trace the particular channel through which it comes to him, but the law will award it to someone else not entitled under any circumstances. It is difficult to assent to this reasoning. Further on, he states that he does not think an alternative claim can be sustained, conceding the presumption of survivorship, but, however that may be, a decisive answer to the suggestion was that there is no legal presumption which courts are authorized to act upon, that there was a survivor, any more than that there was a particular survivor; yet it is not claimed that there is any legal presumption that the children died at the same time; it might indeed be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and, as a physical fact, it might perhaps be inferred that they did not, but this does not come up to the standard of proof.

The rule is that the law will indulge in no presumption on the subject. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances to prove survivorship, courts will look into the whole case to determine the question; if not, they will not undertake to answer it on account of the nature of the question and its inherent uncertainty. The prevailing opinion (for one member of the court dissented on the question of survivorship between the children) closed with the statement that "all the common-law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled."

In *Re Hall*, 9 Cent. L. J. 381, the probate court of Cook county, Illinois, on an application for a decree of distribution of the estate of one who, together with his wife, had been killed in the Ashtabula bridge disaster of 1876, held, there being no evidence of survivorship, that both must have died together, and that neither transmitted rights to the other; therefore that the next of kin of the husband were entitled to his estate. It was therein again declared that the rule of the common law, which in that respect differed from the civil law, was that where several persons perished in the same catastrophe no presumption of survivorship would be indulged in. It would not, by balance L. R. A.

cing probabilities, be presumed either that there was a survivor nor who it was.

In *Russell v. Hallett*, 23 Kan. 276, a charge to a jury resulting in a finding that a mother and two children died at the same time in the same calamity, that when several persons lose their lives by the same event there is no presumption of law as to survivorship based upon age or sex, nor is there any presumption that they all died at the same moment; that the law makes no presumption on the subject, but leaves the survivorship to be determined as a fact from the evidence, and the burden of proof is on the party asserting the affirmative,—was held to be correct.

In *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 182, the facts were that a master mariner with his wife and three infant children sailed from Scotland with a cargo of coals for Havana, and was never afterwards heard of. If living when his mother died he would have inherited a third of her estate. Over six months after he sailed on his last voyage, which ordinarily would take from twenty-five to forty days, his father, who was his heir if no children survived him, made a quitclaim deed to premises in which he had an inheritance. If he lived beyond the date of his father's deed, or if, dying before, his children survived him, no title passed; otherwise *contra*. There was held to be a justifiable presumption of death within six months after the embarkation, and upon the question of survivorship it was asserted that the weight of authority at the present day seems to have established the doctrine that where several lives are lost in the same disaster there is no presumption from age or sex that any one survived the others, nor is it presumed that all died at the same time, but the fact of survivorship, like every other fact, must be proved by the party asserting it. In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment, not because the fact is presumed, but because, from the failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory.

There have been a number of cases involving the right to the proceeds of policies of insurance upon the lives of husbands for the benefit of wives, in each of which both husband and wife died together in a common disaster, and the contest was whether the insurance was an asset of the estate of the wife, passing to her next of kin, or whether it passed to others claiming either through the husband or a more remote beneficiary than the wife. In each of these cases there is an unreserved acceptance of the principles above stated, *viz.*: (1) That there is no presumption, in the absence of all evidence, that either husband or wife survived; (2) that the burden is on the party asserting survivorship of either, to prove it, and such burden must be sustained by evidence or his claim must fail; and (3) that the devolution of the insurance, falling proof of survivorship, is the same as if both died at the same instant of time. But not all agree in placing the burden of proof, nor upon the point as to where the insurance stood vested at the time the insured and his beneficiary died. These are, besides *Moehring v. Mitchell*, 1 Barb. Ch. 264, *supra*, *Fuller v. Linzee*, 135 Mass. 468; *Paden v. Briscoe*, 81 Tex. 563, 17 S. W. 42; *Balder v. Middeke*, 92 Ill. App. 227; and *Cowman v. Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64.

It does not fall within the scope of this note to decide the conflict between these cases; it is sufficient to say that upon the propositions under consideration they are in accord with the current of authority.

In *Ehle's Will*, 73 Wis. 445, 41 N. W. 627, the

question of survivorship was decided on the facts proved. An old man, his son, the latter's wife, and three children were all burned to death in a fire which destroyed their dwelling in the night-time. There were many circumstances indicating the origin of the fire in the old man's room,—an unsafe stove, a lighted lamp, a bare candle in a closet shut off by cotton curtains,—and that it was under considerable headway before other parts of the house, on the opposite side of which the rest of the family roomed, were attacked by the flames. The places where the bodies were discovered also helped the court to conclude that the old man died first, his son next on his way to assist the father, and the wife and children last and together. The rule is declared to be that, when a common disaster destroys several lives, each case is to be decided according to its own peculiar facts and circumstances whenever there is sufficient evidence to support a finding of survivorship. But in the absence of such evidence the question of survivorship is regarded as unanswerable, and the succession of property is determined as if the deaths synchronized.

There is in *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385, a *dictum* in an action of trespass to try the title to land, wherein it was assigned as error that the court found that a mother died before her daughter merely on evidence that both died in the same year, and on the assumption of age only. The court said that the assumption was unwarranted, as the common law did not under any circumstances, even where two perished by the same calamity, indulge in presumptions of survivorship resting upon considerations of age or sex, although in that case the error was harmless.

The last reported case up to the date of writing, *Broome v. Duncan* (Miss.) 29 So. 394, went upon its own peculiar facts and circumstances. In that case the husband and wife left home together after 11 A. M., and entered a nearby wood, from which two shots in succession were heard before noon. About 6 o'clock their bodies were found, the wife's with a bullet wound, still warm and bleeding, and *rigor mortis* not yet supervened, with indications of struggles and movements on her part after receiving her mortal wound; the husband's in a crouching posture, his rifle across his knees, the top of his head shot off, and his brains scattered about. It was decided that the husband had inadvertently or intentionally shot his wife and then committed suicide, that his death was instantaneous, and that she survived him some little time. No authorities are cited, nor are any presumptions referred to by the court, but the case is treated as presenting only a question determinable from the testimony.

2. Exceptions.

The exceptions to the common-law rules above noted are to be looked for, in the United States, only in the states of Louisiana and California, both of which have codes embodying certain presumptions of survivorship arising out of age and sex, among those who meet death in the same casualty.

Louisiana.
Robinson v. Gallier, 2 Woods, 178, Fed. Cas. No. 11,951, was an action by the heirs of a wife against those of her husband to recover certain real and personal property in New Orleans, Louisiana. The deceased husband and wife were passengers on the steamship *Evening Star* voyaging from New York to New Orleans, and perished together when that vessel foundered in a gale in 1866 off the Georgia coast. The plaintiffs claimed under the will of the husband devising the real and bequeathing the per-

sonal estate to the wife, and relied in part on the presumptions of law raised by the Civil Code of Louisiana (arts. 936-939 inclusive), which agrees in substance with the provisions of the Roman law and the Code Napoleon respecting presumptions of survivorship among those who perish in a common disaster. As the husband was sixty-eight and the wife but forty-four, it was conceded that within the spirit of these articles she must be presumed to have survived him. But testimony was offered to show that she actually had survived. It was shown that the husband was feeble, the wife robust; that when last seen the husband was in his berth, prior to the sinking of the ship, while the wife was in the water after the ship went down, and was several times assisted into a lifeboat. The defendants met this testimony by that of other witnesses to the effect that husband and wife had been seen together in their stateroom five minutes before the vessel sunk, and that she was probably not the woman seen in the water after the sinking and assisted into the lifeboat. Manifestly, this testimony was inconclusive as to which of the twain survived, but, so far as it went, it strengthened the presumption of the civil law. The defendants' counsel were upon impregnable ground in arguing that, if the civil-law presumptions did not apply, then the burden was on the plaintiffs to establish by evidence the fact that the wife had actually survived her husband, and this they had failed to sustain. But when they argued that the Civil Code of Louisiana did not apply because its presumptions could be invoked only "in the absence of circumstances of the fact," such as a case where the deceased parties embarked on a ship never heard of after leaving port, while in the case at bar there were "abundant circumstances of the fact," inasmuch as it was known exactly where and how the *Evening Star* perished, and that this husband and wife all through the disastrous voyage, almost to the very moment the ship was engulfed, their habits on board, their risings and sittings, and relative states of mind and body, could be traced,—the fallacy was obvious. It was further contended that the artificial presumptions of the Code did not apply, because it was apparent upon the face of the text that they were made alone for cases of commoriant persons who were "respectively entitled to inherit from one another." This proposition appears equivalent to contending that persons thus dying together, who are entitled to take from each other by statute in case of intestacy, are within the Code, but if only one is thus entitled to take from the other, or if they take by virtue of a will, and not by statute law, they are without the Code. There appears to be no sound reason why the legislature should have made, if it did make, such a distinction; none why the civil law should apply in one case and the English common law in another precisely similar. In submitting the case to the jury the court charged: "I am convinced . . . that the presumptions of law as to survivorship, prescribed by the Civil Code of this state, do not apply to this case. This is not the case of persons respectively entitled to inherit from one another, nor is it a case where, 'in the absence of circumstances of the fact,' the arbitrary presumptions prescribed by the Code can be admitted. . . . You are to determine if you can, from the testimony, whether or not Mrs. Gallier survived her husband. This is a single issue for you to decide. There are no presumptions of law in the case. If the evidence . . . establishes the fact of survivorship to the satisfaction of your minds, your verdict should be for the plaintiff; but if from the evidence you should be led to the conclusion that

Mrs. Gallier perished first, or that both Mr. and Mrs. Gallier died at the same moment, or if it shall be impossible to declare from the evidence which died first, in either of these cases your verdict should be for the defendant. The question submitted to you is purely one of fact, in the decision of which the court can give you little assistance. . . . The burden of proof is on the plaintiffs. . . . They must prove the survivorship of Mrs. Gallier. . . . or their case fails." The jury found for defendants. This charge is unexceptionable and the result is in perfect harmony with the weight of authority and long current of decisions, if the court was correct in holding that the presumptions of the Civil Code of Louisiana did not apply, and that the rules of the common law did, otherwise the case cannot be regarded as conclusive.

California.

In *Sanders v. Simlich*, 65 Cal. 50, 2 Pac. 741, where a testator with his wife and two children perished together in a fire which destroyed their home, the jury found that the wife survived, the effect of which, according to the California statute (Civil Code, § 1299), was to work a revocation of the will which antedated the marriage. The only evidence admitted by the court on the point of survivorship was a recital in the probate order appointing the wife's administrator, that she was surviving wife of the testator. In reversing the judgment the court on appeal said that, as this order was the only evidence before the jury upon which, by the rulings of the court, the verdict was founded, there was no evidence to sustain the finding; and it was against law, for when two persons perish in the same calamity, and it is not shown who died first and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from strength, age, and sex according to certain rules, one of which is, if both be over forty-five and under sixty, and the sexes be different, the male is presumed to have survived. Cal. Code Civ. Proc. subd. 4, § 40, § 1983.

The same presumption, in the same way, was also applied in *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855, where a husband and wife were murdered together in their home. There was evidence, from the position of the bodies when discovered, that the husband was first assailed and killed and the wife pursued, overtaken, and slain later, but none to lead to an inference as to which actually expired first, so the case was decided upon the presumption of the Code.

Concisely stated, the rule on the question in *Re WILLBOE* is: There is at common law no presumption as to the order in which death came to those who perished in a common disaster, when all evidence upon the point is lacking; no presumption, either, that all died at the same time, but the fact being undeterminable, property descends as if death were simultaneous in such cases; and when there is a presumption of any kind it is the creature of statute.

J. B. G.

John DOWELL

v.

Patrick GOODWIN.

(.....R. I.....)

1. A bill in equity will lie to enjoin an action at law on a judgment obtained by

NOTE.—For injunction against judgments obtained by fraud, see the authorities marshaled in a note to *Merriman v. Walton* (Cal.) 30 L. R. A. 756.

51 L. R. A.

the fraud of the officer charged with the service of the writ in the original action, where the return of the officer showed a full and regular service of the writ.

2. An action against the officer guilty of the fraud is not an adequate remedy at law, which will prevent a court of equity from entertaining a bill to restrain the enforcement of a judgment obtained through the fraud of the officer charged with the service of the writ.

(December 3, 1900.)

ON DEMURRER to a bill in equity to restrain the enforcement of a judgment alleged to have been obtained by fraudulent return as to service of process. *Overruled.*

The facts are stated in the opinion.

Messrs. T. W. Robinson and C. J. Farnsworth, for appellant:

An officer's return can be contradicted in equity.

It is, in general, good ground for setting aside a judgment, that there was no service of process on the defendant, provided there has been no waiver of such defect by appearance or otherwise.

Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 302; *Black, Judgm.* 1, 324.

Equity will grant relief against a judgment at law when a defendant has been fraudulently kept in the dark by the plaintiff.

Rogers v. Atkinson, 1 Ga. 12; *Fitch v. Polke*, 7 Blackf. 564; *Spooner v. Leland*, 5 R. I. 348; 1 *Spelling, Extraordinary Relief*, p. 127; *Black, Judgm.* 1, 368, 369, 370.

Where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if it be shown that there is a meritorious defense to the action.

1 *Black, Judgm.* § 376; *Ryan v. Boyd*, 33 Ark. 778; *Blakeslee v. Murphy*, 44 Conn. 188; *Robinson v. Reid*, 50 Ala. 69; *Gaines v. Hale*, 26 Ark. 168; *Southern Exp. Co. v. Craft*, 43 Miss. 508; *San Juan & St. L. Min. & Smelting Co. v. Finch*, 6 Colo. 214.

When a judgment has been obtained by fraud or undue advantage, equity will relieve by injunction, even when relief might have been had on motion at law.

Davis v. Tileston, 6 How. 114, 12 L. ed. 360; *Moore v. Gamble*, 9 N. J. Eq. 246; *Munn v. Worrall*, 16 Barb. 221.

Messrs. McGuinness & Doran for respondent.

Tillinghast, J., delivered the opinion of the court:

This is a bill to enjoin the prosecution of an action at law against the complainant, and for other relief. The bill sets out that on the 10th of March, 1896, the respondent sued out a writ before the district court of the sixth judicial district to recover from the complainant the sum of \$80 for work and labor done; that said writ was placed in the hands of one John F. Ryan, a constable of Pawtucket, Rhode Island, for service; that

it was returnable on the 23d day of March, 1896, at which time it was entered in said court; that said constable made a return on the writ in which he set forth that on the 14th day of March, 1896, he attached the right, title, and interest of the defendant in that suit to certain land described in his return, and that on the same day he summoned the defendant in that suit by leaving an attested copy of the writ with him; that thereafter, on the 30th day of March, 1896, said court rendered judgment against this complainant, the defendant in that suit, for said amount claimed, with costs, which judgment has never been appealed from or reversed; and that the same now stands on the record of said court. The complainant then avers that said Ryan, constable, never made any attachment of the real estate of this complainant on said 14th day of March, 1896, nor on any other day; and that he did not leave any copy of said writ with him (the complainant), and that he did not summon him, as set forth in his return, or in any other manner whatsoever, either on said 14th day of March or at any other time; and that the return of said officer was wholly and absolutely untrue and fraudulent in every particular. The complainant further avers that he did not answer said action at law because he was wholly ignorant of the existence of the same, and that he did not know thereof, or of any judgment rendered therein, until on or about the 13th day of May, 1899. He further alleges that he was not indebted to the plaintiff in said action in any sum whatsoever, and that the alleged claim set up therein is groundless, and that the judgment rendered therein is fraudulent and void. The bill further alleges that on the 19th day of May, 1899, the respondent commenced an action of debt on judgment against the complainant in said district court, said judgment being the same that was obtained in the fraudulent action above referred to; that in said last-named action he has attached the land of the complainant; and that said action is now pending in said district court. The bill further alleges that by the fraudulent acts of said Ryan, and his false return on said writ, the complainant has been greatly injured and damaged, and that the respondent is aware of said illegal and fraudulent acts, but persists in pursuing the complainant on said fraudulent judgment, and also that the complainant is wholly remediless at law, and can only have relief in a court of equity. Wherefore he prays that the respondent be perpetually enjoined from further prosecuting his action on said judgment, and for other relief.

To this bill the respondent demurs on the following grounds, namely: (1) That the bill seeks relief against the enforcement of a judgment obtained upon the writ mentioned in paragraph 2 of the bill, because, as the bill alleges, said writ was not served at all, either by summons or by attachment, while the bill itself and the copy of said writ attached thereto show a return by a proper officer of full and regular service of said writ upon the complainant, both by attaching his

real estate, and by personal service of a copy of the writ upon him; (2) that the alleged grounds for relief consist wholly and only of the contradiction of the return of the constable upon a writ which he was competent to serve; (3) that the complainant has an adequate remedy at law against the officer and the surety on his bond; and (4) that the bill does not state a case entitling the complainant to the relief prayed for.

The question raised by the first two grounds of demurrer is whether, under the facts set forth in the bill, the officer's return on the writ in the action in which the judgment sued on was recovered can be contradicted. Or, to state it more generally, the question raised is whether a bill in equity will lie to enjoin an action at law on a judgment which was obtained by the fraud of the officer charged with the service of the writ in the original action. The respondent's counsel contend that the officer's return cannot thus be contradicted, and that such a bill will not lie, and that the cases of *Angell v. Bowler*, 3 R. I. 77; *Eates v. Cooke*, 12 R. I. 6, and *Barrows v. National Rubber Co.* 13 R. I. 48, fully sustain them in the position which they take. The cases cited hold that an officer's return is conclusive and cannot be contradicted incidentally by motion or plea; also, that the return is part of the record, and that parol evidence cannot be submitted to contradict the court record; for, so long as it remains, it is conclusive upon the parties, and in order to change it some appropriate proceeding acting directly upon the record must be instituted. It is to be observed, however, that the rule as thus laid down in the cases relied on applies to common-law actions. See *Pratt v. Jones*, 22 Vt. at page 345, 54 Am. Dec. 80; *Pettes v. Bank of Whitehall*, 17 Vt., at page 444. And hence the question arises whether it is also applicable to suits in equity; for, if so, it is controlling in the case at bar, unless it can be held that this is a proceeding acting directly upon the record in said original action, which we do not think it is. To state the question more concisely, Can a court of equity ever interfere and grant relief by way of permitting the record of a common-law court to be impeached as to the officer's return on the writ, or as to any other part of the record? We think this question must be answered in the affirmative. One of the peculiar provinces of a court of equity is to relieve against wilful misrepresentation and fraud. A court of equity is a court of conscience, and whatever, therefore, is unconscionable is odious in its sight. Indeed, it is said by Judge Story, in his Commentaries, that "fraud is even more odious than force." That a judgment obtained in a court of law by a false and fraudulent writ, or by a false and fraudulent return thereon by the officer, is so wholly unconscionable as to shock the inherent sense of justice of all right-thinking men, no one will deny. And it would be a reproach to our system of jurisprudence if a court of equity could afford no relief against a judgment so obtained. But that equity does afford a full and adequate remedy

against such a wrong, and that the case stated in the bill before us is clearly within the jurisdiction of such a court, is fully shown by the authorities, to some of which we will proceed to refer.

Perhaps the leading case in this country upon the subject of equitable relief against judgments at law is that of *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362, in which Chief Justice Marshall specified the grounds for the interference of equity in the following terse language: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." In *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 563, 73 Am. Dec. 688, Storrs, Ch. J., said: "No principle is better settled, or more frequently acted on, than that a court of equity will interfere to restrain the use of an advantage gained by the proceedings of a judicial tribunal, either of law or equity, irrespective of the inquiry whether those proceedings were regular or not, when they must otherwise make either of those tribunals an instrument of injustice, in all cases where such advantage has been gained by the fraud of the opposite party, or by accident or mistake, without the fault of the party seeking relief against them. In regard to the judgment of a court of law, it does not in such a case reverse that judgment, but, conceding it to be valid, it prevents its being used for an unconscientious or inequitable purpose." In *Earle v. McVeigh*, 91 U. S., at page 507, 23 L. ed. 400, Mr. Justice Clifford said: "Argument to show that no person can be bound by a judgment, or any proceeding conducive thereto, to which he was never a party or privy, is quite unnecessary, as no person can be considered in default with respect to that which it never was incumbent upon him to fulfil. Standard authorities lay down the rule that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose." In *Hogg v. Link*, 90 Ind. 346, it is held to be well settled that a judgment may be enjoined for fraud in obtaining it, at the suit of the injured party; such a fraud being regarded as perpetrated upon the court as well as upon the injured party. In *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, it was held that a court of chancery has power to grant relief

against judgments obtained by fraud. "Any fact," says the court "which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity." Perhaps no better summary of the law appertaining to the question now under discussion can be given than that which is found in 2 Freeman, Judgm. § 495. That part of the section which is pertinent reads as follows: "We shall now consider the circumstances in which a defendant may be relieved from a judgment or decree rendered in an action wherein his failure to defend is not chargeable to the plaintiff. Prominent among the grounds of relief belonging within this class of cases is the one that the court has proceeded to condemn a party without first giving him an opportunity to be heard. A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs, and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned and had no notice of the suit, a sufficient excuse is shown for his neglect to defend; and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains." To the same general effect are the following cases, viz.: *Wistar v. McLanes*, 54 Pa., on page 326, 93 Am. Dec. 700; *Stubbs v. Leavitt*, 30 Ala. 352; *Duncan v. Gerdine*, 59 Miss. 550; *Jeffery v. Fitch*, 46 Conn. 601; *State Ins. Co. v. Waterhouse*, 78 Iowa, 674, 43 N. W. 611; *Vilas v. Jones*, 1 N. Y. 274; *Wingate v. Haywood*, 40 N. H. 437; *Little v. Price*, 1 Md. Ch. 182; *Lester v. Hoskins*, 26 Ark. 63; *Martin v. Parsons*, 49 Cal. 94; *French v. Shotwell*, 5 Johns. Ch. 555. See also *Beach*, Inj. §§ 615-631; 1 *Spelling*, Extraordinary Relief, § 130.

Although there is no decision in our own reports which fully controls the case at bar, yet there are several in which the validity of the doctrine above enunciated is clearly recognized. In *Spooner v. Leland*, 5 R. I. 348, which was a bill to enjoin an execution in an action at law, this court, while it denied the relief prayed for, on the ground that the answer completely negatived all the allegations of the bill as to the defenses of the complainant in the original action, yet held that, if the party wronged had no no-

tice or knowledge of the judgment obtained against him until after the expiration of the year within which he might have applied for relief on the law side of the court, he would certainly, on the ground of breach of trust and for the prevention of fraud, be entitled to it in equity. In *Furbush v. Col-lingwood*, 13 R. I. 720, which was a bill by a judgment creditor for injunction and for revision of the judgment in the matter of costs, it was held that a court of equity has no more jurisdiction to revise and correct the judgments of a court of law in the matter of costs than in the matter of debt or damages, and that in either matter it has jurisdiction only in case of fraud, accident, or mistake, or something of that nature. In delivering the opinion of the court, Durfee, Ch. J., said: "We apprehend that what is meant by fraud, as a ground for enjoining or setting aside a judgment, is not mere falsity of claim or proof, but fraud outside of them, perpetrated by some artifice or contrivance of the party or person benefited, or by some collusion of both parties, whereby in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention and deceived. *Freeman*, Judgm. §§ 487, 489; *High*, *Lnj.* §§ 86, 96, 97, and notes;

Muscatine v. Mississippi & M. R. Co. 1 Dill. 536, Fed. Cas. No. 9,971; *Bateman v. Willoe*, 1 Sch. & Lef. 201, 204; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604. No such fraud is alleged here." See also *Linnell v. Battey*, 17 R. I. 241, 21 Atl. 606; *Rogers v. Rogers*, 17 R. I. 623, 24 Atl. 46. The allegations of the bill in the case at bar satisfy all of the conditions which these cases, in common with the great current of authorities, render essential in order to give jurisdiction to a court of equity, and hence we have no doubt that it is maintainable.

The third ground of demurrer is not well taken. The complainant has no adequate remedy at law. To permit the respondent to prevail in his action on the judgment sued on, and compel the complainant to pay the same, and then resort to an action against the officer who served the writ, involves a circuitry and remoteness in attaining redress, and an uncertainty as to the result of such an action, which is quite foreign to the spirit of equity. 1 Black, Judgm. § 377; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523.

As the fourth ground of demurrer is covered by what we have already said, there is no occasion for us to consider it separately.

The demurrer is overruled.

PENNSYLVANIA SUPREME COURT.

Appeal of Philip ENGELSKIRGER, Admr., etc., of James Viosca, Deceased.

(197 Pa. 280.)

The grant of ancillary administration in a county in which there is a note belonging to the estate, although the debtor resides in another county, is authorized by act March 15, 1832, providing that, where the decedent was not domiciled in the commonwealth, such letters shall be grantable in the county where the principal part of his goods and estate shall be.

(October 8, 1900.)

A PPEAL by petitioner from a decree of the Orphans' Court for Allegheny County dismissing an appeal from a decree of the register refusing to revoke ancillary letters of administration which he had granted upon the estate of James Viosca, deceased, to H. W. Mitchell. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. H. Forbes and Watson & McCleave, for appellant:

Where a nonresident testator leaves an estate in this commonwealth consisting of one item only, viz., a debt evidenced by an unsealed promissory note, owing by a resident of Venango county, the register of Venango county has exclusive jurisdiction to grant

ancillary letters testamentary upon said estate in this commonwealth.

Eyster's Estate, 5 Watts, 133.

The only asset of the estate consists of a debt alleged to be due from Charles Miller, who, at the time of the death of the decedent, resided and had his domicile, and continuously ever since has resided and had his domicile, in the county of Venango.

Under the common law, for the purpose of the administration of the estate of a decedent, simple-contract debts due the decedent constitute assets at the place where the debtor resides at the time of the death of the testator.

Atty. Gen. v. Bouwens, 4 Mees. & W. 191; *France v. Aubrey*, 2 Lee, Eccl. Rep. 534; *Hilliard v. Cox*, 1 Salk. 37; *Yeomans v. Bradshaw*, Carthew, 373, 3 Salk. 70, 164.

This general rule of the common law has been generally adopted in the United States.

Wyman v. Halstead, 109 U. S. 656, *sub nom.* *Wyman v. United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; *Arnold v. Arnold*, 62 Ga. 627; *Pinney v. McGregory*, 102 Mass. 190; *Picquet, Appellant*, 5 Pick. 65; *Re Ames*, 52 Mo. 290; *Becraft v. Lewis*, 41 Mo. App. 546; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Wright*, 51 N. H. 600; *Banta v. Moore*, 15 N. J. Eq. 97; *Chapman v. Fish*, 6 Hill, 554; *Fox v. Carr*, 16 Hun, 434; *Kohler v. Knapp*, 1 Bradf. 241; *Grant v. Reese*, 94 N. C. 720; *Dial v. Gary*, 14 S. C. 581, 37 Am. Rep. 737; *Vaughn v. Barret*, 5 Vt. 333, 26 Am. Dec. 306.

NOTE.—A note on the question what assets will give jurisdiction to appoint an administrator will be found with the case of *Manning v. Leighton* (Vt.) 24 L. R. A. 684. 51 L. R. A.

The only modification of the above rule which appears from the decided cases is that where the debtor removes from one state or country to another after the death of the decedent creditor the debt becomes assets, for the purpose of administration, in the jurisdiction of the probate court wherein the debtor has taken up his new residence.

Pinney v. McGregory, 102 Mass. 190; *Saunders v. Weston*, 74 Me. 85; *Fow v. Carr*, 16 Hun, 434.

In Massachusetts it is held that a debt due to a decedent from a debtor residing in the county where application is made for probate is sufficient to give jurisdiction to the court of that county.

Emery v. Hildreth, 2 Gray, 228; *Picquet, Appellant*, 5 Pick. 66; *Pinney v. McGregory*, 102 Mass. 190; *Stearns v. Wright*, 51 N. H. 600; *Becraft v. Lewis*, 41 Mo. App. 546.

Under the act of 1832, where the estate of a foreign decedent in Pennsylvania consists of only one debt, administration should be granted by the register of the county where the debtor resides.

Sayre v. Helme, 61 Pa. 299.

The physical presence of the note in Allegheny county at the time when letters were granted there does not confer jurisdiction on the register of that county, because it merely evidenced the debt, which had its situs in Venango county.

Schley's Estate, 2 W. N. C. 684; *Shakespeare v. Fidelity Ins. Trust & S. D. Co.* 97 Pa. 173; *Becraft v. Lewis*, 41 Mo. App. 546; *Chapman v. Fish*, 6 Hill, 554; *Abbott v. Coburn*, 28 Vt. 603, 67 Am. Dec. 735; *Banta v. Moore*, 15 N. J. Eq. 97; *Re Miller*, 5 Dem. 381.

Foreign letters of administration do not authorize such administrator to exercise any authority, by suit or otherwise, to recover assets in Pennsylvania.

Act of 1832, March 15, P. L. 35; *Moore v. Fields*, 42 Pa. 473; *Sayre v. Helme*, 61 Pa. 299.

The fact that Charles Miller, who is alleged to be indebted to the Viosca estate, was casually present in Allegheny county on the day when letters were granted by the register, cannot confer jurisdiction upon him to grant letters of administration.

Abbott v. Coburn, 28 Vt. 603, 67 Am. Dec. 735.

Inasmuch as the grant of letters of administration by the register of Allegheny county under all the circumstances was void, letters were properly issued by the register of Venango county, and the administrator so appointed may properly proceed by petition, etc., to procure a revocation of the letters granted in Allegheny county.

Frick's Appeal, 114 Pa. 33, 6 Atl. 363.

The grant of letters on this estate by the register of Venango county unto Philip Engelskirger cannot be attacked collaterally before this court in this proceeding.

Lovett v. Matheus, 24 Pa. 330; *Shoenberger's Estate*, 139 Pa. 132, 20 Atl. 1050; *Wilson v. Gaston*, 92 Pa. 207.

51 L. R. A.

Messrs. Lyon, McKee, & Mitchell, for appellee:

The personal estate of the deceased is to be regarded, for the purpose of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. The original administrator, therefore, with letters taken out at the place of the domicile, is vested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be.

Wilkins v. Ellett, 9 Wall. 740, 19 L. ed. 586.

The title to the note from Miller to Viosca, on the 10th day of May, 1898, the day upon which ancillary letters of administration were granted to Mitchell, was in Viosca, Jr., the domiciliary executor, who joined in the petition to the register of Allegheny county for the appointment of Mitchell as ancillary administrator.

It is immaterial whether or not the rule at common law is that ancillary letters can only be granted at the residence of the debtor. The statute of Pennsylvania has changed the rule.

Jarman, Wills, p. 712; *Stokely's Estate*, 19 Pa. 482.

If under the Pennsylvania statute the location of the estate is fixed by the common-law rule that simple-contract debts become *bona notabilia* at the residence of the debtor, most of the cases use the word "residence" in stating the rule, not in the sense of house, but rather meaning the whereabouts of the debtor,—where he happens to be.

Atty. Gen. v. Bouwens, 4 Mees. & W. 101; *Hilliard v. Coe*, 1 Ld. Raym. 562.

Merely a house or place of residence did not give jurisdiction, but it took the actual presence of the debtor to give it.

Schouler, Exrs. & Admsrs. p. 3.

Dean, J., delivered the opinion of the court:

James Viosca was a resident of Lower California, in the Republic of Mexico, where he died in June, 1895. At the date of his death he had in his possession a promissory note, payable to his order eighteen months after date, in the sum of \$31,250, signed by J. D. Springer, Allen Manville, and Charles Miller. The last-named was a resident of Franklin, Venango county, Pennsylvania. The other two drawers were not residents of this state. On May 10, 1898, H. W. Mitchell, of Pittsburg, presented a petition to the register of Allegheny county setting out that the only estate of Viosca, deceased, in Pennsylvania, was the note, and that it was in his possession, and prayed that ancillary letters of administration be issued to him. James Viosca, Jr., son of de-

ceased, was executor of his father's will under the laws of Mexico. He had brought the note to Allegheny county, and put it in Mitchell's possession. He concurred in the petition for the issue of letters to Mitchell, who exhibited the note to the register. Letters were accordingly issued to Mitchell, who brought suit as administrator in the common pleas of Allegheny county against Miller. The summons was duly served upon him within the county on May 10, 1898. Fourteen days after the service of the writ, and while the suit was pending, to wit, on May 24, 1898, upon the petition of the Carmen Island Salt Company, an alleged creditor of Viosca, deceased, stating the only asset in this state was the Miller note, the register of Venango county issued ancillary letters of administration on the Viosca estate to this appellant, Engelskirger. The latter then petitioned the register of Allegheny county to revoke the letters previously granted to Mitchell. After hearing, the petition was refused. An appeal from his decision was taken to the orphans' court of Allegheny county, and the decision of the register was affirmed in an opinion filed by that court. We have now this appeal by the Venango administrator.

It is argued that the court below erred in not holding that, as the only asset of Viosca, deceased, within the commonwealth, was the promissory note in question, that note, for the purposes of administration, had its situs at the residence of the debtor in Venango county, and did not follow the person of the debtor, Miller, *in itinere*.

It is conceded by counsel for appellant in their argument that the precise question involved has never been decided, but it is argued from analogy to a number of decided cases involving different facts that the Allegheny county letters should be revoked. We think the concession, so far as it implies an assertion that the point has never been decided against appellant, is too broad. In *Fox v. Carr*, 16 Hun, 434, it was expressly decided that the debtor, a citizen of North Carolina, temporarily in New York state, could there be sued by an ancillary administrator, if the suit were brought in good faith. The court declined to hold that the situs of the asset was the residence or domicile of the debtor, but, in effect, decided that the situs was where the debtor could be sued by the ancillary administrator. Also, in *Goodlett v. Anderson*, 7 Lea, 286. In this case the plaintiffs had an assignment from one Tomlinson of a claim which the latter held against one Maclin. Both Tomlinson and Maclin were residents of Mississippi. The assignees of the claim alleged that the mother of Maclin, the debtor, she being a resident of Mississippi, had there died, leaving assets in Tennessee, consisting of a promissory note of \$5,600, of one Guy, a resident of Tennessee. This note properly would have come into the hands of Anderson, a Tennessee administrator on the estate of the mother. The assignees commenced proceedings in the chancery court at Memphis, Tennessee, to attach the interest of Maclin in the Guy note, which

formed part of his mother's estate in Tennessee. The note had not actually come into the hands of Anderson, the Tennessee administrator. He, however, made no defense; but Maclin, the son, and Guy, the debtor, both appeared, and contested the right of plaintiffs. The court below made a decree in favor of the Tennessee administrator against Guy, the debtor, and directed the amount of the note to be collected and paid into court, that the son's share might be appropriated in payment of plaintiffs' debt against him. On appeal to the supreme court the decree was reversed, the court holding that the title and the right to sue were in him who had possession of the note; as the Tennessee administrator did not have possession of it, and had brought no suit, and as plaintiffs had no possession, the suit could not be maintained by the Tennessee creditor as against Guy, the Tennessee debtor, to Goodlett, the plaintiff; that administration taken out where the debtor resides does not draw to it the title to the note until it actually comes into his hands. We think this decision sound on the reasoning given. The note was in possession of the payee when she died. It was then an asset *bona notabilia* at her residence. No foreign court had jurisdiction over it until it came into the hands of an ancillary administrator over whom such court had jurisdiction. For all that appeared, the debtor may have had property in Mississippi or elsewhere, which could have been reached by the administrator of the domicile. If he thought best, he could raise an ancillary administrator in Tennessee, and deliver to him the note that suit might be brought upon it; but where he placed it, there, as is said of specialties, "it happened to be." That case, in effect, rules that this Venango county administrator is an intermeddler with what is not his business; that, the Allegheny county administrator, having possession of the note by the act of Viosca's executor, he alone had the right to sue upon it.

As to the analogous cases cited by appellant, it will be noticed that the decedent was a resident of the foreign country where he died. He there made his will, and appointed his son, James Viosca, executor thereof. This placed in the executor the legal title, and right to possession of the assets, including this note; but his power as executor, to collect by suit, reached no farther than the territorial boundaries of Mexico. When collection in this state from a resident of this state becomes necessary, it must be done through the intervention of ancillary letters issued to a citizen of the state, and to this ancillary administrator must be transferred the legal title and possession of the note. In refusing to recognize the powers of the foreign executor here, the state does not question the legality of his appointment, or his right to the possession of the asset. The comity between civilized states requires of them an acknowledgment of each other's local laws determining rights of property. But this comity does not extend so far as an acknowledgment of the right of the foreign

representative to take possession of and remove the asset beyond the jurisdiction of the state, when such removal may be prejudicial to creditors who are citizens of the state. Hence the ancillary administrator must take possession of the asset, and in his hands it is under the jurisdiction of our courts, subject to the just claims of Pennsylvania creditors. When these are satisfied, the Pennsylvania representative must pay over the balance to the foreign one. The intent of the law, as so held, is not to favor a home debtor, for he needs no favor if he desires to pay an honest debt, but to favor the home creditor, to save him the hardship and expense of going into a foreign jurisdiction to collect his debt out of assets removed from his own state to the foreign jurisdiction. The argument of the learned counsel for appellant all through, although not so expressed, suggests the idea that the requirement of a Pennsylvania administrator is for the protection of the Pennsylvania debtor at his residence. Not so. It is for the protection of the assets, so that they may, through the courts of our state, be reached by those having legal claims upon them. Says Thompson, Ch. J., in *Sayre v. Helme*, 61 Pa. 299: "To allow it [a foreign administrator to sue] would be to enable executors and administrators authorized by a foreign jurisdiction to collect and carry away the assets of a foreign decedent's estate, and compel domestic claimants to follow them." While it is conceded that at common law some kinds of debts are assets where they happen to be,—leases where the lands lie, judgments where they are recorded, and specialties where they happen to be,—yet as to simple-contract debts it is argued their situs is the residence or domicile of the debtor.

We think the question must be decided under our act of assembly of March 15, 1832, P. L. 136, § 6, which says: "Letters testamentary and of administration shall be grantable only by the register of the county within which was the family or principal residence of the decedent at the time of his decease, and if the decedent had no such residence in this commonwealth, then by the register of the country where the principal part of the goods and estate of such decedent shall be." The note was personal property. Where was its situs when brought by the foreign administrator into Pennsylvania, and sued on in Allegheny county? There can be no question of the situs of real estate, but no such test as to fixity or immovability is applicable to personal property. In *Re Stokes*, 10 Pa. 482, this court said: "Personal property has no situs in contemplation of law. It is attached to the owner's person wherever he is." This perhaps states the proposition too broadly, for some species of personalty, such as live stock and merchandise, though capable of quick and easy transportation, may be said to still have a situs independent of the whereabouts of the person of the owner. But as concerns other species of personal property, such as bank bills, bills of exchange, promissory notes,

personal jewelry, and the like, its situs follows the person of the owner. As stated in Jarman, Wills, 712, "Choses in action have no locality." Their situs must be determined by the locality of the person of the owner who has them in his possession. And as stated in Schouler, Exrs. & Adms. § 24: "But where the personal property consists of a debt owing upon some security, or document of title, which of itself is commonly transferable as possessing a mercantile value, the local situation of such security or document of title would, in various instances, be well held to confer a probate jurisdiction as of *bona notabilia* apart from the obligor's or debtor's place of residence."

It seems to us immaterial whether the note was left in Pittsburgh by the payee in his lifetime, or was brought there by his agent after his death. It was there in the possession of the legal owner, and was by him delivered to the administrator, a resident of Pittsburgh, who had the letters issued and the suit brought. If suit had been brought by the testator in his lifetime,—which it is not questioned he could have done,—or if it had been left there for collection by him, the note would have been in Allegheny county for purposes of suit, and the common pleas of that county would have had jurisdiction. In the same sense it was there after his death for purposes of administration and suit. To fix its situs by the residence of the debtor, it must be taken from Allegheny county, where it happens to be, to Venango county, where it does not happen to be. The plea of appellant practically rests on the single proposition, namely, the residence of the debtor, Miller, was in Venango county. At common law that fixed the situs of the chose in action in Venango county, and therefore the register of that county alone could legally issue the ancillary letters. We do not so construe the act, which declares they shall be issued "where the principal part of the goods and estate of such decedent shall be." The reason for the common-law rule that the situs of the contract debt was the residence of the debtor, as we have already noticed, was not based on an intention to favor the debtor. It is stated in several of the cases cited by both appellant and appellee thus: "Judgments are *bona notabilia* where the record is, specialties where they happen to lie, and simple-contract debts where the debtor resides, and where they can be sued upon." The last half dozen words of the quotation disclose the reason of the rule. The debtor can be sued at his place of residence at all times. He may or may not be sued elsewhere, depending on whether service can be had elsewhere. It was not intended to favor him by providing for him a home forum, but the intent was to favor the creditor, that he might arrest him on *capias* (for imprisonment for debt was then the law), or serve him with a summons to compel appearance to an action on the contract. But the common-law rule has been expressly supplanted by our statute, which fixes the situs "where the principal part of the goods and

estate of such decedent shall be." No account whatever is taken of the residence of the debtor. The whole method of administration of a decedent's estate in England by archbishops and diocesans, chiefly ecclesiastical, and the law built up on that administration, never did fit the customs and religious habits of the people of this commonwealth; and the rule (never an invariable one) that the residence of the debtor determined the situs of the contract debt was without force after the passage of our act. The history of the ecclesiastical administration of decedents' estates as narrated by Gibson, Ch. J., in *Eyster's Estate*, 5 Watts, 133, is interesting as showing what the common law was, but affords no aid in the interpretation of the language of our statute, which is so plain as to be unmistakable. In fact, the cumbersome methods of administration in England, with most of the many decisions on the subject, have been swept away by the statute (20 & 21 Vict. chap. 77) passed in 1857. By this all jurisdiction on the subject has been taken from the ecclesiastical tribunals, and transferred to a new court, called the "court of probate." The authority of the ordinary, the old manorial, and other peculiar courts is wholly superseded. Everything relating to the administration of decedents' estates is vested in this court, and its jurisdiction extends over all England. See Wms. Exrs. 7th Eng. ed. 290, 294, etc. So, not only does our statute as to the situs of personal property abrogate the common law as it is argued it stood before that date, but the very source from which it was derived has been in great part abrogated by the British statute. Why should we go back of our own statute, and cling to the common law, dead even in England, as still the perfection of reason? Our law furnishes an easily determined and simple test as to the proper place for the issue of letters. Where, then, at the date of the issue of the letters to Mitchell, the appellee, was the principal part of the estate of James Viosca? The title and possession of the note were in the Mexican executor, James Viosca, Jr. He carried the note with him to Allegheny county. Practically, he was the owner when he stopped in Pittsburg. The chose in action being in his manual possession, it was as certainly in Pittsburg as he was; but he could not sue upon it, because he was now in a jurisdiction foreign to Mexico. But this did not relieve him of the duty of gathering up the assets of his father's estate. He could do this only by the aid of an auxiliary who labored under no disability. He selected Mitchell as a proper person to act in accord with him and placed in his possession the note, and letters were issued to him. No change had taken place in the locality of the note. It was not only the principal part of the decedent's estate in Pennsylvania, it was all of it. Not one cent of it was in Venango county at the time the letters were issued there. It seems to us without a total disregard of the terms of the statute we cannot hold that the principal part of the estate was elsewhere than in Allegheny county. As-

51 L. R. A.

sume as law that which is very doubtful,—that, if the foreign executor had made no effort to collect a debt owing by a resident of Venango county, a creditor in that county might there, without the possession of the note, have taken out ancillary letters, collected the asset, and the courts of that county would have distributed them,—yet no such facts arise in this case. The foreign executor was diligent. He conformed promptly to our laws; would very soon have had the principal estate ready for distribution to home—that is, all Pennsylvania—creditors, if such there proved to be. His conduct was not only not unlawful, but was in strict conformity to the law. Then the prompt administration thus put in motion is now stopped by a hostile claimant of letters, who alleges no unfitness in the administrator appointed, no absence of good faith, but only that the debtor resides in an adjoining county. The rule, as stated by Schouler, Exrs. & Admrs. § 24, is: "But a convenient rule sanctioned by statute in some American states is that, when a case lies within the jurisdiction of the probate court in two or more counties, the court which first takes cognizance thereof by the commencement of proceedings shall retain the same, and administration first granted shall extend to all the estate of the deceased in the state, and exclude the jurisdiction of the probate court of every other county." If this alleged creditor's sole object had been the collection of a debt, there was no hindrance to obtaining his object by the grant of the Allegheny county letters. Instead of frustrating, as the second grant has, it speeded, the collection of his debt.

Nor is there any weight in the point made in the argument, that fixing the situs in any other way than by the residence of the debtor will lead to confusion in administration. It is conceded that, as to a specialty, a sealed bond, or a single bill, always at common law the situs was where the "specialty happened to be;" but, aside from the technical distinction as to the two forms, which enjoins distinct forms of action and involves different pleas, what difference is there in substance between a promissory note and specialty when it comes to collection and distribution? None that we can see. Yet not a single case reported seems to have arisen because of any confusion in determining the situs of a specialty, while in nearly every reported case the litigation was prompted by doubtful law and doubtful facts as to the situs of an asset resting on a contract debt. If residence of the debtor be made the test, then the first question that arises is, Where is his residence? He may have more than one. Many persons have. He may have none so far as permanent sojournment in a particular county is concerned. According to modern methods, many active business men, in the transaction of their business, flit from county to county and state to state. Notice the numerous contested election cases. In most of them large numbers of illegal votes are averred because the voters did not reside in the district. The law holds residence to be

a question of intention often known only to the voter, and dependent on his oath. Is it comity to the foreign creditor to compel him to chase after a defaulting debtor over the whole state before he can have a proper person qualified to collect his claim? Or suppose, as in this case, there are three promoters; and suppose, further, that, instead of two of them being nonresidents, each is resident of a different county. If the residence of the debtor fixes the situs of the asset, in which county shall the letters be taken out? Or shall they be taken in all three? Is it not in every way fairer, more promotive of orderly judicial administration, to adhere strictly to the letter and spirit of our statute; that is, administer the estate where the principal part of it shall be? Then the ancillary administrator can go into any county of the state and collect from the debtor, and the creditor in any county of the state can prefer his claim before the court having jurisdiction over the administrator when it distributes the assets collected in Pennsylvania. Look at the perplexities of this foreign administrator if this appeal be sustained. His duty is to gather the assets. In doing this he must act in accord with the ancillary administrator, who is subordinate to him. This subordinate must have the principal's confidence; not confidence alone in his bond and sureties, for he does not want litigation to collect from the subordinate what the latter collects from the debtor; but confidence in his diligence, his business capacity, and integrity. Therefore, what more suitable to the circumstances than that the principal should suggest the subordinate, and that, when the latter is qualified, he should intrust to him the collection of the assets for distribution in the court of the situs? On the other side is an alleged creditor, a corporation known as the Carmen Island Salt Company. Where chartered, or subject to what law, or where its place of business, is not stated. It would appear from the will of Viosca, Sr., that it was located in Mexico, the domicil of the testator; but upon petition of the secretary of the corporation, appellant is appointed by the register of Venango county ancillary administrator, that he may collect this note. He is a stranger to the executor of the domicil, has not the note in his possession, has never seen it, and has had no communication with the executor. Whether appellant is a proper person to be intrusted with the responsibilities of administrator the executor does not know. Whether he would push vigorously the collection of this large amount of money against his neighbor he does not know. Yet it is urged that this son, the executor of his father's will, shall hand to this stranger this large asset, and confide in his fidelity to the trust. It seems to us no such construction of the law ought to prevail, for it would tend to defeat the very purpose of the issuance of ancillary letters. We are satisfied the court below was right in refusing to revoke the letters issued to the register of Allegheny county, and the decree is affirmed.

51 L. R. A.

Samuel PURDY, Appt.,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

(197 Pa. 257.)

The use of barrels that had formerly contained oil, alcohol, turpentine, benzine, whisky, and other things, for the shipment of iron, does not render an employer liable for injury to an employee by explosion of a barrel caused by lighting a match to read the number on the barrel, when it is not shown that the employer had any knowledge that there was danger of such an explosion in the use of such barrels.

(October 8, 1900.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Allegheny County refusing to take off a compulsory nonsuit which had been entered in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas M. Marshall and Rody P. Marshall, for appellant:

Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities is a breach of duty for which the master is liable.

Mullan v. Philadelphia & S. Mail S. S. Co. 78 Pa. 25, 21 Am. Rep. 2; *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467; *Tissue v. Baltimore & O. R. Co.* 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667; *Wagner v. H. W. Jayne Chemical Co.* 147 Pa. 475, 23 Atl. 772.

Consequences, however improbable, are proximate when they might have been foreseen. The fact that charcoal alcohol and like volatile liquids generate a gas, which, when mixed with the air in proper quantities, is violently explosive, is so well known that the agent should have at once foreseen the danger of shipping iron castings, as was

NOTE.—For liability on account of escape and explosion of gas, see *note* to *Ohio Gas Fuel Co. v. Andrews (Ohio)* 29 L. R. A. 337; *Lebanon Light, H. & P. Co. v. Leap (Ind.)* 29 L. R. A. 342, and *McGahan v. Indianapolis Natural Gas Co. (Ind.)* 29 L. R. A. 355. See also following cases in this series: *Richmond Gas Co. v. Baker (Ind.)* 36 L. R. A. 683; *Consolidated Gas Co. v. Crocker (Md.)* 31 L. R. A. 785; *Consumers' Gas Trust Co. v. Perrego (Ind.)* 32 L. R. A. 146; *Evans v. Keystone Gas Co. (N. Y.)* 30 L. R. A. 651; *Pine Bluff Water & Light Co. v. Schneider (Ark.)* 33 L. R. A. 306; *Schmeer v. Gaslight Co. (N. Y.)* 30 L. R. A. 653; *Dow v. Winnepesaukee Gas & Electric Co. (N. H.)* 42 L. R. A. 569; *Barrickman v. Marlon Oil Co. (W. Va.)* 44 L. R. A. 92; *McKenna v. Bridge-water Gas Co. (Pa.)* 47 L. R. A. 790.

done in this case, in a barrel which had recently contained any quantity of charcoal alcohol or liquids having like properties.

Defendant was responsible for "whatever consequences might, in the nature of things, occur from its neglect, although those consequences were such as could not, by any ordinary prudence have been anticipated." The accident in this case was a consequence of the act of the defendant, and it was responsible therefor.

Oil City Gas Co. v. Robinson, 99 Pa. 1; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Raydure, W. & Co. v. Knight*, 2 W. N. C. 713; *Bell v. McClintock*, 9 Watts, 120, 34 Am. Rep. 507; *Tissue v. Baltimore & O. R. Co.* 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667.

Messrs. Dalzell, Scott, & Gordon, for appellee:

The defendant company was not bound to find out that under the conditions this barrel might explode.

Allison Mfg. Co. v. McCormick, 118 Pa. 519, 12 Atl. 273; *Augerstein v. Jones*, 139 Pa. 183, 21 Atl. 24; *Melchert v. Smith Brewing Co.* 140 Pa. 448, 21 Atl. 755; *Dooner v. Delaware & H. Canal Co.* 171 Pa. 581, 33 Atl. 415.

McCollum, J., delivered the opinion of the court:

The plaintiff instituted this suit for the purpose of obtaining compensation for an injury which he alleged he received through the negligence of the defendant company. On the trial of the case, the court, adjudging the testimony introduced to establish his claim insufficient, entered a judgment of compulsory nonsuit. The plaintiff then moved the court in banc to take it off, which motion, upon hearing had, was denied. This appeal was the result of the denial.

The plaintiff testified that he was a common laborer, employed by the defendant company to work in its storeroom. The principal part of the work in which he was engaged was the receiving and arranging of its goods in accordance with instructions. On the day he received the injury of which he complains, he, with a fellow workman, was employed in receiving castings brought in barrels from Newark to East Pittsburgh. The barrels were obtained by the defendant's purchasing agent from Walsh, "who was a dealer in secondhand barrels. They had originally contained oil, alcohol, turpentine, benzine, whisky, and other things." The purpose of the purchasing agent was to obtain any kind of strong barrel that would hold from 500 to 700 pounds of castings. About 100 barrels of this description were purchased by the agent, and used in the removal of the castings, as above stated. The injury received by the plaintiff was caused by an explosion of a barrel he and Dugan were inspecting for the purpose of discovering the number upon it. According to the plaintiff's own testimony, the barrel was in

a place "that was nearly all the time dark." To the question, "Did some person strike a match?" his answer was, "I couldn't say that he did." Duffy, however, testified that he saw Purdy and Dugan with their heads down against the barrel, in a stooping position; that he saw Dugan take a match in his hand, and light it, and that the lighting of the match was immediately followed by the explosion. This testimony is uncontradicted, and no one questions the accuracy of it. There is no testimony in the case which shows that the defendant company, or any person connected with it, knew that the barrels used as above stated were, under any circumstances, explosive; nor is there any testimony showing that such barrels are not commonly and ordinarily used for such purposes at manufactories, or that they are in any way unsuitable for such use. It seems, therefore, that the testimony introduced in support of the plaintiff's claim was justly held by the court below to be insufficient to charge the defendant company with negligence. To be relieved from liability for injuries received by a servant from the use of defective materials, the master is not required to supply the best materials known, or to subject such as he does supply to an analysis to determine what hazard may be incurred in their use. *Allison Mfg. Co. v. McCormick*, 118 Pa. 519, 12 Atl. 273; *Augerstein v. Jones*, 139 Pa. 183, 21 Atl. 24; *Melchert v. Smith Brewing Co.* 140 Pa. 448, 21 Atl. 755; and *Dooner v. Delaware & H. Canal Co.* 171 Pa. 581, 33 Atl. 415. From the opinion of our Brother Mitchell in *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 626, 20 Atl. 518, we quote the following as relevant to the case at bar: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed." Many cases analogous to those already cited might be referred to or included herein, but it is not thought to be necessary, or of material importance, to note the numerous decisions in accord with the case to which reference has been made above. We have examined and considered all the cases referred to in the plaintiff's printed argument, and are not convinced that they rule the case in hand.

Judgment affirmed.

TENNESSEE SUPREME COURT.

E. D. THOMPSON *et al.*, *Appts.*,
v.

STATE of Tennessee.

(105 Tenn. 177.)

1. An indictment for attempting to make an unlawful sale of the dead body of a human being is not bad for duplicity on the ground that it charges three separate offenses, merely because it recites a mere narrative of facts leading up to the offense, including statements that the accused failed to bury the body, and that they conspired not to bury, but to sell, it.
2. An unauthorized sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*.
3. An attempt to make an unlawful sale of the dead body of a human being is itself a misdemeanor.
4. The fact that one of the participants in a crime was a mere agent of another does not affect his criminal liability for his acts.
5. Punishment of two or more persons for the same crime is to be inflicted as if each one had committed the crime separately.

(June 25, 1900.)

APPEAL by defendants from a judgment of the Criminal Court for Shelby County convicting them of attempting to sell a dead body for purposes of dissection. *Affirmed*.

The facts are stated in the opinion.

Messrs. John T. Moss and M. B. Norfleet for appellants.

Mr. George W. Pickle, Attorney General, for the state.

Caldwell, J., delivered the opinion of the court:

Frank Thompson and E. D. Thompson are under conviction for a joint attempt to dispose of and sell for profit and gain to themselves the dead body of Jennie McGuire, a pauper, which was intrusted to them for burial; and the punishment assessed against each of them is a fine of \$750, and imprisonment in the county workhouse for the period of eleven months and twenty-nine days. Having appealed in error, they seek a reversal for numerous reasons assigned by their counsel.

It is said in the first place that the indictment charges three separate offenses in one count:—(1) Failure to bury; (2) conspiracy not to bury, but to sell; (3) attempt to sell,—and hence that the motion to

quash should have been sustained in the lower court, and should now be sustained in this court. The indictment does state that the body in question was delivered to E. D. Thompson, county undertaker, for burial; that he and Frank Thompson confederated and conspired, not to bury, but to dispose of it for profit and gain to themselves, and that thereupon they packed it in a trunk and shipped it away for the purpose of sale, etc. Yet the true legal import of the charge, when rightly interpreted, is that the two defendants made a joint and unlawful attempt to dispose of the body for profit and gain to themselves. That is the real gravamen of the state's action, so to speak; the other parts being in the nature of mere description or inducement, and largely unnecessary. It is an indictment on the facts of the case, with some superfluity of narration. The statement of the failure to bury the body is not to be taken as a separate and distinct charge, but rather as a mere narrative of a fact leading up to the offense of shipping the body away for unauthorized sale; and the other statement, that the defendants confederated and conspired, not to bury, but to sell, the body, is only an overformal charge of joint action on their part in the attempted sale, and not an independent charge of unlawful conspiracy.

Then, does the indictment so interpreted and limited, charge an offense cognizable in a criminal court? Confessedly, we are without a statute creating such an offense. Hence, unless it existed at common law, or can properly be evolved from the principles of the common law, either of which would be sufficient, it does not exist at all. Civilized countries have always recognized and protected, as sacred, the right to Christian burial, and to an undisturbed repose of the human body when buried. The wilful, unlawful, and indecent taking and carrying away of the dead body of an unknown person, with the intent to sell and dispose of the same for gain and profit, to the scandal and disgrace of religion, and in contempt of the laws and customs of the realm, was held to be an indictable offense in *Rex v. Gilles*, Russ. & R. C. C. 366, note, 1 Russell, Crimes, 464, and the disinterment of the body of a human being for the purpose of dissection was held to be indictable at common law in *King v. Lynn*, 2 T. R. 734, 1 Leach C. L. 497, and in *Kanavan's Case*, 1 Me. 226. These cases, and many others with kindred rulings, are cited and more elaborately stated on pages 391, 392, Roscoe, Crim. Ev., on page 464, 1 Russell, Crimes, and in note II. a.

NOTE.—The rights in respect to dead bodies of persons have been considered in former cases in this series as follows:

As to right of action for mutilating dead body, see *Young v. College of Physicians & Surgeons* (Md.) 31 L. R. A. 540, and note as to power of coroners to order post mortem examination; see also *Burney v. Children's Hospital* (Mass.) 38 L. R. A. 413.

As to liability for disinterment of dead body, 51 L. R. A.

see *State v. McLean* (N. C.) 42 L. R. A. 721, and note.

As to disposal and control of corpse, see note to *Larson v. Chase* (Minn.) 14 L. R. A. 85; *Hackett v. Hackett* (R. I.) 19 L. R. A. 558; *Choppin v. Dauphin* (La.) 33 L. R. A. 133; *Thompson v. Deeds* (Iowa) 35 L. R. A. 56; *O'Donnell v. Slack* (Cal.) 43 L. R. A. 388; and *Keyes v. Konkel* (Mich.) 44 L. R. A. 242.

State v. McLean (N. C.) 42 L. R. A. 733. One of the other cases is more closely related to that now before the court. Of it Roscoe says: "In *Reg. v. Feist*, Dears. & B. C. C. 590, 27 L. J. M. C. N. S. 164, the defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through, with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination; and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to a hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offense at common law, in disposing of a body for the purpose of dissection." But the appellate court, though approving that finding, held that he was protected by statute. Roscoe, Crim. Ev. p. 392.

Bishop, in the course of his chapter on "Protection to the Public Morals, Religion, and Education," employs the following language, namely: "Moreover, as tending to corrupt the public morals, and as disturbing the sensibilities of the people, are such acts as casting the dead body of a human being into a river without the rites of Christian sepulture; the stealing of a corpse; the digging of it up, where buried, or conveying of it away from the burial ground for sale or for dissection; and the selling, for dissection, of the dead body of a person capitally convicted and executed, when the sentence did not direct such disposition of it. These are all indictable offenses at the common law." 1 Bishop, Crim. Law, § 950.

It is broadly stated by numerous authorities that every attempt to commit a felony or a misdemeanor, whether the attempted offense be such at common law or by statute, is itself a misdemeanor at common law. Clark, Crim. Law, 104; Roscoe, Crim. Ev. p. 282; 1 Bishop, Crim. Law, § 683; 1 Russell, Crimes, 47; and citations by all of them. Bishop says, however, by way of exception or qualification, that "no mere attempt to commit some of the smaller misdemeanors is a sufficient dereliction from duty to be indictable" (§ 684), and that "some offenses cannot have the appendage of attempt, because of their little magnitude" (§ 687). The substance of the rule enunciated in the second edition of 3 Am. & Eng. Enc. Law, pp. 252, 253, is that an attempt to commit a misdemeanor is not indictable at common law, when the offense attempted is merely *malum prohibitum*, but only when it is *malum in se*, and that some misdemeanors that are *mala in se* are of such a nature as not to admit of indictable attempts to commit them. This court held in *Whitesides v. State*, 11 Lea, 474, that an attempt to commit a misdemeanor that "is purely statutory" is not indictable at the common law. But, without multiplying citations, or dwelling further upon the contrariety of opinion in the parallel L. R. A.

particulars indicated, it may be safely stated that the authorities are harmonious on the proposition that the unauthorized disposition and sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*, and that an unsuccessful attempt to commit that offense is itself a misdemeanor indictable and punishable at the common law. It follows, therefore, that the present indictment, which charges such attempt, and that only, is good, and that the motion to quash was properly overruled.

The other objections urged against the judgment below do not require elaborate consideration. Of those directed against the court's rulings as to the admissibility of certain evidence, and against the charge to the jury, it is sufficient to say generally that none of them present any reversible error. The evidence of guilt on the part of each defendant is plenary. It shows that Jennie McGuire, a white woman and pauper, died in the poorhouse of Shelby county, Tennessee; that, after suitable preparation, her dead body was, by direction of the superintendent of that institution, delivered to the defendant E. D. Thompson, as county undertaker, for burial; that thereafter he and the other defendant, Frank Thompson, who was in his employment, placed the body in a short metal box, which, after sealing, they put in a trunk; that this trunk, when securely locked, and three others, each containing the dead body of a negro similarly packed, were by them shipped to St. Louis, Missouri, where the defendant Frank Thompson was apprehended by officers of the law with the four trunks and their contents in his charge, and whence they were to be transported, at his instance, to Keokuk, Iowa, under a fictitious name, but in fact for a certain person of that city, who was to pay \$50 for each of the four bodies, for purposes of dissection. The defendants are not protected by chapter 206 of the Acts of 1899, which provides for the disposition of certain unclaimed bodies, because they made no effort to comply with the requirements of that act, but pursued their own course, without reference to it. They are equally without the protection of the last clause of § 6775 of Shannon's Code, which authorizes dissection "by consent of relatives," for they had no such consent. The only surviving relative of Jennie McGuire, so far as known, was a brother residing in another state, and he seems to have been entirely ignorant of her death until after her body had been taken to St. Louis. The only authority the defendants had in respect of this body was to give it decent burial, and that authority was violated in the manner already stated; and that, too, long after E. D. Thompson had been admonished by a proper representative of the county that he had no right to sell for dissection bodies intrusted to him for burial.

It is of no legal consequence that Frank Thompson may have been but an employee of his codefendant, nor that one of them may have done more than the other in unlawful effort to dispose of and sell this body,

since the criminal law does not recognize the civil relation of principal and agent, and treats all participants in the commission of a misdemeanor as joint principals. *Atkins v. State*, 95 Tenn. 474, 32 S. W. 391; *Whitesides v. State*, 11 Lea, 475.

The offense of which the defendants have been convicted is punishable by both fine and imprisonment, or by either (1 Bishop, Crim. Law, § 719); and after the jury had found them guilty and assessed a fine against them, it was within the province of the trial judge, in the exercise of a sound discretion, to superadd imprisonment, as he did. Though joint actors in the commission of the same offense, and jointly tried and convicted, it was proper that punishment be inflicted upon the defendants separately, as if each had committed the offense alone (Id. § 732), and each is bound to respond in full to his own separate sentence; satisfaction, in whole or in part, of that against one of them not satisfying that against the other one, in any sense or to any extent.

Let the judgment be affirmed.

CHATTANOOGA ELECTRIC RAILWAY,
Appt.,
v.
Isaac BODDY.

(105 Tenn. 666.)

A person leaving a street car, who passes behind it and is then struck by a car on a parallel track, is no longer a passenger to whom the street-railway company owes the extraordinary degree of care to which passengers are entitled, but is to be deemed only a traveler on the highway.

(October 8, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Hamilton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Brown & Spurlock for appellant.

Messrs. Bloom & Boddy and Pritchard & Sizor for appellee.

Beard, J., delivered the opinion of the court:

The defendant in error boarded a car of

NOTE.—As to when relation of passenger to street railway terminates, see former case, in this series, of *Creamer v. West End Street R. Co.* (Mass.) 16 L. R. A. 490.

As to duty of street-railway company to passenger after leaving car, see *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *Gargan v. West End Street R. Co.* (Mass.) 40 L. R. A. 421.
61 L. R. A.

the plaintiff in error, which ran north on Whiteside street, in Chattanooga. His point of destination was the intersection of that street with Lewis street. When this place was reached, the car was stopped and he was invited to alight. To do this he passed to the back platform, and thence down the steps. After reaching the ground, and while the car was standing still, he passed around its rear end, intending to cross (as was his habit, and as his business called him) to the far side of Whiteside street. About 18 inches or 2 feet from the track on which the car stood which he was leaving, there ran a parallel track used for the passage of the cars of the same company. In the act of stepping between the rails of this parallel track, he was struck by a south-bound car which was running at such a rate of speed that, after having knocked him down, it dragged him a very considerable distance before it could be brought to a standstill. The result was serious personal injuries, for which he obtained a substantial recovery in this action. Upon this appeal in error by the railway company a number of assignments of error were made upon the action of the trial court, only one of which will be embraced in this written opinion. The others, being less important, will be disposed of orally.

The trial judge, after properly stating to the jury that if they found that plaintiff and defendant were guilty of negligence which contributed proximately to the injury, or if they found that want of care on the part of the plaintiff was the proximate cause of the accident, the action must fail, then added: "If the proof shows that the plaintiff was a passenger on one of the defendant's cars, and he had alighted from the car upon which he had been transported, and in attempting to leave at the point of his destination, to go to his business, he was injured by another car being operated by the defendant company, while attempting to cross behind the car from which he had alighted, that he would still be considered a passenger, . . . and the defendant would owe him a high or extraordinary degree of care to protect him. . . . He has the legal right to cross the track and go to his destination in safety, and the defendant was bound, in the highest degree, that he was exposed to no peril." It is obvious that the situation in which the defendant in error was placed just before and at the moment he received this injury, while such as to require prudence on his part, at the same time imposed the duty of diligent attention upon the railway company to see that he received no injury from anything under its control. The conductor and motorman on the approaching car, seeing that the north-bound car had stopped at the crossing, were bound to know that passengers were alighting from or getting on it. If alighting, they might well have anticipated the possibility

that they would come out from behind the car to cross the street, and in doing so would be put in peril by the approaching car, unless it was under perfect control. That the care required of the plaintiff in error was proportioned to the danger more or less incident to the situation is obvious, but did the passenger relation between the common carrier and the defendant in error exist at the moment of the injury complained of, so that the law imposed in his favor, upon the railway company, the extraordinary degree of care required by this instruction?

On this question there is a conflict of authority, but we think the more reasonable view is that, where a man who has traveled on a street car steps from the car upon the street, this terminates his relation and rights as passenger, and the railway company is not responsible to him, as carrier, for the condition of the street, or for his safe passage from the car to the sidewalk. Where a common carrier has the exclusive control or occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that a person intending to take passage upon or leave a train sustains the relation of a passenger in leaving or approaching the cars at a station; but one who steps upon a street-railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger. *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391.

If the limitation indicated in the foregoing paragraph was not adopted, it would be difficult to suggest one resting upon a satisfactory basis. Take the case at bar. If the passenger relation did not determine when the defendant safely alighted from the car, when would it end? Would it continue only while he was crossing the parallel track, or until he had reached a point of comparative safety on the far side of the street? Or if, after reaching the ground, he had directed his steps to the other side of the street, would it have continued until he had reached the pavement? We think that the Massachusetts supreme court was wise in adopting the rule that this relation terminated the moment the passenger descended to the street. This is a fixed point, free from all speculation or uncertainty. In accord with this will be found the cases of *Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559, 17 Atl. 895; *Platt v. Forty-second Street & G. Street Ferry R. Co.* 4 Thomp. & C. 406, 2 Hun, 124. We think the trial judge was in error in announcing a different rule, and, as this error may have materially affected the jury in their consideration of the case, we are constrained to reverse and remand for a new trial.

51 L. R. A.

CHATTANOOGA RAPID TRANSIT COMPANY, Impleaded, etc., *Appt.*,
v.

George E. VENABLE.

(105 Tenn. 460.)

A night watchman at a railroad depot who boards a train near his home to ride to the depot and report his readiness to return to duty the coming night, after being off duty a few days, has the rights of a passenger in case he is injured by the carrier's negligence, although he is riding, in violation of a rule of the company, without a pass or payment of fare, but with the implied permission of the conductor, who has neglected to enforce the rule.

(October 13, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Hamilton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. William T. Murray, for appellant:

Where an engineer, while under pay of the company and under direction of the yard master, takes an engine and passenger coach some 2 miles down the track, and brings a carful of the company's employees to attend a meeting, and returns the same, the yard master acting as conductor, there is some evidence to establish the relation of carrier and passenger, though there is no evidence that any fares were paid.

Bryant v. Chicago, St. P. M. & O. R. Co. 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. Rep. 997.

An employee in charge of a train engaged in carrying persons over the line of the road will be presumed to have authority from the carrier to accept such persons as passengers.

Ibid.

A popcorn vender who travels on a train under a contract with the company to pay a certain sum annually in money, and to supply the passengers with ice water, is a passenger while so traveling, and not an employee.

Com. v. Vermont & M. R. Co. 108 Mass. 7, 11 Am. Rep. 301.

NOTE.—For railroad employees or officers as passengers, see earlier cases in this series as follows: *Texas & P. R. Co. v. Smith* (C. C. App. 5th C.) 31 L. R. A. 321, and *note*; *Doyle v. Fitchburg R. Co.* (Mass.) 83 L. R. A. 844; *McNulty v. Pennsylvania R. Co.* (Pa.) 38 L. R. A. 376; *Iannone v. New York, N. H. & H. R. Co.* (R. I.) 46 L. R. A. 780; and *Louisville & N. R. Co. v. Weaver* (Ky.) 50 L. R. A. 381.

As to person riding unlawfully by permission of employee, see *Wagner v. Missouri P. R. Co.* (Mo.) 3 L. R. A. 156; *Whitehead v. St. Louis, I. M. & S. R. Co.* (Mo.) 6 L. R. A. 409; *McVeety v. St. Paul, M. & M. R. Co.* (Minn.) 11 L. R. A. 174; *Woolsey v. Chicago, B. & Q. R. Co.* (Neb.) 25 L. R. A. 79; *Louisville & N. R. Co. v. Hailey* (Tenn.) 27 L. R. A. 549; and *Condran v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 28 L. R. A. 749.

One employed by a railroad, and carried to and from his work as part of his wages was held not to be in the employ of the company while being so carried, but a passenger, and entitled to protection as such.

O'Donnell v. Allegheny Valley R. Co. 59 Pa. 239, 98 Am. Dec. 336; *State use of Abell v. Western Maryland R. Co.* 63 Md. 433; *Gillenwater v. Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101; *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630; *Fort Worth & D. C. R. Co. v. Mackney*, 83 Tex. 410, 18 S. W. 949; *Perry v. Lansing*, 17 Hun, 34; *Gray v. Philadelphia & R. R. Co.* 24 Fed. Rep. 168; *Baltimore & O. R. Co. v. State use of Trainor*, 33 Md. 542.

The existence of the contract of carriage, as a fact, fixes the liability; and the law finds an adequate consideration for a contract of gratuitous carriage in the doctrine that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.

Coggs v. Bernard, 1 Ld. Raym. 909, 1 Smith, Lead. Cas. 199; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *Waterbury v. New York C. & H. R. R. Co.* 17 Fed. Rep. 671; *Gillenwater v. Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; *Ohio & M. R. Co. v. Selby*, 47 Ind. 479, 17 Am. Rep. 719; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246; *State use of Abell v. Western Maryland R. Co.* 63 Md. 433; *Todd v. Old Colony & F. River R. Co.* 7 Allen, 207, 83 Am. Dec. 679; *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Buffalo, P. & W. R. Co. v. O'Hara*, 12 W. N. C. 473; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640; *Prince v. International & G. N. R. Co.* 64 Tex. 144; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 58 Am. Rep. 848, 30 N. W. 282.

A passenger is not deprived of his right of redress for injuries sustained through the negligence of a carrier, merely because he was being carried gratuitously, he being a "steamerboat man," and it being the custom to carry such persons free.

The New World v. King, 16 How. 469, 14 L. ed. 1019.

Persons riding free by consent of the company fairly obtained are to be considered as passengers.

Austin v. Great Western R. Co. L. R. 2 Q. B. 442; *Todd v. Old Colony & F. River R. Co.* 3 Allen, 18, 80 Am. Dec. 49; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Washington v. Nashville & C. R. Co.* 3 Head, 638, 31 L. R. A.

75 Am. Dec. 784; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11, 125 Mass. 130; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423; *Buck v. People's Street R. Electric Light & P. Co.* 48 Mo. App. 555; *Thompson v. Yazoo & M. Valley R. Co.* 47 La. Ann. 1107, 17 So. 503. Messrs. Pritchard & Sizer for appellee.

Beard, J., delivered the opinion of the court:

The defendant in error, at the time of the injury he complains of in this action, was in the service of the plaintiff in error. His chief duty was that of night watchman at the company's depot in Chattanooga. Coupled with this, however, during his watch he was required to stand at the gate which shut off the railroad tracks from the station, and examine the tickets of parties seeking, and direct them to, its trains. On account of a slight injury previously received, he had laid off from service for a few days. About 8:30 o'clock of the morning of the day of the accident in question in this case he boarded one of the trains of the plaintiff in error at a point near his home, a short distance outside of Chattanooga, to ride to the station or depot of his employer, to report his readiness to return to duty the coming night. Just before reaching his destination the train on which he was riding had a head-end collision with a train of the Chattanooga, Rome, & Southern Railway Company, which, under a contract with the plaintiff in error, had the right to use its tracks at intervals. The injury for which the defendant sues resulted from this collision. Both companies were defendants in this action, and there was a verdict against both. A new trial was granted the Chattanooga, Rome, & Southern Railway Company, and disallowed as to the Chattanooga Rapid-Transit Company, and the case is before us on its appeal in error.

The declaration alleged negligence on the part of the two railway companies, but there was no evidence to sustain the averment. The case was rested, by the plaintiff below, on the proof of the accident, the resulting injury, and a presumption of negligence arising from the accident. The chief controversy in the case was as to the status of the defendant in error at the time of the accident, or, rather, as to the relation he then sustained to the plaintiff in error. The insistence of the rapid-transit company was that Venable was an employee of the company riding on one of its trains, in full knowledge of the fact that he was violating one of its rules, which forbade anyone to ride without the payment of fare or a pass from a superior officer, and in doing so he was a trespasser, to whom no duty was owed save not to inflict upon him wanton injury. On the other hand, the contention of the defendant in error was that he was a passenger, entitled to all the protection which the law attaches to the passenger relation. On this point the testimony of the plaintiff below was that ever since his employment by the company he had ridden on its trains to and

from his work without a pass or the payment of fare, and his right to do so had never been questioned by any of the conductors or other officers of the company, and that he had never heard of any rule requiring an employee to exhibit a pass or pay fare in order to ride. On the other hand, the conductor of the train testified there was a rule of the company posted in conspicuous places, by which conductors were forbidden to permit parties to ride without a pass or the payment of fare, save employees of the company going to or returning from their work, and that he had called the attention of Venable to this rule more than once, and had said to him on such occasions that he must either pay his fare or get a pass. He admitted, however, he had never enforced this rule against him or any other employee of the company, and that on the morning of the accident, and a little while before it occurred, he saw Venable on the train, but did not demand fare from him. On the point raised by this testimony of the conductor, the trial judge said to the jury that "if the plaintiff had been notified that he would not be allowed to ride on its train by virtue of his position as an employee of the road, and had been notified that he could not ride on its trains without a pass or the payment of fare, and he was undertaking to ride, at the time he claims to have been injured, without a pass or the payment of fare, and if there is nothing in the evidence to show he was on the train by the consent or permission of the conductor, he would not be entitled to recover." Again, putting his view of the law on this subject, so as to save all misapprehension on the part of the jury, he says: "If the proof shows that the plaintiff was on the defendant's [rapid-transit company's] train with the knowledge or by the consent of the conductor, then he occupied the position of a stranger, and not that of an employee of the defendant company, and it would owe him the same duty that a common carrier owes a passenger for hire. . . . And if he was on the train under that state of facts, and the proof shows there was a head-end collision, . . . the law would presume that there was negligence on the part of the defendant the rapid-transit company, and your verdict should be for the plaintiff, provided he was injured."

It is insisted that there is error in this charge of the court. A railroad company, beyond question, has the right to make and enforce reasonable rules for the control of its trains and persons thereon, not only to provide for the security of its passengers and employees (*Louisville & N. R. Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720), but to protect itself from imposition and wrong (1 Elliott, Railroads, § 199), and such rules cannot be abrogated by subordinate employees (4 Elliott, Railroads, § 1500). In recognition of this unquestioned right upon the part of the company, and the lack of power of the subordinate to wilfully abrogate such a rule, in *Louisville & N. R. Co. v. Hailey*, 94 Tenn. 383, 27 L. R. A. 549, 29 S. W. 367, it

was held that a party who was injured while traveling on a freight train was not entitled to recover where he induced a conductor to violate a known rule of the railroad company, which forbade the taking of passengers on a freight train without a permit from the superintendent. If, therefore, the instruction of the trial judge is to be taken as announcing a contrary view, it would undoubtedly be error. But we do not so understand it. It must be considered, and was no doubt so understood by the jury, in the light of the evidence of the case relied on by the defendant company. As has been seen from the testimony of the conductor, he had never exacted fare from Venable on any occasion when traveling on his train. The most he had ever done was to call his attention to the rule, and then permit him to travel unmolested. He had at no time put defendant in error to the alternative of paying his fare or getting off, as he had no pass, nor did he the morning of the accident. Before it happened he saw Venable riding in his train, yet he did not approach him. He not only did not ask him for fare, but he makes no pretense of a purpose on his part to do so. The presumption is that everyone not an employee in the service of the company in running the train, and traveling openly in the coaches upon a passenger train, is a passenger, and if riding with the knowledge of the conductor, and without interference from him, that he has been accepted by the company as such. 4 Elliott, Railroads, § 1578, and cases cited in notes. The fact that he is riding without the payment of fare makes him none the less the stranger or passenger. *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784. And it is evident that such a person cannot be converted into a trespasser until he resists or refuses to comply with the reasonable demand of him who is in charge of the train to pay his fare. That person is the conductor. He is the *alter ego* of the master, clothed with authority to control the train, and, among other things, to determine who shall or shall not be carried on it. He also, for himself, decides when he will demand fare, requiring a party either to pay it or leave the train. As said in *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784, the conductor is the officer intrusted by the company "with the duty of excluding all persons not lawfully entitled to be on the train."

The case at bar, according to the testimony most favorable for the company, is that of a party traveling on a passenger train under the eyes of the conductor, and who knows that under the rule his duty is to pay fare or furnish a pass, but who is not called upon to do either up to the time of the accident, and it is to this case that this instruction was directed. We think in such a case the railroad company cannot be exonerated from responsibility to such a party who suffers injury as a consequence of its negligence or want of care. On the contrary, his presence on the train by the permission of the conductor, to be implied

from his knowledge that the party was there, and his neglect to enforce the company's rule by requiring fare or a pass, made such person a passenger, and entitled him to the highest degree of care for his safety. *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 380; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336; *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784. Being a passenger, the rule is that negligence was to be presumed from evidence of the collision. 4 Elliott, Railroads, § 1635, and cases cited in notes. Applying the instruction to the facts of the case and in the light of the authorities, we think there was no error committed by the trial judge in this regard.

It is next assigned for error that the trial judge declined two special requests, as follows: "If he [the plaintiff] was riding on his own business, but according to the custom of employees, as alleged in the declaration, no presumption of negligence would arise from the mere fact of a collision. And again: If the facts alleged in the declaration were all true, it would not be such a case of the carriage of a passenger as would authorize you to infer or presume negligence from the mere fact of collision." The averments of the declaration to which these two requests were directed were as follows: "The plaintiff at the time of the injury was a passenger upon one of defendant's, the Chattanooga Rapid-Transit Company's, trains from Sherman Heights to Chattanooga, the plaintiff being a servant . . . of the defendant, but not on its said train, and not in the line of his duty at the time; his post of duty being at the station of the company in Chatta-

nooga. . . . He [plaintiff] lived in Sherman Heights, and it was the custom and habit of the company to carry him home after his work was finished upon its train, and back to his work," etc. We think there was no error in declining these requests. If the declaration had averred that plaintiff was at the time of the injury riding to his work at its station from his home by the courtesy or kindness of the company, without the payment of fare, there is no doubt the averment would have been good. Then, what difference can it make in the respective rights and liabilities of the parties that this kindness or courtesy of the company has ripened into habit or custom? Having no connection with the service of the train, and, as is implied from the averment, riding upon it for his own convenience and according to a custom, Venable was a passenger, and the law, on proof of his injury, would infer negligence from the collision which occasioned it. The weight of authority and of sound policy, we think, is that where a servant performs all his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger. *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 246, 98 Am. Dec. 336; *Fitzpatrick v. New Albany & S. R. Co.* 7 Ind. 436; *Doyle v. Fitchburg R. Co.* 166 Mass. 492, 33 L. R. A. 844, 44 N. E. 611; *McNulty v. Pennsylvania R. Co.* 182 Pa. 479, 38 L. R. A. 376, 38 Atl. 524; *New York, L. E. & W. R. Co. v. Burns*, 61 N. J. L. 340, 17 Atl. 630; *State use of Abell v. Western Maryland R. Co.* 63 Md. 433. Finding no error in the action of the court below, the judgment is affirmed.

WASHINGTON SUPREME COURT.

STANDARD FURNITURE COMPANY,
Appt.,
v.

Con VAN ALSTINE, Respt.

(22 Wash. 670.)

1. A vender of goods, with knowledge that they are to be used in a house of ill fame, must be deemed to aid and participate in the immoral and illegal use, so as to defeat its right of action to recover the goods from a purchaser thereof on sale under execution against the vendee, where the sale reserved title, ownership, and possession of the property, with the right to take possession even before maturity of the deferred payments, whenever the vender deemed itself insecure.

2. Purchasers of goods on execution sale subject to the rights of a prior vender of the property under a contract of conditional sale are not estopped to set up the il-

legality of such contract on the ground of public policy.

(July 25, 1900.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover possession of certain personal property alleged to belong to plaintiff, but which defendant had seized under execution as the property of a third person. *Affirmed.*

The facts are stated in the opinion.

Messrs. George F. Aust and Osborn & Steele, for appellant:

The levy and sale and purchase of the property in controversy having been made expressly subject to appellant's conditional contract of sale, the judgment creditor and purchaser—this respondent—is estopped to question the validity of the contract, from any cause whatsoever.

The amount of the lien, or the value of the outstanding title, of necessity becomes part of the purchase price or consideration.

NOTE.—As to right to recover price of property sold for unlawful use, see *Graves v. Johnson* (Mass.) 15 L. R. A. 834, and note. 51 L. R. A.

Mississippi Valley Trust Co. v. Hofius, 20 Wash. 272, 55 Pac. 54; *Skinner v. Reynick*, 10 Neb. 323, 35 Am. Rep. 479, 6 N. W. 369; *Forgy v. Merriman*, 14 Neb. 513, 16 N. W. 836; *Koch v. Losch*, 31 Neb. 625, 48 N. W. 471; *Parker v. Parker*, 52 S. C. 382, 29 S. E. 805; *Freeman v. Auld*, 44 N. Y. 50; *Hartley v. Harrison*, 24 N. Y. 170; *Chapin v. Thompson*, 89 N. Y. 271; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

The levy upon, and sale under execution of, the interest of a party in a contractual right, estop the judgment creditor from questioning the contract upon which the interest sold depends for its existence.

Bigelow, Estoppel, 2d ed. 503, 514.

A third person not a party or privy to a contract cannot question its validity on the ground that it is in contravention of public policy. The parties must be *in pari delicto* before the defense can be made. The policy of the law is to leave the two parties to the unlawful contract where it finds them.

Murray v. Julson, 9 N. Y. 73, 9 Am. Dec. 516; Note to *Lemon v. Grosskopf* (Wis.) 99 Am. Dec. 61; Note to *Boyd v. Barclay* (Ala.) 34 Am. Dec. 765; *Andrews v. New Orleans Brewing Asso.* 74 Miss. 362, 20 So. 837; *Woodworth v. Bennett*, 43 N. Y. 275, 3 Am. Rep. 700; *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348; *Kieucert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731, 1 N. W. 163.

Knowledge that property, innocent in itself and a legitimate subject of bargain and sale, may or will be put to an unlawful use, does not render void a contract for its sale.

Contracts, to be avoided on the doctrine, *contra bonos mores*, must be characterized by mutuality in the wrong. The parties must be *particeps criminis*. Although the parties may both be guilty of wrong, yet before either can take advantage of the other's guilt to avoid a contract, they must be *in pari delicto*.

Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; *Faikney v. Reynolds*, 4 Burr. 2069; *Schankel v. Moffatt*, 53 Ill. App. 382; *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Mahood v. Tealza*, 26 La. Ann. 108, 21 Am. Rep. 546; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *Anheuser-Busch Brewing Asso. v. Mason*, 44 Minn. 318, 9 L. R. A. 506, 46 N. W. 558; *Kreiss v. Seligman*, 8 Barb. 439; *McKinney v. Andrews*, 41 Tex. 365; *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383; *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516; *Tedder v. Odum*, 2 Heisk. 68, 5 Am. Rep. 25; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356.

Messrs. Richard Winsor, and Ballinger, Ronald, & Battle, for respondent:

The lease of chattels for operating a bawdy house is not different from a lease of real estate for the same purpose.

The testimony of the president of appellant shows this transaction to be void.

Benjamin, Sales, §§ 506-509; Story, Sales, §§ 206, 488; *Webster v. Munger*, 8 Gray, 587; *Chateau v. Singla*, 114 Cal. 91, 33 L. R. A. 750, 45 Pac. 1015; *Reed v. Brewer* (Tex. Civ. App.) 30 S. W. 99; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 419; *Dougherty v. Sey-* 51 L. R. A.

mour, 16 Colo. 289, 26 Pac. 823; *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272; *Uddike v. Campbell*, 4 E. D. Smith, 570; *Hamilton v. Grainger*, 5 Hurlst. & N. 40; *Davis v. Bronson*, 6 Iowa, 432; *Adams v. Couliard*, 102 Mass. 167; *Ely v. Webster*, 102 Mass. 304; *Riley v. Jordan*, 122 Mass. 231; *Wright v. Crabbs*, 78 Ind. 487; *Territt v. Bartlett*, 21 Vt. 184; *Aiken v. Blaisdell*, 41 Vt. 655; *Wilson v. Stratton*, 47 Me. 120; *Webber v. Donnelly*, 33 Mich. 471; *Rose v. Mitchell*, 6 Colo. 103, 45 Am. Rep. 520; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Dyett v. Pendleton*, 8 Cow. 727; *Appleton v. Campbell*, 2 Car & P. 347; *Hooker v. De Palos*, 28 Ohio St. 256.

The court will leave the parties in just the position in which it found them, and will not lend its aid in the enforcement of such contracts.

Turnbull v. Farnsworth, 1 Wash. Terr. 447; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *McBlair v. Gibbes*, 17 How. 232, 15 L. ed. 132; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631, 21 Pac. 230; *Spurgeon v. McElhain*, 6 Ohio, 442, 27 Am. Dec. 266; *Hooker v. De Palos*, 28 Ohio St. 251.

Fullerton, J., delivered the opinion of the court:

This is an action brought by the appellant, a domestic corporation, for the recovery of certain furniture and house-furnishing goods. The complaint was, in form, that commonly used in this state for the recovery of personal property *in specie*. The respondent, who was defendant below, after denying the allegations of ownership and right of possession of the property in appellant contained in the complaint, pleaded affirmatively that the appellant claimed title to the property by virtue of a certain agreement in writing by which two certain women purchased the property and agreed to pay appellant therefor, but without further description as to the character of the agreement. He then pleaded the recovery of a judgment by himself against the purchasers named in the agreement, the issuance of an execution thereon, the seizure and sale of the property under the writ of execution, and his purchase of the property and its delivery to him at the execution sale. He pleaded further that the vendees were, at the time of the execution of the written agreement and the delivery of the property by the appellant to them, the keepers of a house of ill fame in the city of Seattle; that the appellant had knowledge at the time the agreement was entered into, and at the time the goods were delivered, that the vendees were the keepers of a house of ill fame, "and that the said goods so delivered, and said written agreement aforesaid, were to aid and enable the said" vendees "to carry on and conduct a house of prostitution; . . . and that any sum remaining unpaid on account of said goods, if any did remain, was to be paid by said" vendees to the appellant "out of the earnings of said house of prostitution."

The appellant, in reply, admitted the judgment, levy, and sale, and that it claimed

title by virtue of a conditional contract of sale, but denied the other allegations of the affirmative answer. It then pleaded affirmatively the conditions of the contract under which the sale of the property was made, showing it to be a conditional sale, with "title, ownership, and possession of the property" reserved in itself until the purchase price should be paid; with the right, also, to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before maturity" of the deferred payments; that the purchase price was to be paid in monthly instalments of \$150 each, and that title should pass to the vendees when the last instalment should be paid; alleged a breach on the part of the vendees of the conditions of the contract, that the respondent had refused to perform the same, and its election to declare the contract forfeited. It then alleged, by way of estoppel, that the notice given of the execution sale at which the respondent purchased expressly recited that the property was to be sold subject to the contract of sale between the appellant and its vendees; that the officer conducting the sale orally proclaimed that fact at the time he offered the property for sale; and that the sale was actually so made.

At the trial, after the appellant had introduced its evidence and rested its case, the respondent called the president of the appellant, and proceeded to examine him touching the affirmative matter alleged in his answer not admitted by the reply. Before the examination of the witness was concluded, the court announced that the evidence was sufficient to warrant the court in holding that the contract was void as against public policy. He thereupon refused to permit the appellant to offer proofs on the matter alleged in the reply as an estoppel, took the case from the jury, and entered judgment in favor of the respondent.

It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient to justify the trial court in its holding that the contract was void as against public policy. It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of the vender of goods that the vendee designs to and will put them to an immoral or illegal use is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vender and vendee was that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to se-

cure the deferred payments of the purchase price. The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vender. On the other hand, it is held by all of the cases—even those which announce the rule contended for by the appellant—that if the vender has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vender cannot recover. *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Tracy v. Talmagh*, 14 N. Y. 162, 67 Am. Dec. 132; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Gaylord v. Soragen*, 32 Vt. 110, 78 Am. Dec. 154; *Aiken v. Blaisdell*, 41 Vt. 665; *Schankel v. Moffatt*, 53 Ill. App. 382; *Ralston v. Boady*, 20 Ga. 449; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167; *Graves v. Johnson*, 156 Mass. 211, 15 L. R. A. 834, 30 N. E. 818, and note to this case in 32 Am. St. Rep. 450; *Beach*, Modern Law of Contracts, § 457. And there are cases which hold that knowledge on the part of the vender that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the Supreme Court of the United States in *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only *malum prohibitum*, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case. See also *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381. Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vender. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vender, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved "title, ownership, and possession of the property," but reserved the right to "take possession of the aforesaid personal property whenever it may

deem itself insecure, even before the maturity" of the deferred payments. This practically left the control of the use of the property with the appellant, and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vender, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill fame, or to let a house knowing it was to be used for the purpose of prostitution (Wharton, *Crim. Law*, § 1459); that in this state these acts are made misdemeanors by statute (Ballinger's *Anno. Codes & Statutes*, §§ 7239, 7281); and that "any contract auxiliary to the keeping of a bawdy house, or otherwise encouraging prostitution, . . . is void" (Bishop, *Contr.* § 506; *Dougherty v. Seymour*, 16 Colo. 289, 26 Pac. 823; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294; *Chateau v. Singla*, 114 Cal. 91, 33 L. R. A. 750, 45 Pac. 1015; *Beach, Modern Law of Contracts*, § 1443). We are aware that the appellant, though it admits that it had knowledge at the time it entered into the contract that its vendees were prostitutes, and that the house where they lived and where the goods were delivered was in a section of the city known as the "Tenderloin District," contends that the evidence fails to show that it had knowledge that the house was kept as a house of ill fame. A perusal of the entire record, however, does not leave this question in doubt. Nor was there such a substantial conflict in the evidence thereon as to compel the trial court to submit the question to the jury.

It is further contended that the trial court erred in refusing to permit the appellant to offer proofs of the matter alleged in the reply by way of estoppel, but in this we find no error. No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy. It is because of the public interest, and not the desire to aid the defendant, that the courts refuse to enforce such a contract, and hence the doctrine of estoppel has no application. *Greenhood*, Pub. Pol. rule 126, and illustrations there given; *Beach, Modern Law of Contracts*, § 1499; *Turnbull v. Farnsworth*, 1 Wash. Terr. 444; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093.

The judgment is affirmed.

Dunbar, Ch. J., and Beavis and Anders, JJ., concur.
51 L. R. A.

W. C. STULL, *Appt.*,

v.

J. P. DE MATTOS *et al.*, *Respts.*,

(.....Wash.....)

1. A license tax of \$25 per day on persons selling stocks of merchandise or parts thereof at auction is not authorized by general provisions of law for the regulation of business, but is authorized by a charter giving power to license business for the purposes of regulation and revenue, since this power is conferred without limitation as to the amount of the tax.
2. Constitutional provisions as to uniformity of taxation do not apply to license taxes on business.
3. To determine the amount of revenue required for the needs of a municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion.
4. The intent of the council that a license tax shall be prohibitory is immaterial, if the council has power to impose the tax for the purpose of raising revenue, and the ordinance imposing it is valid on its face.
5. A license tax is not unconstitutional by reason of discrimination because it imposes a higher rate upon those who sell merchandise at auction than upon those who sell household furniture at the house where it has been in use.

(September 6, 1900.)

A PPEAL by complainant from a judgment of the Superior Court for Whatcom County in favor of defendants in a proceeding to enjoin interference with plaintiff's business for failure to comply with the ordinances fixing license taxes. *Affirmed.*

The facts are stated in the opinion.

Mr. John R. Crites, for appellant:

The charge of \$25 per day is unreasonable, oppressive, partial, not uniform as applied to class, restrains trade, contravenes a common right, and in effect is prohibitory.

The power conferred is not without limitation in its exercise: (1) It must be reasonable; (2) must not be oppressive; (3) must be impartial, fair, and general, and uniform as applied to class; (4) may regulate, but not restrain, trade; (5) must not contravene a common right.

1 Dill. *Mun. Corp.* 3d ed. §§ 254-325; *Cooley, Taxn.* 2d ed. 578, 597; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Re Quong Woo*, 13 Fed. Rep. 229; *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809, 42 N. W.

NOTE.—On the subject of auctions in street as a nuisance subject to city control there are some cases in a note to *Hagerstown v. Wimer* (Md.) 39 L. R. A. on page 678.

As to the limit of amount of license fees there is a note with the case of *State ex rel. Tol v. French* (Mont.) 30 L. R. A. 415. See also the cases of *Carrollton v. Bazette* (Ill.) 31 L. R. A. 522; *Re Haskell* (Cal.) 32 L. R. A. 527; *State v. Harrington* (Vt.) 34 L. R. A. 100; *Fleetwood v. Read* (Wash.) 47 L. R. A. 205; *State v. Foster* (R. I.) 50 L. R. A. 339; and *Morton v. Macon* (Ga.) 50 L. R. A. 485.

977; *State v. Moore*, 113 N. C. 697, 22 L. R. A. 472, 18 S. E. 342; *Sipe v. Murphy*, 49 Ohio St. 536, *sub nom. Re Sipe*, 17 L. R. A. 184, 31 N. E. 884; *State, Morgan, Prosecutor v. Orange*, 50 N. J. L. 389, 31 Atl. 240; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1071; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hayes v. Appleton*, 24 Wis. 542; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76; *State, Mühlenbrinck, Prosecutor v. Long Branch Comrs.* 42 N. J. L. 304, 36 Am. Rep. 522; *State Center v. Barrenstein*, 66 Iowa, 249, 23 N. W. 652.

Having tendered license fee which has been refused, business may be conducted without such license.

Royall v. Virginia, 121 U. S. 102, 30 L. ed. 883, 7 Sup. Ct. Rep. 826.

The court has jurisdiction to restrain its enforcement.

M. Schandler Bottling Co. v. Welsh, 42 Fed. Rep. 561; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 28 S. W. 528; *Spring Valley Waterworks v. Bartlett*, 16 Fed. Rep. 615; *New Orleans Waterworks Co. v. New Orleans*, 104 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1072; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 30 Atl. 648; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *South Covington & O. Street R. Co. v. Berry*, 93 Ky. 43, 15 L. R. A. 604, 18 S. W. 1026.

It may be enjoined, not only upon the ground of irreparable injury, to protect a common right, but also to prevent a multiplicity of suits.

Davis v. Fusig, 128 Ind. 271, 27 N. E. 726; *Platt & D. Canal & Mill Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Wood v. Brooklyn*, 14 Barb. 425; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 28 S. W. 528; 2 High. Inj. §§ 68, 1247.

Messrs. Charles H. Hurlbut and E. P. Nicholson, for respondents:

The jurisdiction of equity to grant injunctions is founded upon rights of property, and does not extend to a matter affecting an exclusively personal right.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21, 13 S. E. 700; *Paulk v. Sycamore*, 104 Ga. 24, 41 L. R. A. 774, 30 S. E. 417; *Corliss v. E. W. Walker Co.* 57 Fed. Rep. 434; *Wellenvoss v. Grand Lodge, K. of P.* 20 Ky. L. Rep. 113, 40 L. R. A. 488, 45 S. W. 360.

A city ordinance, passed under and in conformity to legislative power granted, cannot be set aside as unreasonable if the original proceeding was by injunction, but if by habeas corpus, or upon appeal, it may be.

State, Raffetto, Prosecutor v. Mott, 60 N. J. L. 413, 38 Atl. 857.

It is said that the license fee is excessive, 61 L. R. A.

but the local legislature is a better judge of this than the courts can be, and the discretion to fix the amount is confided to the common council, and not to the judiciary.

Wolf v. Lansing, 53 Mich. 370, 19 N. W. 38; *Ash v. People*, 11 Mich. 347.

Where there are no property rights the court will not interfere.

Rigby v. Connol, 28 Week. Rep. 650.

Even then, the injury to property must be irreparable. It must be of a peculiar nature, so that compensation in money cannot atone for it.

Gause v. Perkins, 56 N. C. (3 Jones Eq.) 177, 69 Am. Dec. 728; *Erhardt v. Boaro*, 113 U. S. 537, 28 L. ed. 1116, 8 Sup. Ct. Rep. 500; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Newall v. Staffordville Gravel Co.* (N. J. Eq.) 11 Atl. 495; *Leininger's Appeal*, 106 Pa. 398; *Torpedo Co. v. Clarendon*, 19 Fed. Rep. 231; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

A mere possibility of injury does not authorize the writ of injunction.

Dumesnil v. Dupont, 18 B. Mon. 804; *Truly v. Wanzer*, 5 How. 141, 12 L. ed. 88.

It is not sufficient for the bill simply to allege that the injury would be irreparable.

Thompson v. Williams, 54 N. C. (1 Jones Eq.) 176; *Bogey v. Shute*, 54 N. C. (1 Jones Eq.) 180; *Schoonover v. Bright*, 24 W. Va. 698; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Carney v. Hadley*, 32 Fla. 344, 22 L. R. A. 233, 14 So. 4.

To warrant relief in any case, it must appear that no adequate relief can be had at law.

Gartside v. East St. Louis, 43 Ill. 47; *State ex rel. Jaffray v. Ninth Dist. Judge*, 39 La. Ann. 1108, 3 So. 342; *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336.

Courts of equity will not by injunction prevent the institution of prosecutions for offenses for violation of municipal ordinances.

Paulk v. Sycamore, 104 Ga. 24, 41 L. R. A. 772, 30 S. E. 417; *Crighton v. Dahmer*, 70 Miss. 602, 21 L. R. A. 84, and *note*, 13 So. 237; *Neaf v. Palmer*, 20 Ky. L. Rep. 176, 41 L. R. A. 219, 45 S. W. 506; *Phillips v. Stone Mountain*, 61 Ga. 386.

A municipal ordinance is a legal law, and the same rules govern its construction as apply to the general statutes, and therefore the presumption is in favor of its regularity and validity.

Pittsburgh, O. C. & St. L. R. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Burmeister v. Howard*, 1 Wash. Terr. 208.

A reasonable ordinance is one that is not inconsistent with the charter or the state law, nor with those principles having relation to the liberty of the citizen, or the rights of private property.

1 Dill. Mun. Corp. 3d ed. 319; *Kruse v. Johnson* [1898] 2 Q. B. 91, 78 L. T. N. S. 647.

To set aside an ordinance for unreasonableness there must be no equipoise of opin-

ion; its unreasonableness must be demonstrably shown.

State ex rel. Kennedy v. Union Merchants' Exchange, 2 Mo. App. 96.

Restraints in form of regulation may be imposed upon the few for the benefit of the many.

Peoria v. Calhoun, 29 Ill. 317; 1 Dill. Mun. Corp. 3d ed. 362, and note.

Injunction will not lie to test or restrain the enforcement of municipal ordinances, imposing a penalty for disobedience, enacted under legislative authority.

Ewing v. Webster, 103 Iowa, 226, 72 N. W. 511; *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64.

The legislative grant of power to the city council to license and tax any business involves the determination of the extent or duration, and the sum to be paid.

Darling v. St. Paul, 19 Minn. 389, Gil. 336; Code 1896, 1224, subdvs. 10, 20.

Fullerton, J., delivered the opinion of the court:

The city of New Whatcom, by the terms of the general law under which it is incorporated, has power "to license for purposes of regulation and revenue, all and every kind of business, including the sale of intoxicating liquors, authorized by law, and transacted and carried on in such city, and all shows, exhibitions, and lawful games carried on therein and within 1 mile of the corporate limits thereof, to fix the rate of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Acting under the authority thus granted, the city council passed an ordinance providing for licensing auctioneers. Section 6 of the ordinance provides: "No sale of goods, chattels, or personal property at auction (excepting sales made under legal process, and imported live stock, sold for breeding purposes) within the city of New Whatcom, Washington, shall be made, excepting by an auctioneer or other persons who shall have first obtained from the city a license as hereinbefore provided." Section 7: "There shall be charged for every license granted for the selling of any household goods to be sold at the house where such goods have been in use the sum of fifteen dollars per quarter, or fifty dollars per year, payable in advance; and no license shall be granted for a shorter period than one quarter." Section 8: "There shall be charged for every license granted for the selling of any stocks of merchandise, or parts thereof, wearing apparel, dress goods, millinery goods, jewelry goods, and other stocks of goods, or parts of stocks of goods, the sum of twenty-five dollars per day, payable in advance; and no such license shall be granted for a shorter period than one day. Every applicant for such license having or professing to have a regular auction store or fixed place of business shall state in his written application the location of such store or place of business." Section 10 provides penalties for violations of the ordinance, and § 13 repeals all prior ordinances in conflict therewith. Prior to this 51 L. R. A.

time the city council had enacted an ordinance fixing the amount to be charged for auctioneer's licenses at \$25 per quarter. In December, 1898, the appellant was engaged in the retail jewelry business in the city of New Whatcom, and, being desirous of opening an auction store for the purpose of selling jewelry at auction, engaged the services of one Frank Triplett to act as auctioneer for him and applied to the proper officers of the city of New Whatcom for an auctioneer's license for one quarter in favor of Triplett, tendering to them the amount of the fee required by the old ordinance. The officers refused to issue the license, on the ground that the amount tendered was insufficient, by the terms of the ordinance in force, to authorize them to issue a license for the time demanded, and threatened to arrest and prosecute Triplett for violation of the ordinance in case he attempted to sell the appellant's goods at auction without paying a license fee at the rate of \$25 per day for each day during the time the auction should continue. This action was brought to restrain the threatened arrest and prosecution. Issue was taken on the allegations of fact in the complaint, and upon a trial judgment went in favor of the respondents. It is the contention of the appellant that the later ordinance is void, because the charge exacted as a license fee is (1) unreasonable, oppressive, and prohibitory; and (2) not uniform as applied to class.

1. We agree with the appellant in his contention that this ordinance cannot be upheld as a legitimate exercise of the power to regulate businesses granted to the municipality by the General Statutes. The power to regulate, while it vests in the municipal authorities a wide discretion, is not without well-defined limitations. Thus, as was said by the supreme court of Ohio in *Sipe v. Murphy*, 49 Ohio St. 536, *sub nom. Re Sipe*, 17 L. R. A. 184, 31 N. E. 884, construing an ordinance of the city of Columbus passed under a power granted that city to regulate and license the sale at auction of goods, wares, and merchandise imported into the city for the purpose of being sold at auction: "It is not to be presumed from the language of the statute, that it was the design of the legislature to authorize the passage of ordinances that would be unjust, or oppressive, or unfair and partial, or in restraint of trade, or in contravention of public policy, or containing special and unwarranted discriminations against property brought into the corporation from other parts of the same state to be sold at auction, or ordinances containing such discriminations against property brought into the corporation from another state for the same purpose, and thus in conflict with the powers of Congress to regulate commerce among the several states. And while ordinances subject to such infirmities cannot be deemed to be authorized by the statute, obviously it cannot be held that the municipal body has such authority by virtue of the general incidental power of municipal corporations to enact appropriate by-laws or ordinances." So, in *Simrall v.*

Covington, 90 Ky. 444, 9 L. R. A. 556, 14 S. W. 369, it was said: "Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right. It is a rule, therefore, that where the by-law of a municipality, enacted under a general grant of power or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right, or the general law of the state, or make unwarranted or special discriminations." Under the statute of Iowa authorizing cities of the first class to regulate and license sales within their corporate limits by auctioneers and transient merchants, the city of Ottumwa passed an ordinance fixing the amount of the license at auction or at private sale, at the rate of \$250 per month, or \$25 per day if a license was issued for a shorter period than one month. This ordinance was said by the supreme court of that state to be an abuse of the power conferred, and the ordinance was held invalid; the court saying: "The municipality, under the authority given it to license, had the right to impose such a charge as would cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business; but nothing beyond this. . . . It seems to us, in view of the nature of the business licensed; the fact that it was in no manner injurious to the public health or morals; that it was confined to a particular place, and was not of such a nature as to become a nuisance; that it did not require the police supervision, and was in no manner calculated to disturb the peace and quietness of the city,—that it is perfectly apparent that the fee exacted in this case was not required as a police regulation, but for the purpose of revenue to the city. It may also have been fixed at this sum to protect, in a measure, the home merchant against the passing one, who otherwise might not be called upon to pay anything to the support of the instrumentalities of government. But such protection, however desirable and just, cannot be afforded under an ordinance passed in virtue of authority given by the state to regulate and license. In passing we may observe that a comparison of the language used in §§ 462 and 463 of the Code clearly demonstrates that the legislature did not intend, by § 462, to confer upon municipalities the right to tax transient merchants, by the use of the words 'regulate and license.'" *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L. R. A. 734, 64 N. W. 646. It may be true, as the respondents argue, that, under an authority to license for the purpose of regulation, the amount proper to be charged as a license fee must be left largely to the discretion of the municipal authorities, and that the fee exacted need not be confined to the mere expense incident to the issuance of the license, but may be made sufficiently large to cover all costs that will be incurred in the oversight of the regulated business by the police officers, and create a fund sufficient to

prosecute violators of the regulations imposed, even though incidentally the revenues of the municipality may be increased thereby; and also that it is only when the ordinance is plainly unreasonable and prohibitive in its character that the courts may interfere, and pronounce it invalid. But, conceding this, as well as all else that can justly be claimed for the power to regulate the business of selling goods at auction, we think the present ordinance cannot be sustained as a legitimate exercise of that power. *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809, 42 N. W. 977; *State, Morgan, Prosecutor v. Orange*, 50 N. J. L. 389, 13 Atl. 240; *State v. Taft*, 118 N. C. 1190, 32 L. R. A. 122, 23 S. E. 970; *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.

Can the ordinance be upheld as an exercise of the taxing power? As has been shown, the statute expressly empowers municipalities of the class to which the city of New Whatoom belongs to license for the purpose of revenue as well as of regulation all and every kind of business, without limitation as to the amount of tax that may be thus imposed. For this reason it cannot be said that the ordinance in question is in excess of the power conferred upon the municipality by its charter. Nor is a tax of this kind within any of the inhibitions of the Constitution against unequal and ununiform taxation. This we determined in the case of *Fleetwood v. Read*, 21 Wash. 547, 47 L. R. A. 205, 58 Pac. 665. That case arose upon a conviction for the violation of an ordinance of the city of Tacoma which required dealers in merchandise, who gave to purchasers of goods coupons or similar devices, which enabled such purchaser to obtain from other dealers articles of merchandise on the surrender of the devices received, to pay a license fee of \$50 per year. It was insisted that the ordinance was void because it imposed a burden upon a portion, and not the whole, of a class of merchants, and that it was in violation of §§ 1, 2, 9, art. 7, of the state Constitution, which provide for uniformity in taxation. In passing upon these objections we held that the ordinance was uniform as to class, in that it made no distinction between merchants doing business in that particular way, and that the constitutional provision requiring uniformity and equality in taxation applied to taxes upon property, but had no application to taxes upon trades, professions, or occupations. The adjudicated cases on these questions were not collated by the writer of that opinion. They can be found partially collated, at least, in the cases of *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L. R. A. 608, 41 Pac. 826; note to *People v. Thurber*, 13 Ill. 554 (Smith & Hitchcock's reprint); where will be found also elaborate and thorough discussions of the principles involved. See, further, *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796.

The learned counsel for the appellant made the further contention that, even if there be no express constitutional inhibition against this mode of taxation, or the amount that may be levied thereunder, there is what may be called implied inhibition of the Constitution which can be invoked to prevent flagrant injustice and palpable wrong, though committed under the guise of a power so wide in extent as the taxing power,—such as those which guarantee the individual citizen against wilful aggressions on his personal rights, and unlawful confiscations of his property. There seems to be in authority, as well as in reason, support for this contention. Judge Cooley, in his work on Constitutional Limitations, discussing the question of the power of taxation, says: "Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." Cooley, Const. Lim. 5th ed. p. 603. In his work on Taxation, while speaking more directly to the question, he says: "If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose." Cooley, Taxn. 2d ed. p. 597. See also cases cited in support of the text; *Fretwell v. Troy*, 18 Kan. 271, 275. If, however, it be conceded that the courts have power to declare a municipal ordinance levying a license tax on businesses invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation, they will not determine the question by a mere inspection of the amount of the tax imposed. All presumptions and intentions are in favor of the validity of the tax. It will be presumed, in the absence of a contrary showing, that the municipal authorities acted justly and honestly, and not in disregard of the rights of the citizens or property holders of the municipality; that a necessity for the revenue to be derived from the tax exists; that an equally high rate has been levied upon all business and on all property; and, however large the particular tax complained of may appear to be, it will be presumed to be in harmony with all other taxation, and not an unjust or unreasonable

51 L. R. A.

discrimination. In other words, the mere amount of the tax does not prove its invalidity. To determine the amount of revenue required for the needs of the municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion. To quote Chief Justice Marshall, it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." Passing, then, to the record, the only evidence we find that might be said to support the contention of the appellant that the tax imposed by this ordinance is unreasonable and oppressive is the showing to the effect that the ordinance was passed upon the petition of certain merchants of New Whatcom; that no license had been taken out to sell merchandise in this manner since the ordinance went into effect; that the auction conducted by the appellant, held while the temporary restraining order issued in this case was in force, would have been unprofitable had he been compelled to pay the license fee required by the ordinance; and the statement of one of the witnesses that the ordinance was intended by the city council to be prohibitory. But we think this inconclusive. Every citizen of a municipality has an undoubted right to petition for such legislation as he may think will be beneficial to the community. The fact that no license has been taken out under the ordinance might be evidence that it was less profitable to sell goods in this manner than in the ordinary way, even had auction stores been common prior to the passage of the ordinance, but it would not prove that it was wholly unprofitable. Nor does the failure of the appellant have this conclusive effect. So many conditions enter into every business enterprise tending to make it successful or unsuccessful that it cannot be said that its nonsuccess is caused by any one condition. It may be the fault of the individual having the business in charge. Common experience needs only to be cited to prove that under exactly similar conditions many succeed where one fails. Neither is the intention of the city council in passing the ordinance material. If the ordinance be passed in accordance with the charter authorizing it, be lawful upon its face and its nature and effect, the courts will not generally inquire what motives induced its passage. *Freeport v. Marks*, 59 Pa. 253; *Buell v. Ball*, 20 Iowa, 282; *Dill. Mun. Corp.* §§ 311, 312.

2. It is insisted that the ordinance is not uniform as applied to class. As has been shown, the main contention of appellant under this head—namely, that the ordinance is invalid because it imposes a burden upon a portion, and not the whole, of a class of merchants—is concluded against him by the case of *Fleetwood v. Read*, 21 Wash. 547, 47 L. R. A. 205, 58 Pac. 665. The further objection is that the discrimination made by the ordinance in the amount of the license fee required of auctioneers for the sale of the goods described in § 7 and the amount

of the fee required for the sale of those described in § 8 is an unlawful discrimination. This could be so only on the theory that the business of selling property at auction is but a single "kind of business" within the meaning of these words as used in the city's charter. But, conceding this to be correct in principle, we know of no reason why the city council may not classify single kinds of business in accordance with the different charac-

ter and kind of property sold, and graduate the license tax in any manner that the exercise of a sound discretion dictates.

The judgment is affirmed.

Dunbar, Ch. J., and Reavis and Anderson, JJ., concur.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Board of Councilmen of HARRODSBURG,
App't.,
v.

R. C. RENFRO *et al.*

(.....Ky.....)

1. An ordinance fixing the amount of a license for the sale of intoxicants at \$300 more for a place on the main street than is required for a place on any other street is unconstitutional because it violates the spirit of the Constitution as to uniformity of laws,—especially in respect to taxation, and the prohibition against local and special legislation.

2. Payment in excess of the amount constitutionally chargeable for a license fee imposed under an unconstitutional ordinance entitles the one who pays it to recover it back from the city.

(October 30, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Mercer County sustaining a counterclaim of defendants to recover back excessive payment of license fees in an action brought to enforce payment of a sum still unpaid of the amount as fixed by ordinance. *Affirmed.*

The facts are stated in the opinion Mr. P. B. Thompson for appellant. Messrs. Gaither & Vanarsdall, for appellees:

No license can be imposed upon any trade, profession, or occupation, which discriminates against any person engaged in that particular calling.

Taxation should be equal and uniform, and the burden should fall on all alike.

Com. v. Wright, 79 Ky. 23, 42 Am. Rep. 203; *Marshall v. Donovan*, 10 Bush, 681.

Whenever a tax in the form of a license fee is imposed, under legislative authority, upon any trade, profession, or calling, it

must be levied on all alike in the same profession.

Bullitt v. Paducah, 8 Ky. L. Rep. 870, 3 S. W. 870; *Rankin v. Henderson*, 9 Ky. L. Rep. 861, 7 S. W. 174; *Simrall v. Covington*, 90 Ky. 444, 9 L. R. A. 556, 14 S. W. 369.

Municipal by-laws must be reasonable. Whenever they appear not to be so the court must, as a matter of law, declare them void.

Cooley, Const. Lim. pp. 200, 202; *Elliott v. Louisville*, 101 Ky. 262, 40 S. W. 690; *Municipality No. Two v. Dubois*, 10 La. Ann. 56; *St. Louis v. Spiegel*, 75 Mo. 146; *Timm v. Harrison*, 109 Ill. 593; *New Orleans v. Home Mut. Ins. Co.* 23 La. Ann. 449; *East Feliciana ex rel. Howell v. Gurth*, 26 La. Ann. 140.

Appellee had a right to recover on his counterclaim.

Stanford v. Hite, 2 Ky. L. Rep. 386; *Bergmeyer v. Greenup County*, 19 Ky. L. Rep. 1599, 44 S. W. 82; *Wilson v. Lexington*, 20 Ky. L. Rep. 1593, 49 S. W. 806; *Baker v. Lexington*, 21 Ky. L. Rep. 811, 53 S. W. 16.

White, J., delivered the opinion of the court:

The city of Harrodsburg is of the fourth class. Its board of council passed an ordinance as follows: "Resolved, that the fee for license to sell at retail spirituous, vinous, and malt liquors should be, and is hereby, fixed at six hundred dollars per annum, provided the business is carried on at any place upon any other streets than Main street, and provided there be no entrance from Main street to such place of business, and for license to conduct the saloon or retail liquor business upon Main street the sum of nine hundred dollars should be paid. Said license fees should be paid semiannually, cash in advance. The second payment to be secured by security approved by the city

NOTE.—As to necessity of uniformity in license or privilege tax, see earlier cases in this series as follows: *Chaddock v. Day* (Mich.) 4 L. R. A. 809, and *note*; *Simrall v. Covington* (Ky.) 9 L. R. A. 556; *Magenau v. Fremont* (Neb.) 9 L. R. A. 786; *Sayre v. Phillips* (Pa.) 16 L. R. A. 49; *Ex parte Williams* (Tex. Crim. App.) 21 L. R. A. 783; *Denver City R. Co. v. Denver* (Colo.) 29 L. R. A. 608; *Ottumwa v. Zekind* (Iowa) 29 L. R. A. 734; *State ex rel. Tol v. French* (Mont.) 30 L. R. A. 415, with *note* on limit of amount of license fees; *Carroll* 51 L. R. A.

ton v. Bazzette (Ill.) 31 L. R. A. 522; *Re Haskell* (Cal.) 32 L. R. A. 527; *State v. Harrington* (Vt.) 34 L. R. A. 100; *Singer Mfg. Co. v. Wright* (Ga.) 35 L. R. A. 497; *Banta v. Chicago* (Ill.) 40 L. R. A. 611; *State v. Gardner* (Ohio) 41 L. R. A. 689; *Phoenix Assur. Co. v. Montgomery Fire Department* (Ala.) 42 L. R. A. 468; *Fleetwood v. Read* (Wash.) 47 L. R. A. 205; *State ex rel. Wyatt v. Ashbrook* (Mo.) 48 L. R. A. 205; *Knisely v. Cotterel* (Pa.) 50 L. R. A. 86; and *Stull v. DeMattos* (Wash.) *ante*, p. 892.

council and no license to be issued for a shorter period than one year." The appellee, Renfro, was granted a license to sell, at retail, liquors, as provided under the ordinance. The business was to be conducted on Main street, so the license was put at \$900. The first half, \$450, was paid cash, and note with surety was executed for the second half. On this note Renfro paid \$250, and, failing or refusing to pay the remainder, \$200, this action was instituted to recover thereon. Appellee, by answer and counterclaim, attacked the validity of the provision of the ordinance fixing the license fee at \$900 for business on Main street, but alleged that under the ordinance the fee for license was and could only be \$600 per annum, and that he had already paid \$700. He then sought judgment for the \$100 he had paid in excess of the sum of \$600. The court overruled a demurrer to the answer and counterclaim, and, appellant electing to stand by its demurrer, the petition was dismissed, the note canceled, and judgment rendered for appellee for the \$100 overpaid. From that judgment this appeal is prosecuted.

The sole question presented for our consideration is the validity of the provision of the ordinance fixing the license fee at \$900 when the business is to be conducted on Main street, when at the same time the license fee for the same business conducted elsewhere than on Main street is only \$600. The ordinance in question was passed under authority of subsection 27, § 3490, Ky. Stat. (charter of cities of the fourth class). That subsection permits a division into three classes of license fees to sell spirituous liquors, viz.: By retail, to be drunk on the premises, or the ordinary saloon; the retail druggist, for medical purposes; and to sell in not less than a quart. There is no provision in that subsection, or, indeed, in the entire act, that authorizes the council to discriminate in license fees according to locality or street, or number of the house on the street. The council is given power and authority to refuse to grant a license to any person or in any locality, and its

determination of the matter is exclusive. Under this provision the council could refuse to grant a license to sell on Main street at all, or to conduct a business where there was an entrance from Main street. But that it did not attempt to do. The license was granted to sell on Main street. The whole spirit of the Constitution is that all laws shall be uniform within the limit of the lawmaking power, and especially that all taxation shall be equal and uniform within the territorial limits of the authority levying the tax. The state legislature is prohibited from enacting local and special legislation. It cannot be that the council of one of our cities can enact local or special legislation to apply to a part of the territory, or to a special person within the limits of such city. All persons are guaranteed the equal protection of the laws, and no grant of exclusive privileges can be made to any person, except in consideration of public services. We are clearly of the opinion that the ordinance fixed the license fee at \$600 and no more. The provision or exception as to Main street was special and local legislation, and is invalid. The council could have made the license for the city at \$900, but, if it had done so, it could not have then excepted business not conducted on Main street, and provided that such business not on Main street should pay only \$600. This would have been equally objectionable. The charter of a municipal corporation is a delegation of powers to its governing authority by the legislative branch of the government, and no powers will be presumed to have been granted that are not mentioned or not necessarily included in a general grant of power. Certainly a power that the legislature itself cannot exercise will not be presumed to be granted to a municipal corporation. It appearing from the answer and counterclaim that appellee had paid \$100 in excess of the license fee, he was entitled to recover same from the city. *Bruner v. Stanton*, 19 Ky. L. Rep. 1514, 43 S. W. 411.

There is no error.
Judgment affirmed.

TEXAS SUPREME COURT.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, *Plff. in Err.*, v.

A. E. FRALEY *et al.*, Exrs., etc., of Mrs. M. E. Fraley, Deceased.

(.....Tex.....)

1. An amendment to the constitution of a benevolent order incorporated as

NOTE.—For provision avoiding insurance policy in case of suicide, sane or insane, see note to *Billings v. Accident Ins. Co.* (Wt.) 17 L. R. A. 89.

For insanity as affecting provisions against suicide generally, see note to *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258.
51 L. R. A.

the "Sovereign Camp of the Woodmen of the World," when adopted by delegates assembled as the sovereign camp, in the manner required by the by-laws, is a proper exercise of the power given to the corporation to make its own constitution and to exercise general legislative authority, when the sovereign camp constitutes the supreme judicial department of the order, although an executive council composed of the officers of the sovereign camp may exercise legislative authority under certain conditions and limitations.

2. Authority to hold meetings for the exercise of strictly corporate functions outside of the state of incorporation arises by implication where the corporation constitutes the supreme legislative department of a benevolent order to be established

by it, with power to organize subordinate bodies throughout the United States and Canada.

2. A certificate of a benevolent order providing that it shall be void if the member die by his own hand, unless he is insane, though made on an application stating that it is subject to all the provisions of the constitution, is not controlled by a constitutional provision that there shall be a condition in every certificate making it void if the member die by his own hand, "whether sane or insane," since this is not a general provision of the constitution or by-laws making all certificates void if the insured shall commit suicide, but specifically relates to those certificates of which that condition shall be made a part; or, if it is a general provision, it will not apply as against one who was misled by the failure of the officers to insert the condition in his contract.

(December 8, 1900.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Harrison County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. H. Prendergrast, Brome & Burnett, and M. B. Parchman for plaintiff in error:

The court erred in holding that the beneficiary of W. B. Fraley had any right to question the validity of the amended by-law, he having joined the order and received his certificate after the amendment to the by-law was enacted by the sovereign camp.

1 *Waterman, Corp.* § 73; *Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1042; *Wood's Field Corp.* § 266; 1 *Bacon, Ben. Soc.* § 81.

The court erred in declaring void the amendment to the by-laws passed by the St. Louis meeting of the sovereign camp in 1897, for the reason that said amendment was passed at a meeting outside of the state of Nebraska, the state creating the corporation.

Taylor, Corp. § 382; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Missouri Lead Min. & Smelting Co. v. Reinhard*, 114 Mo. 218, 21 S. W. 488; *Camp v. Byrne*, 41 Mo. 525.

In a mutual benefit insurance fraternity, where the certificate refers to the by-laws of the order as controlling, then the by-laws contain the contract of insurance if there is a conflict between them and the certificate.

Splawn v. Chew, 60 Tex. 535; 1 *Bacon, Ben. Soc.* §§ 63-161; *Supreme Lodge of Protection, K. & L. of H. v. Grace*, 60 Tex. 572; *Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1042; *Bliss, Life Ins.* § 552; *May, Ins.* §§ 63, 64; *Biddle, Ins.* §§ 52 *et seq.*

A mutual benefit insurance company does not waive the benefit of one of its by-laws by reason of the fact that its officers issue certificates contrary to said by-laws.

Supreme Lodge K. of H. v. Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084; *Miller v. Hillsborough Mut. F. Assur. Asso.* 42 N. J. Eq. 51 L. R. A.

450, 7 Atl. 895; *Burbank v. Boston Police Relief Asso.* 144 Mass. 434, 11 N. E. 693; *Bacon, Ben. Soc.* §§ 121, 125, 148, 434a; *Story, Agency*, §§ 58, 133; *Morawetz, Priv. Corp.* § 580, 599; *Priest v. Citizens' Mut. F. Ins. Co.* 3 Allen, 602; *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541, 7 Atl. 394.

Where the by-laws provide that there can be no recovery if the insured commits suicide, sane or insane, then the beneficiary of an insane suicide cannot recover even though the certificate provides otherwise.

Splawn v. Chew, 60 Tex. 535; *Bacon, Ben. Soc.* §§ 101, 184.

The court erred in not holding that the beneficiary certificate issued to W. B. Fraley was issued without any authority from defendant company, because said certificate provided that the beneficiary could recover if Fraley committed suicide while insane; and the officers issuing the certificate had no authority to change or waive the by-laws.

Miller v. Hillsborough Mut. F. Assur. Asso. 42 N. J. Eq. 459, 7 Atl. 895; *Burbank v. Boston Police Relief Asso.* 144 Mass. 434, 11 N. E. 693; *Bacon, Ben. Soc.* § 171; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410.

In these mutual benefit orders the authority of the officers and agents is measured by the constitution and by-laws of the order; and when they exceed their powers there is no waiver, and the order is not estopped.

Supreme Lodge K. of H. v. Keener, 6 Tex. Civ. App. 273, 25 S. W. 1084; *Miller v. Hillsborough Mut. F. Assur. Asso.* 42 N. J. Eq. 459, 7 Atl. 896; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Baxter v. Chelsea Mut. F. Ins. Co.* 1 Allen, 294, 79 Am. Dec. 730; *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541, 7 Atl. 395; *Bacon, Ben. Soc.* § 148; *Story, Agency*, § 133; *McGowan v. Supreme Council, C. M. B. Asso.* 76 Hun, 534, 28 N. Y. Supp. 177.

The officers of a fraternal benefit society have no authority to waive those of its by-laws which relate to the substance of the contract between it and a member, determine the relations of the members to each other, or in any manner fix the rights and liabilities of the parties.

Burbank v. Boston Police Relief Asso. 144 Mass. 434, 11 N. E. 691; *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541, 7 Atl. 394; *Mulvey v. Shawmut Mut. F. Ins. Co.* 4 Allen, 116, 81 Am. Dec. 689; *Evans v. Trimountain Mut. F. Ins. Co.* 9 Allen, 329; *Harvey v. Grand Lodge A. O. of U. W.* 50 Mo. App. 472; *Lyon v. Supreme Assembly R. S. of G. F.* 153 Mass. 83, 26 N. E. 236; *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101; *Bacon, Ben. Soc.* § 171; *Brewer v. Chelsea Mut. F. Ins. Co.* 14 Gray, 209; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Leonard v. American Ins. Co.* 97 Ind. 305; *Behler v. German Mut. F. Ins. Co.* 68 Ind. 354; *State ex rel. Young v. Temperance Benev. Asso.* 42 Mo. App. 485; *Hysinger v. Supreme Lodge, K. & L. of H.* 42 Mo. App. 628.

The officers of a benefit society are special agents whose commission and authority are

to be found in the by-laws and articles of association.

Bacon, Ben. Soc. §§ 121, 148, 434, note a.

The rule as to special agents is that the party dealing with them must act at his peril, and is bound to inquire into the nature and extent of the authority conferred.

Story, Agency, §§ 58, 133; Bacon, Ben. Soc. § 125, and § 126, p. 206, note; Morawetz, Priv. Corp. §§ 580, 599; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348; *Leonard v. American Ins. Co.* 97 Ind. 299; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Bolton v. Bolton*, 73 Me. 299; *Borgraefe v. Supreme Lodge, K. & L. of H.* 22 Mo. App. 127; *Supreme Lodge K. of H. v. Keener*, 6 Tex. Civ. App. 273, 25 S. W. 1084; *Sovereign Camp, Woodmen of the World v. Rothschild*, 15 Tex. Civ. App. 463, 40 S. W. 553; *Re Globe Mut. Ben. Asso.* 63 Hun, 263, 17 N. Y. Supp. 852.

Messrs. C. E. Carter and T. P. Young, for defendants in error:

The exercise of the legislative power of a corporation—the right to make by-laws binding on all members, whether voting for the same or not—is the highest function the body can exercise, and is strictly a corporate act. This exercise of this power, being the performance of a corporate act, must be within the territorial limits of the state which incorporated the body.

Franco-Texan Land Co. v. Laigle, 59 Tex. 343; *Beattie v. Hardy*, 93 Tex. 131, 53 S. W. 686; 5 Am. & Eng. Enc. Law, 2d ed. p. 89, note 2; *Mitchell v. Vermont Copper Min. Co.* 8 Jones & S. 406; *Waterman, Corp.* pp. 210, 211; *Angell & A. Priv. Corp.* § 498; *Miller v. Euer*, 27 Me. 509, 46 Am. Dec. 619.

The power to make by-laws, existing in a corporation, must be exercised by that body in whom the charter has vested the lawmaking power; and any attempt at the exercise of this power by any other body is absolutely void. In this case the supreme executive council, or board of directors, had the power to make by-laws.

Supreme Lodge K. of P. v. Stein, 75 Miss. 107, 37 L. R. A. 775, 21 So. 559; *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493.

A member of a benevolent and co-operative mutual insurance company, such as appellant, is not bound by such void laws and regulations as some body of men other than the corporation has attempted to impress upon the corporation, whether such laws are passed before or after he becomes a member, especially in this case, when such corporation itself ignores such attempted laws, and treats them as not binding when it receives such member into its folds.

Supreme Lodge K. of P. v. Stein, 75 Miss. 107, 37 L. R. A. 775, 21 So. 559.

Where the corporation itself, by and through its general officers, and in accordance with a long course of dealing in issuing certificates, grants a certificate which is inconsistent with a by-law, which by-law is not observed in its dealings, the certificate controls, and the by-law must yield to the 51 L. R. A.

contract as stated in the certificate. Under such circumstances the beneficiary of the certificate must be held to have contracted with reference to its terms, and not with reference to a by-law disregarded by the corporation.

Davidson v. Old People's Mut. Ben. Soc. 39 Minn. 303, 1 L. R. A. 842, 39 N. W. 803; 16 Am. & Eng. Enc. Law, p. 36; 16 Am. & Eng. Enc. Law, 2d ed. p. 639, note 8; *Cooke, Life Ins. p. 20*; *Supreme Lodge Nat. Reserve Asso. v. Mondrowski*, 20 Tex. Civ. App. 322, 49 S. W. 919; Bacon, Ben. Soc. § 179, p. 229; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295.

A corporation such as a mutual benefit society may waive any by-law which was intended for the protection of the company; and where the general officers and directors of the company so disregard a by-law and issue a great number of certificates during a protracted course of dealing, it will be held to have waived such by-law in favor of those who have accepted such certificates under such circumstances.

Splawn v. Ohio, 60 Tex. 537; *Bankers & M. Mut. Ben. Asso. v. Stapp*, 77 Tex. 523, 14 S. W. 168; Bacon, Ben. Soc. § 171, p. 214 and § 426, p. 636; *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313, 64 Am. Dec. 377.

Brown, J., delivered the opinion of the court:

On the 1st day of January, 1891, under the general laws of the state of Nebraska, certain persons filed articles of incorporation for the purpose of creating what was to be known as the "Sovereign Camp of the Woodmen of the World." Article I provided that the name of the corporation should be "Sovereign Camp of the Woodmen of the World," with powers to make its own constitution, laws, rituals, rules of order and discipline, and secret work, and for supervisory and legislative control over the general laws and regulations of the sovereign camp, and its jurisdiction, and all its subordinate branches." The purposes of the organization were declared to be to organize and establish a social, fraternal, beneficiary, and benevolent order, "combining and associating together white male persons of sound bodily health, exemplary habits," etc., with power in the sovereign executive council to change the ages, etc.; to create a fund out of which to pay a sum not exceeding \$3,000 to the beneficiary designated by the member, upon proof being made of the death of the member, as required by the by-laws. The affairs of the corporation were to be conducted by an executive council composed of not more than thirteen members consisting of the elective officers of the sovereign camp. The plan was to organize local camps, called "membership camps," and what was known as "head camps," having supervisory control and authority over the membership camps, from which head camps delegates were to be selected, which composed the sovereign camp of the order. These delegates were required

to meet on the 2d Tuesday of March every two years, at such place as might be designated by the sovereign camp, the sovereign executive council, or the sovereign consul commander. It was provided that the first meeting should be held in 1895 at the city of Omaha, in the state of Nebraska, at which time the officers of the camp should be elected. The jurisdiction of the order extended throughout the United States and its territories and the Dominion of Canada. It was provided in the articles of incorporation that those articles might be altered or amended at any time at any meeting of the executive council by a two-thirds vote of the members present, or at a special biennial meeting of the sovereign camp by a two-thirds vote of the legal delegates present. The constitution of the order was adopted at the first meeting in 1895, which contained the following provision: "The following condition shall be made a part of every beneficiary certificate, and shall be binding on both member and order," among which conditions was the following: "If the member holding this certificate . . . should die by his own hand (except it be shown that he was at the time insane), . . . this certificate shall be null and void and of no effect." At a regular meeting of the delegates to the sovereign camp held in St. Louis, Mo., March 9-20, 1897, the constitution was so changed as to read as follows: "The following conditions shall be made a part of every beneficiary certificate, and shall be binding on both member and the order: . . . If the member holding this certificate . . . shall die by his own hand or act, whether sane or insane, . . . this certificate shall be null and void and of no effect." The constitution contained a clause prohibiting any officer or employee or agent of the sovereign camp or a head camp, or any camp, to waive any of the conditions upon which a beneficiary certificate issued, or to change or vary or waive any of the provisions of the constitution and laws, providing expressly, "Each and every beneficiary certificate is issued only upon the conditions stated in, and subject to, this constitution and laws." The change in that part of the constitution which prescribed the conditions of the certificate took effect on the 1st day of May, 1897.

In August, 1897, W. D. Fraley, by regular application, became a member of the order, and received a life beneficiary certificate, payable, in the event of his death while the certificate was in force, to his mother, Mrs. M. E. Fraley, for the sum of \$3,000, and \$100 for a monument. The certificate was issued subject to the constitution and by-laws of the order, which were declared to be a part thereof, and to certain conditions indorsed on the certificate, one of which was as follows: "If the member holding this certificate shall die by his own hand (except it be shown that he was at the time insane), then this certificate shall be null and void and of no effect." The application made by Fraley expressly stated that it was made subject to all the provisions of the constitution and the 51 L. R. A.

by-laws of the order. The reason given for not including in the certificate the condition expressed by the amendment to the constitution is that the new form of certificate had not been issued, and the officer used the old form. The certificate was signed by the sovereign consul commander and secretary of the Sovereign Camp of the Woodmen of the World.

On April 1, 1899, while a member of the order in good standing, and his certificate in full force, W. B. Fraley committed suicide, he being then insane. Mrs. M. E. Fraley died on May 15, 1899, leaving a will in which the defendants in error, A. E. and F. W. Fraley, were appointed executors. The will was duly probated; and the officers of the Sovereign Camp of the Woodmen of the World having refused, upon proper proof of the death of Fraley and his insanity, to pay the amount of the certificate, this suit was brought by the executors of Mrs. Fraley to recover the sum of \$3,000, expressed therein, and \$100 for a monument. The case was tried before the district judge without a jury, and a judgment was entered for the plaintiffs below for the amount sued for, which judgment was by the court of civil appeals affirmed.

The three controlling questions presented in this case are: (1) Did the Sovereign Camp of the Woodmen of the World which assembled at St. Louis have the power to enact laws for the government of the order? (2) If it had that power, was it authorized to do so at the meeting held at the city of St. Louis? (3) If those questions be held in the affirmative, can the sovereign camp defeat a recovery on this certificate because the insured, being insane, committed suicide?

The articles of incorporation adopted "The Sovereign Camp of the Woodmen of the World" as the name of the corporation, which was empowered to make its own constitution and to exercise general legislative authority. The executive powers of the corporation were confided to an executive council composed of the officers of the sovereign camp, and under certain conditions and limitations the council might exercise legislative authority. Authorized delegates from the head camps were required to meet every two years, and when assembled were denominated "The Sovereign Camp of the Woodmen of the World," and constituted the supreme legislative department of the order, to which was committed the authority to make its laws. The amendment in question was adopted by the delegates assembled as the sovereign camp, in the manner required by the by-laws. It was a proper exercise of power given to that body.

It is claimed that the corporation could not hold a meeting for the exercise of strictly corporate functions outside of the state of Nebraska, under whose laws it was organized. That is the rule with regard to ordinary corporations. *Franco-Texan Land Co. v. Laible*, 59 Tex. 343. That rule, however, is based upon public policy, which seeks to protect the stockholders from meetings which might be held at places remote from

their homes, or of which they had not been notified; but the reason is not applicable to this class of corporations, because, in the first place, there are no stockholders, in the sense in which that term is ordinarily used. Such associations are composed of members living in various states,—usually the greater number outside of the state in which the corporation was created. Their interests demand that the meetings of the supreme legislative department be held as near to the membership as possible, and to accomplish this purpose the place of meeting is usually changed at each convocation of the body. Sound public policy sustains such a proceeding as consistent with the rights of persons interested in the management of the corporation. In the second place, when a corporation like this is created, with power to organize subordinate bodies over so large a scope of country as the United States and the Dominion of Canada, it is necessarily contemplated that the greater part of the business will be transacted beyond the territory of the state in which it has its origin, and the authority to hold the meetings at such place as may be best adapted to the purpose of its creation arises by implication. *Derry Council, No. 40, J. O. U. A. M. v. State Council J. O. U. A. M.* 197 Pa. 413, 47 Atl. 208.

As amended, the language of the constitution is: "The following conditions shall be made a part of every beneficiary certificate, and shall be binding on both member and order: . . . If the member holding this certificate shall die by his own hand or act, whether sane or insane, . . . this certificate shall be void and of no effect." The provision is a command to the

officers of the sovereign camp to embody the prescribed condition in each certificate there after issued, which binds the member accepting it, and the order issuing it. This is not a general provision of the constitution, nor a general by-law of the order, which declares all certificates void if the insured shall commit suicide, but, in direct and specific terms, declares void that certificate of which it shall be made a part. The rule of construction, that the intention of the parties to a contract must be declared and enforced, applies in this case, and demands that the certificate, as issued, shall be upheld as against the amended article. If, however, we consider it in the light of a general by-law or resolution, and that it was intended, by inserting it in the certificate, to give notice to the member of its existence, then, the officers of this order having failed to insert that condition, Fraley was misled, and caused to enter into a contract of membership that he might not have accepted if the terms had been expressed as now claimed. Having assumed the duty of notifying the member of the existence of that provision, he was not chargeable with knowledge on the ground that it was a by-law of the order. The plaintiff in error is bound by the notice as it was actually given by its officers at its direction. *Fitzgerald v. Equitable Reserve Fund Life Asso.* 18 N. Y. S. R. 914, 3 N. Y. Supp. 214; *Warnebold v. Grand Lodge, A. O. U. W.* 83 Iowa, 23, 48 N. W. 1069; *Davidson v. Old People's Mut. Ben. Soc.* 39 Minn. 303, 1 L. R. A. 482, 39 N. W. 803. The certificate of membership must govern in determining the rights of the parties, and the judgments of the District Court and Court of Civil Appeals are affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

Morton MARYE, Auditor of Public Accounts, etc.,
v.

J. Singleton DIGGS et al.

(.....Va.....)

A suit by the state or by a county for the collection of taxes is not within the jurisdiction of a court of equity, where the statutes have provided efficient remedies to enforce payment of the taxes without suit.

(December 6, 1900.)

CCROSS-APPEALS from a decree of the Circuit Court for Patrick County rendered in a suit to enjoin the removal of timber from lands on which the commonwealth and county of Patrick claimed liens for taxes until the property should be redeemed.

NOTE.—Earlier cases in this series on the right to bring suit to enforce payment of taxes are *Louisville Water Co. v. Com.* (Ky.) 6 L. R. A. 69; *Mercler's Succession* (La.) 11 L. R. A. 817, and note; and *State v. Georgia Co.* (N. C.) 19 L. R. A. 485.
51 L. R. A.

ed from such liens; the auditor appealing from so much of the decree as reduced the amount of taxes alleged to be due; and defendant appealing from so much as sustained the jurisdiction of the court. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

Messrs. P. Bouldin, Jr., and J. M. Hooker, for plaintiff:

The court below did not transcend its jurisdiction; it did not make any new assessment.

Equity has been defined to be "the correction of that wherein the common law, by reason of its universality, was deficient."

Equity is the proper forum to ascertain and enforce liens against land; to correct all sorts of mistakes. A tax assessed is a lien on the land.

Equity claims exclusive jurisdiction wherever upon the principles of universal justice the interference of a court of judicature is necessary to prevent a wrong and the positive law is silent.

Fonblanque, Eq. ed. 1807, note, pp. 10, 11.

In this state the tax lien has been enforced

for titles (*Powell v. Richmond*, 94 Va. 79, 26 S. E. 389); for individuals who had been required to pay (*Repass v. Moore*, 96 Va. 147, 30 S. E. 458, and *Simmons v. Lyles*, 32 Gratt. 752); and for the commonwealth herself on a petition filed in a pending suit in circuit court of Albemarle. *Com v. Ashlin*, 95 Va. 145, 28 S. E. 177.

A citizen may enjoin the collection of on illegal tax.

Shenandoah Valley R. Co. v. Clarke County Supers. 78 Va. 209.

If this land were owned and claimed by an individual, and some nonresident, or, for that matter, anyone, were destroying the substantive value of the estate,—the standing timber,—equity would enjoin, and, having obtained jurisdiction upon one ground, would go on and administer full relief, even to trying purely legal titles.

Miller v. Wills, 95 Va. 337, 28 S. E. 337; *Rakes v. Rustin Land, Min. & Mfg. Co.* (Va.) 22 S. E. 498.

If an individual held a lien on this land for all it was worth, and the timber was its chief value, and it was being spirited away, this would be equitable waste. "It is an unconscientious or unreasonable exercise of a legal right, for which the law provides no remedy," and it may exist without any malicious intent.

High. Inj. 3d. ed. §§ 680, 326, 480.

The state has inherently all remedies not voluntarily relinquished.

State v. Georgia Co. 112 N. C. 34, 19 L. R. A. 485, 17 S. E. 10; *State v. Burkholder*, 30 W. Va. 593, 5 S. E. 439; *Com. v. Field*, 84 Va. 26, 3 S. E. 882; *Com. v. Ford*, 29 Gratt. 683; *State v. Baltimore & O. R. Co.* 41 W. Va. 81, 23 S. E. 677.

Mr. A. J. Montague, Attorney General, also for plaintiff.

Messrs. Diggs & Perkins, for defendants:

A chancery court has no jurisdiction to compel a landowner to redeem his land from a tax sale; nor to give the commonwealth the possession of land alleged to be forfeited; nor to enforce a perfectly regular tax lien; nor to wipe out all taxes and levies as theretofore laid by the statutory officers, because the same were null and void, and proceed to relist, reassess, and retax the land, ascertain the amount, fix the lien, and decree the payment and the sale of the land by its own commissioner to satisfy the lien thus fixed and the cost of the suit.

Cooley, Taxn. p. 324; *Black, Tax Titles*, § 51; *Cabin Creek Dist. Bd. of Edu. v. Old Dominion Iron, Min. & Mfg. Co.* 18 W. Va. 441; *State v. Baltimore & O. R. Co.* 41 W. Va. 81, 23 S. E. 677; *Virginia & T. R. Co. v. Washington County*, 30 Gratt. 485; *Richmond v. Richmond & D. R. Co.* 21 Gratt. 617; *Willis v. Com.* 97 Va. 667, 34 S. E. 460; *Lane County v. Oregon*, 7 Wall. 71, 19 L. ed. 101; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Crapo v. Stetson*, 8 Met. 394; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 435; *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 44, 4 Am. 51 L. R. A.

Dec. 80; Turnpike Comrs. v. Louisville & N. R. Co. (Ky.) 1 S. W. 671; *Cole v. Muscatine*, 14 Iowa, 296; *Camden v. Allen*, 26 N. J. L. 398; *Alexandria v. Heyman*, 35 La. Ann. 301; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Heine v. Lerce Comrs.* 19 Wall. 655, 22 L. ed. 223; *Carondelet v. Picot*, 38 Mo. 125; *People v. Biggins*, 96 Ill. 481.

Keith, P., delivered the opinion of the court:

Morton Marye, auditor of public accounts of the commonwealth of Virginia, suing for the benefit of the commonwealth and the county of Patrick, filed a bill in the circuit court of said county to enforce the lien for certain taxes due and unpaid upon a large tract of land owned, at the time the suit was instituted, by J. Singleton Diggs. The bill charges that the title of this land was formerly in one John R. Allen, who remained charged with all the taxes upon it down to the year 1894. In Allen's name it had been returned delinquent, was sold, and bid in for the commonwealth for taxes; but it afterwards appearing, for reasons which need not be specifically stated, that there had been no delinquency on Allen's part, he having parted with his title to one James L. Maury, the sale and purchase by the commonwealth were void, and this land was assessed to James L. Maury and others for taxes accruing for each year from 1894 back to and including 1876, with interest, as provided by §§ 479 and 632 of the Code of 1887. The taxes thus assessed were not paid, were returned delinquent, and the land in due time was regularly offered for sale by the treasurer of Patrick county, and it was again bid in by the commonwealth on January 28, 1896, for taxes amounting as of that date to \$4,412.32 due the state and \$12,298.36 due to the county. By conveyances referred to in the bill, Diggs now claims to be the fee-simple owner, and the bill charges him as acting and treating the same as his own, irrespective of the rights of the commonwealth and the county of Patrick. The bill further charges that Diggs has sold the timber on the land, which has again been sold by his alienee, and it is charged that these purchasers of the timber are making active preparations to cut and remove it from the land; that the timber is very valuable, but that the land itself is rugged, and will, when the timber is removed, be sufficient to pay the taxes, levies, and interest, which now amount to more than \$20,000.

Diggs, and those claiming rights in the timber under him, are made parties defendant, and the prayer of the bill is that the defendants, their agents, employees, and all other persons be enjoined and restrained from cutting or removing any timber whatsoever, and from placing any sawmills thereon, and from interfering with said land in any way, until the further order of the court; that Diggs may be required to redeem said land, or discharge the clouds he has placed upon the title; and that he be

enjoined from collecting any part of the purchase money due for the timber already sold.

This bill, it will be observed, avers that the title is in the commonwealth by purchase at a tax sale, and that she comes into a court of equity to restrain trespass upon, and waste of, her property.

At a later day an amended and supplemental bill was filed, in which it is claimed that, if the complainant is not entitled to relief upon the grounds stated in the original bill, there exists a lien in favor of the state and county for taxes and levies, and that, to protect them in their respective rights as lienors, the court will, under the peculiar circumstances of the case, restrain the defendants from trespass and waste, and take the necessary steps to sell the land and pay the liens upon it.

To these bills the defendants filed demurrers, pleas, and answers, which present a number of questions for adjudication. Of these, the most serious is that a court of chancery is without jurisdiction to entertain the bill of the plaintiff.

Before entering upon a discussion of this most interesting question, it may be well to observe that the right of the commonwealth as a purchaser of the land at a sale for delinquent taxes is not insisted upon.

The decree of the circuit court, which in part grants the relief prayed for by the commonwealth, and which is appealed from because it did not grant all that she demanded, rests upon the proposition, not that the commonwealth is a purchaser of the land in controversy, but that she and the county of Patrick have a lien upon it for taxes due and unpaid, and it is this aspect of the case alone that we shall consider.

It is insisted upon by counsel for appellants that neither the commonwealth of Virginia nor the county of Patrick has any standing in a court of chancery to enforce a lien for taxes.

The proposition is that the obligation of the citizen to pay taxes is imposed by the state by virtue of her sovereign power; that it is purely of statutory creation; and that taxes can only be levied, assessed, and collected in the mode pointed out by express statute. Cooley, Taxn. 2d ed. p. 15. At page 448 the same author says: "It is not uncommon to provide by statute for the enforcement by suit, either in the law courts or in equity, of the lien for taxes. . . . In considering this remedy by suit, it is to be kept in mind that it exists only by force of the statute." To the same effect, see Black, Tax Titles, § 54; 1 Desty, Taxn. 407.

In *People v. Biggins*, 96 Ill. 481, it is said: "A court of chancery has no jurisdiction to enforce the lien upon real estate given by statute for taxes assessed thereon. Such lien is purely legal in its character, the creature of the statute, not arising upon contract, and can be enforced in the mode provided by the law of its creation, and in no other mode.

"If the revenue law be defective in respect of the remedy provided for enforcing such a lien, that is a matter of legislative concern, 51 L. R. A.

not calling upon the courts to provide a remedy by extending the equitable jurisdiction beyond its recognized limits.

"Nor does the fact that it is the state which is seeking to enforce the lien operate in any way to change the rule upon the question of jurisdiction. The officers of the state in the collection of revenue are as much bound to observe the law and to proceed in the mode pointed out by the statute as an individual is required to observe the law in the enforcement of any right."

Crapo v. Stetson, 8 Met. 393, was an action of assumpsit to recover taxes by the town of New Bedford, Mass. It was held that "it is well settled that the law gives no remedy for the collection of taxes other than those provided by statute; and, unless the mode now sought to be enforced is given by statute, it does not exist." *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Brule County v. King*, 11 S. D. 294, 77 N. W. 107.

In *McLean County Precinct v. Deposit Bank*, 81 Ky. 254, the court says: "The power to levy or collect taxes is not one of the inherent powers of any judicial tribunal. The duty and the power is legislative. If, when the legislature fails to enact proper legislation, or to provide the means of collecting taxes imposed, the judiciary may interpose, the theory of the government and the distribution of powers are destroyed." *Camden v. Allen*, 26 N. J. L. 399; *Shaw v. Peckett*, 26 Vt. 482.

The question under consideration is of such importance that we have deemed it proper to search the decisions of many states for precedents to guide us to a right conclusion. The cases which we have cited are sufficient to show the general tenor of opinion upon the subject.

We now come to a case decided by the supreme court of West Virginia, which, for obvious reasons, is entitled to great weight in aiding our determination. Judge Green, delivering the opinion, in which he reviews the cases to which we have referred and many others, says: "It is true that cases have been decided where it has been held that the imposition of a tax created a legal obligation to pay, on which the law raised an assumpsit, notwithstanding the statute gave another specific remedy; and on this implied assumpsit an action at law would lie; . . . but these decisions are against both reason and the decided weight of authority. It would follow, therefore, that taxes are not a lien upon lands, unless made so by express language of the statute, or by fair implication from the statutory language. . . .

"When a municipal tax is declared to be a lien, and no mode of collection is prescribed by the statute, and no power to collect by sale exists, such lien may be enforced in equity by the municipal corporation instituting the suit; . . . yet a tax is not a debt, and the right of the municipality to bring such a suit in equity is a purely statutory right, which must be either expressly given or be given by fair implication. . . .

It would seem necessarily to follow that, though a municipal tax was expressly declared by statute to be a lien, yet if a specific mode be provided, whereby the land may be sold to satisfy such a lien, no suit could be brought in a court of equity to enforce such a lien; for the foregoing decisions show that the specific statutory mode of collection must be pursued, and other cases lead to the same conclusion." Further on, he says: "There is nowhere in our laws any authority to collect them by suit, or anything from which such authority could be implied." *Cabin Creek Dist. Bd. of Edu. v. Old Dominion Iron, Min. & Mfg. Co.* 18 W. Va. 445.

This decision was subsequently reaffirmed in *State v. Baltimore & O. R. Co.* 41 W. Va. 81, 23 S. E. 677.

In many of the cases which we have considered, it seems to be conceded that if a tax be properly levied and assessed, and no means be provided by law for its collection, resort may be had to the courts for that purpose; and in such case, if the tax be made a lien upon real estate, a court of chancery would, by parity of reason, have jurisdiction to enforce it by sale of the land; but there is no such defect in our laws for the collection of taxes as would warrant courts in the assumption of jurisdiction for that purpose. As is well said by the supreme court of West Virginia in *State v. Baltimore & O. R. Co.* 41 W. Va. 81, 23 S. E. 677, where this whole subject is fully and ably discussed, and the conclusion reached that the courts have no jurisdiction to entertain suits for the collection of taxes: "The absence of remedies in the two states [Virginia and West Virginia], through all their history, is easily explained. The remedies given by statute were better, more speedy, and efficacious. These were sale of land for taxes, and distress of personalty without exemption. Why fill the courts with suits, burden the state with endless delays of litigation, and burden the citizen with costs? If a railroad company defaults in payment of taxes, every wheel upon its tracks may be stayed, every particle of its movable property be taken, and its power to earn revenue taken away. What more drastic remedy can the wit of man devise? It is urged that the statute commands the railroad to pay, and this begets obligation, and therefore action lies. Grant there is obligation, and it can be enforced; but the same statute points out the means of enforcement, and excludes a suit."

The citizen must come into a court and obtain a judgment before he can have execution against the property of his debtor. He must have a decree before he can sell the land of his debtor to discharge a lien upon it by judgment, but the state, when she has levied and assessed the tax, is clothed *ipso facto* with the power to take the personalty by distress, and the realty by sale for taxes, after a most summary proceeding. What more can she need? What necessity exists for the power to sue? In the language of the court just quoted, "What more drastic remedy can the wit of man devise?" Where

the property of the citizen is not appropriated to the payment of taxes assessed against him, the failure is due, not to the insufficiencies of the remedies provided by law, but to the neglect and inefficiency of those whose duty it is to enforce them.

In *Com. v. Ashlin*, 95 Va. 145, 28 S. E. 177, the state came into the chancery court of Albemarle county, and filed her petition in the pending suits of *Scott v. Langhorne* and *Scott v. Ashlin*, which had been brought to subject the real estate of Charles A. Scott to the payment of his debts. It appeared that the land had been sold for taxes; that at the sale the state had become the purchaser, and its title under this purchase was complete. She might, therefore, have seized and appropriated the whole subject of litigation, but by her petition she offered to relinquish this right upon the payment of the taxes justly due. The question there discussed was as to the nature and extent of the lien for taxes. The right of the state to come into a court of chancery was not challenged. This court held that "the lien of the commonwealth on land for taxes assessed thereon after the death of the owner is superior and paramount to the right of creditors of the decedent to subject the land to the payment of their debts. Where this lien has been perfected by a sale of the land for delinquent taxes and a purchase thereof by the commonwealth, she stands as a purchaser for value. If she offers to relinquish her title only upon payment of the taxes justly due, creditors of the decedent cannot complain."

It will be observed that in the case just cited the commonwealth came by petition into a chancery suit properly brought in the circuit court of Albemarle. A court of chancery will permit a party to seek its aid and protection by petition in a pending suit, although the petitioner would have no standing in court to institute a suit on his own behalf. Of this practice many illustrations may be given. A creditor with a judgment for less than \$10 could not enforce it by suit until a statute was passed permitting it to be done, but it is believed that he might at any time have come into a pending suit and have proved his claim. So in the case of a nonresident lienor, who may, by reason of his nonresidence, bring suit in the United States circuit court to subject real estate to the payment of his lien; and into that suit we apprehend may come domestic lienors, who would have had no standing in that court to institute the suit. *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163; *Belmont Nail Co. v. Columbia Iron & Steel Co.* 46 Fed. Rep. 338. The practice rests upon this principle: That a court of equity, being clothed with jurisdiction to sell real estate and administer the funds, must clear the title which it proposes to sell, and to that end will convene before it all those who have liens upon it. We believe it is the practice in the courts of the United States to sell land subject to liens, but doubtless the jurisdiction exists to first

ascertain and marshal the liens, and then sell free from encumbrance.

In the case of *Com. v. Ashlin*, 95 Va. 145, 28 S. E. 177, suit had been properly instituted, as we have seen, to subject the land of Scott to his debts. The demand of the commonwealth constituted such an encumbrance and cloud upon it as would have impaired, if not defeated, its sale. Therefore a court of chancery rightfully entertained the petition as a necessary incident to the jurisdiction it was bound to exercise; and that the commonwealth relinquished its right as purchaser, and accepted the amount due for

taxes in full discharge of its claim, was a matter by which no one else was aggrieved. This is in accordance with the general practice in the state, which always protects the commonwealth and her collecting officers wherever a court of chancery is called to administer a fund, and it is found that there is a demand against it for unpaid taxes.

We are of opinion that neither the commonwealth nor the county of Patrick can maintain a suit for the collection of taxes, and the decree of the Circuit Court of Patrick county must be reversed, and the bill dismissed.

WISCONSIN SUPREME COURT.

William J. LYLE, *Respt.*,

v.

MCCORMICK HARVESTING MACHINE COMPANY, *Appt.*

(.....Wis.....)

1. The payment of a note which has been transferred to an innocent purchaser by the payee in violation of his contract with the maker is not a condition precedent to a right of action by the maker for breach of the contract, notwithstanding that he is insolvent.
2. The insolvency of the plaintiff is a fact to be considered on the question of his damages for breach of contract by transferring to a bona fide purchaser a note made by him, but which he has not paid.
3. The question whether a judgment against the plaintiff could be collected upon execution need not be submitted to the jury in an action by him for breach of contract in transferring to a bona fide purchaser a note which he has not yet paid, where the court has told the jury that his insolvency or the collectibility of the judgment is an element to be taken into consideration in ascertaining the amount of his damages.
4. The refusal to give an instruction as to a question submitted to the jury is proper when the only portion of it which is in anywise broader or more instructive than the question itself consists of a general rule of law respecting the effect of an answer given to the interrogatory.

(October 30, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Dodge County in favor of plaintiff in an action to recover damages for the alleged wrongful transfer of a note made by plaintiff to defendant, the consideration for which had failed. *Affirmed.*

NOTE.—The effect of an agreement restricting the transfer of a negotiable instrument when considered as a defense to an action on such instrument is considered in a note to *American Gas & Ventilating Mach. Co. v. Wood* (Me.) 43 L. R. A. 419.

For an injunction against the negotiation of a negotiable instrument, see note to *Erickson v. First Nat. Bank* (Neb.) 28 L. R. A. 577.

51 L. R. A.

Statement by Dodge, J.:

The following facts are alleged by the complaint, and substantially found to exist by a special verdict had after trial, to wit: The plaintiff, on January 3, 1898, purchased from the defendant a corn husker, a sale of which in the previous year had, by consent, been rescinded, and on that day gave therefor his negotiable note for \$150, due December 1, 1898, under a contract signed by both parties, whereby the defendant agreed to fix the husker in first-class shape, "make the same do good work, and satisfactory to the average witness for whom W. J. Lyle may husk corn in 1898; the machine subject to one day's trial. If the company fail to comply with any part of this agreement, Lyle can return the machine to Fox Lake, and his notes will be returned," etc. Plaintiff notified defendant of his desire to start the machine on January 21st, and called on them to make it work. Their duly authorized agent attended at the time, but went away without starting the machine, as he claims, by consent of plaintiff, but, as plaintiff claims, without such consent. The jury found with the plaintiff. Thereafter, on March 23d, the plaintiff returned the machine to Fox Lake, notified defendant of the fact, and then, or on April 14, 1898, demanded return of his note, which was refused. It also appeared that before commencing this suit the note had been transferred to an innocent third party for value, and by him sued and put in judgment against the plaintiff in the sum of \$166.20, of date February 7, 1899, which the plaintiff had not paid. There was some evidence of plaintiff's own declarations, made before suit upon the note, that he was execution proof. Whether the negotiation of the note preceded or followed plaintiff's demand for its delivery did not appear. The only questions of the special verdict involved in the errors assigned are the sixth: "Did the plaintiff consent, expressly or impliedly, to postpone the fixing and testing of the machine, or that it need not be done on January 21, 1898?" answered, "No," and fifteenth: "At what sum do you assess plaintiff's damages?" answered, "\$150." Motion for nonsuit was made at the close of the plaintiff's case, and

motion to direct a verdict for the defendant at the close of all the testimony, for the reason, among others, that the plaintiff had failed to prove any damages. Defendant also requested instruction that only nominal damages could be awarded. Such motions being overruled, defendant requested submission of the question: "Could the judgment obtained by J. H. Weber against the plaintiff upon his note, which has not been paid, be collected upon execution?" which request was refused. Defendant also requested an instruction as follows: "I instruct you that it is immaterial whether plaintiff or defendant first suggested that the machine should not be tried or tested on January 21, 1898, by Mr. Jones. If the plaintiff agreed or consented, expressly or impliedly, by word or act, that the machine need not be tried at that time, then your answer to the sixth question must be in the affirmative." That also was refused. From a judgment for plaintiff upon the verdict for the sum of \$150, interest and costs, the defendant appeals.

Messrs. Quarles, Spence, & Quarles for appellant:

An action for a breach of a covenant against damage because of liability cannot be maintained without allegation and proof of loss or injury. It is not sufficient that a judgment has been entered. The judgment must be paid.

Selleck v. Griswold, 57 Wis. 291, 15 N. W. 151; *Taylor v. Coon*, 79 Wis. 77, 48 N. W. 123; *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82; *Aberdeen v. Blackmar*, 6 Hill, 324; *Learned v. Bishop*, 42 Wis. 470; *Thompson v. Taylor*, 30 Wis. 68; *Potter v. Necedah Lumber Co.* 105 Wis. 25, 80 N. W. 90, 81 N. W. 118.

The judgment entered upon the note could not be collected.

The extent of such liability is to be measured by the extent of the loss. If the judgment debtor should be insolvent, and thus the issuing of the execution could not have benefited the creditor, no more than nominal damages would be recoverable.

Taylor v. Hunt, 23 Ohio St. 261; *Freeman v. Verner*, 120 Mass. 426.

The court should have directed the jury that the plaintiff had suffered at the most but nominal damages, because of his insolvency.

Latham v. Brown, 16 Iowa, 118.

If the court thought that there was any issue, under the evidence, as to the plaintiff's insolvency, then the defendant had the right to have that question submitted to the jury, as requested.

Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513; *Andrews v. Chicago, M. & St. P. R. Co.* 90 Wis. 358, 71 N. W. 372; *Rhyner v. Menasha* (Wis.) 83 N. W. 305; *McDermott v. Jackson*, 102 Wis. 419, 78 N. W. 598.

Mr. M. L. Lueck, with **Messrs. North & Lindley**, for respondent:

The note in this case was delivered by the respondent to the appellant with the provision that it would be returned to him in case

the appellant failed to fulfil the terms of the written agreement. This was merely a conditional delivery, and as between the respondent and appellant there could be no liability on the same because the appellant failed to perform the conditions of the contract.

Dodd v. Dunne, 71 Wis. 582, 37 N. W. 430.

As soon as the respondent had returned the machine by reason of appellant's failure to comply with the conditions of the contract, the contract was rescinded, and the note in the hands of the appellant was without value.

Hubbard v. Galusha, 23 Wis. 398; *Walter A. Wood Mowing & R. Mach. Co. v. Calvert*, 89 Wis. 640, 62 N. W. 532.

The sale and transfer of the note by the appellant to a bona fide holder was a wrongful act and a fraud upon the respondent.

Decker v. Mathews, 12 N. Y. 313; *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 24 N. E. 381.

The measure of damages in such cases is the amount due on the note, and the maker need neither allege nor prove that he has paid the same or that he is solvent.

Decker v. Mathews, 12 N. Y. 313; *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 24 N. E. 381; 3 *Sutherland, Damages*, 2d ed. p. 2442; *Winona v. Minnesota R. Constr. Co.* 29 Minn. 68, 11 N. W. 228.

The respondent had a cause of action for the purchase price upon the failure of the appellant to fix and adjust the machine as provided in the written contract.

Park v. Richardson & B. Co. 81 Wis. 399, 51 N. W. 572.

Dodge, J., delivered the opinion of the court:

1. The first, second, and third assignments of error naturally fall together for the purposes of discussion. They present the question whether plaintiff has shown himself entitled to any damages, and, if so, to what amount. These questions were raised by the motion for nonsuit and for direction of verdict, and for an instruction to allow only nominal damages for the reason that no actual damages had been proved. Appellant's position is predicated upon the propositions: (1) That the action is not in tort, for the reason that the disposal of the note by the defendant is not alleged to have been wrongful, and that it is neither alleged nor proved that the note was in its possession or control at the time when plaintiff's contract right to and demand for its delivery came; therefore no conversion or other wrong could be committed by refusing its delivery. (2) That, being an action on contract, it falls within the class of those where the contract is substantially one of indemnity, and in this case is to be construed as indemnity only against the damage resulting from liability on the note, and therefore cannot be maintained until damage has been actually suffered by the compulsory payment of the note or the judgment thereon. (3) That, plain-

tiff being insolvent, the note has no value, and liability thereon occasions him no damage.

In the view we have taken of the other propositions, the first need not be authoritatively decided. It is suggested in response thereto that, although no tort may have been committed at the time of refusing plaintiff's demand, still, the defendant was under a duty to retain the note within its control so as to enable its delivery in case the plaintiff demanded it, and that its disposal thereof, even before demand, was in breach of that duty to the plaintiff, and therefore a conversion. In either event the measure of damage would be the value of the note *prima facie*, there being no special damages alleged. Such value, of course, might involve consideration of plaintiff's financial condition, and perhaps other circumstances.

The second proposition presents an interesting and somewhat novel question, upon which no entirely direct authority has been cited, and little has resulted from our own research. The principle is well recognized that, in case of an agreement to indemnify, ordinarily the construction of indemnity against damages only will be adopted, rather than indemnity against mere liability. This proposition is decided in *Thompson v. Taylor*, 30 Wis. 68, 72, and *Taylor v. Ooon*, 79 Wis. 83, 48 N. W. 123, while the enforceability of a contract of indemnity clearly against liability alone is established by *Smith v. Chicago & N. W. R. Co.* 18 Wis. 17, 24. This contract before us, however, on its face is not a contract of indemnity. It is a plain and simple contract, under the circumstances shown to exist, to deliver up plaintiff's note upon demand. That demand being made, and not complied with, a distinct and complete breach of defendant's contract was committed, and no reason is apparent why the plaintiff should not have a right to maintain an action upon such breach for whatever damages he has suffered.

The measure of damages in an action for the breach of a contract is, of course, contractual. It is that which the defendant, either expressly or impliedly, has agreed to pay upon nonfulfilment of his stipulation. Where there is no express agreement as to what those damages shall be, the law raises the implication that they shall be compensation for what the plaintiff suffers by reason of the breach, so far as reasonably to be contemplated by the parties at the time of contracting. Analyzing the situation in the light of that principle, obviously the damage which fell upon the plaintiff in this case by reason of noncompliance with the agreement to deliver up his note was the continued existence against him of a liability thereon; a liability the very existence of which was a breach of his right. The question, therefore, for trial was, What would compensate him for that liability? It cannot be said that the damage which he suffered by defendant's breach of its contract could only be what he might at some future time have to pay, for that would not be the damage

L. R. A.

falling upon him at the time of and by reason of the breach. That would result from various subsequent circumstances. If the note were in the hands of the defendant, overdue, so that a perfect defense thereto might be made, he might ultimately have to pay nothing, or only the expenses of defense, while under other circumstances he might be put to expense and pecuniary loss much greater than the amount of the note. In *Barth v. Graf*, 101 Wis. 27, 40, 76 N. W. 1104, this general subject was considerably discussed, and the language of Church, Ch. J., from *Kohler v. Matlage*, 72 N. Y. 259, was quoted with approval, as follows: "It is settled that upon an obligation to do a particular thing, or to pay a debt for which the covenantor is liable, or to indemnify against liability, the right of action is complete on the defendant's failure to do the particular thing he agreed to perform, or to pay the debt, or discharge the liability." This language was used in a case where a retiring partner gave bond to his copartners to pay on a day fixed certain debts for which all were liable. On his failure so to do, the obligees were held to have a complete cause of action for the amount of those debts; the court saying that, if there had been merely a bond to indemnify against damage by reason of those debts, no cause of action would have existed until they had actually paid them. This view was also taken in *Loosemore v. Radford*, 9 Mees. & W. 657, in which case the defendant, a debtor, had agreed with the plaintiff, his surety, that he would pay the guaranteed debt by a day certain. On failure so to do, it was held that the cause of action of his surety was complete, although the latter had not been called on to pay. Numerous other authorities similar in effect may be found. *Lathrop v. Atwood*, 21 Conn. 125; *Redfield v. Haight*, 27 Conn. 31; *Gage v. Lewis*, 68 Ill. 604, 617; *Merriam v. Pine City Lumber Co.* 23 Minn. 314, 322; *Johnson v. Britton*, 23 Ind. 105; *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *Sedgw. Damages*, 8th ed. §§ 786, 789. The reasoning of these cases seems to us founded on sound principle. The breach of contract by the defendant is complete, and in analogy to all other situations the plaintiff should have his right of action therefor. If the measure of his damages is still involved in some degree of uncertainty, or if possibly recovery of the full amount of the face of the note may work injustice to the defendant, still, it must be remembered that the situation results from default of the latter, and not of the former. The postponement of the plaintiff's recovery till he has paid, especially if he be poor or embarrassed, may subject him to serious injuries meanwhile, enhanced by his poverty. His attempts to do business or to emerge from his state of insolvency may be thwarted at every turn by the impairment of his credit from the mere existence of the liability. Any property acquired by him may be promptly sacrificed in the effort to enforce that liability, and still the debt remain unpaid, and he without remedy; and that, too, without any fault

on his part save poverty. As between the two, inconvenience should fall on the guilty, rather than the innocent. The peril, suggested by respondent, that plaintiff may recover and collect judgment against defendant, and still not pay the note, was pointed out, and held not sufficient to prevent a recovery in *Lousemore v. Radford*, 9 Mees. & W. 657, and was considered in *Johnson v. Britton*, 23 Ind. 105, where it was shown that under Code practice, where law and equity are administered by the same court, it might readily be averted by equitable counterclaim.

Two decisions of our own court are cited by appellant as in conflict with conclusions here reached, namely, *Learned v. Bishop*, 42 Wis. 470, and *Selleck v. Griswold*, 57 Wis. 291, 15 N. W. 151. In those cases a purchaser of real estate had assumed and agreed to pay certain encumbrances thereon. The holders of those encumbrances had thereafter demanded and taken proceedings to enforce payment of the indebtedness secured by such encumbrances against the grantors, and the latter had sued their grantees. The court disposed of the cases on the ground that the effect of the contract assuming and agreeing to pay the debts was to constitute the purchasers of the land principal debtors, and the grantors sureties merely, whereupon they applied the familiar doctrine that the implied contract from a principal to his surety is merely to protect the latter from damage resulting to him by reason of the liability assumed, not to indemnify him against liability alone,—a principle reiterated in *Momson v. Noyes*, 105 Wis. 565, 81 N. W. 560. The grounds upon which these decisions went, as well as the fact that there was no time specified at which the grantees of the land had agreed to pay these debts, we think clearly distinguished them in principle from the class of cases last before cited, and from the case in hand. The case of *Learned v. Bishop* is further distinguishable by the fact that it was not an action for a breach of the contract to pay the encumbrance, but was a suit in equity to foreclose a mortgage given to secure an agreement to pay that debt, and to hold the mortgagee harmless from it; and relief was refused on the ground that the only part of the contract which the mortgage secured was the indemnity clause, which would not be breached until the mortgagee suffered harm.

From what has been said it is apparent that no error was committed in refusing to hold that no damages, or only nominal damages, had been suffered, because the plaintiff was insolvent or execution proof, even if such fact conclusively appeared. A note is not necessarily entirely valueless because its maker is insolvent, or because no property subject to execution exists. Many a note has been paid notwithstanding such condition. This situation, too, would largely disappear upon recovery of judgment in plaintiff's favor which might be in reach of execution. Still less is it true, as already pointed out, that insolvency precludes damage to the maker of such a note from its existence

as a liability against him. At most, plaintiff's financial condition was a circumstance to be considered by the jury in assessing the damages. It was so treated.

2. Error is assigned for that the court refused defendant's request to submit a question for consideration "Could the judgment obtained by J. H. Weber against the plaintiff upon this note, which has not been paid, be collected upon execution?" Appellant points out that there was evidence of declarations made by the plaintiff of his insolvency and invulnerability to execution at some previous date. The court submitted to the jury question fifteen, as to the amount of plaintiff's damages, and instructed them generally that the measure of damage is prima facie the amount due on the note, but that the defendant was at liberty to reduce this valuation or amount by showing the insolvency of the maker thereof; the measure of damages being the actual value of the note to be found from the evidence. We think no error was committed in refusing to submit this question. The special verdict should properly pass upon all the material controverted issues of the case, but ordinarily there is no propriety in going further, and inviting the jury to pass upon each conflict of testimony upon evidentiary facts. *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 220, 78 N. W. 442; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 317, 80 N. W. 644. The jury were informed that the solvency or collectibility of the plaintiff was an element to be taken into consideration in ascertaining the amount of his damages. This sufficiently submitted to them the question which would have been presented by defendant's interrogatory, which at best was merely a collateral consideration in reaching a conclusion upon the real issue of the amount of the plaintiff's damage.

3. The charge is criticised as being a general one, and not merely a series of directions calculated to aid the jury in understanding and answering the several questions submitted to them, within the remarks of this court in *McDermott v. Jackson*, 102 Wis. 419, 78 N. W. 589, *Fox v. Martin*, 104 Wis. 581, 80 N. W. 921, and *Rhyner v. Menasha* (Wis.) 83 N. W. 305. We are unable to discover any error in this respect prejudicial to the defendant. True, the court did not—as is very good practice—take up each question, and explain to the jury its meaning, and their method of consideration of it. It is due to the court, however, to say that most of the questions were so clear and unambiguous that such instruction was hardly necessary. The charge is made up of general instructions as to weight of evidence, burden of proof, and the conduct of the jury generally, more or less applicable to their consideration of every question; but we do not find it obnoxious to the criticism that general rules of law governing the rights of the parties are given to the jury therein so as to inform the latter of the fact of their answer either way to any interrogatories. *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 225, 78 N. W. 442; *New Home Sewing*

Much. Co. v. Simon, 104 Wis. 120, 126, 80 N. W. 71. It should also be borne in mind that no requests for specific instructions with reference to any of the questions were made by defendant, except as hereafter discussed.

4. The sixth assignment of error is predicated upon the court's refusal to give the instruction as to the sixth question set out in the statement of facts. This instruction is open to the criticism that the only portion of it which is in anywise broader or more instructive than the question itself is obnoxious to the rule stated under the last assignment,—that instructions of a general character, such as to inform the jury of the effect of their conclusions upon the rights of the parties, should not be given. It substantially informed the jury that the rights of the parties were not to be affected by the question of who suggested that the machine should not be tried or tested on January 21st. In that respect it is improper, and under the provision of the statutes that an instruction is to be either refused or given in the exact words in which it is presented no error can be predicated upon its refusal alone. We think, also, that the question itself was so clear and unambiguous as not to require, for the protection of either party, any qualifying charge; so that failure to caution the jury in the line suggested by appellant's request was not prejudicial, although such caution, if given, might not have been improper.

Judgment affirmed.

FRENCH LUMBERING COMPANY, *Respt.*,

v.

John B. THERIAULT *et al.*, *Appts.*

(.....Wis.....)

- *1. The word "void," in § 2320, Rev. Stat., relating to fraudulent conveyances of property by debtors, means "voidable."
2. A deed of real estate made under such circumstances as to fall within the condemnation of § 2320, Rev. Stat., nevertheless passes title to the property to the fraudulent vendee, so that a judgment thereafter rendered on a precedent debt of the vendor, and duly docketed, does not become a specific lien on the land under § 2902, Id., which provides that a money judgment, docketed in the office of the clerk of the circuit court of a county, shall be a lien on the real property of the judgment debtor in such county.
3. Under such circumstances as those stated in No. 2:
 - (a) A judgment creditor can obtain a specific lien on the real property of the judgment debtor by levy thereon under an execution issued on the judgment, and then equity will aid him to remove the impediment to an advantageous sale thereof and enforce-

*Headnotes by MARSHALL, J.

NOTE.—As to lien of judgment on land fraudulently conveyed, see *Russell v. Chicago Trust & Sav. Bank* (Ill.) 17 L. R. A. 345, and note; and also case of *Doster v. Manistee Nat. Bank* (Ark.) 48 L. R. A. 334.
51 L. R. A.

ment of the lien, created by the fraudulent transfer.

(b) Equity will not aid a judgment creditor till he actually obtains a specific lien by attachment of the property under writ of attachment or levy thereon under an execution, or he has exhausted all his legal remedies to collect his claim. The last condition mentioned being satisfied, equity will enforce the creditor's right to a lien on the property in an action to annul the fraudulent transfer of the property so that the judgment may attach thereto.

(c) If the fraudulent vendor die before a specific lien shall have been obtained on the property, the judgment cannot be enforced by execution against such property under § 2902, Rev. Stat., and a lien be thereby secured which equity will protect.

4. A deed made by an insane person not under guardianship is voidable only. It passes title so that a judgment thereafter rendered and docketed will not be a specific lien on the property conveyed till the conveyance be actually avoided; and if before that occur the insane person die, the judgment creditor cannot, by execution levy under § 2902, Rev. Stat., obtain a lien on such property which equity will aid by removing the cloud created thereon by such conveyance.

(October 12, 1900.)

APPEAL by defendants from an order of the Circuit Court for Chippewa County overruling a demurrer to a complaint filed to set aside a conveyance of real estate alleged to have been made by an insane person in fraud of complainant's rights. *Reversed.*

Statement by **Marshall, J.:**

The complaint states, in substance, the following: Plaintiff is a domestic corporation. February 23, 1898, it recovered a judgment in the circuit court for Chippewa county, Wisconsin, against Isador Lavoie, for \$2,824.60, that was duly docketed on the succeeding day in the office of the clerk of the circuit court for said county, and upon which, September 8, 1899, and before the commencement of this action, an execution was duly issued. Pursuant to such execution the sheriff of said county levied upon and advertised for sale certain lands (describing them) situated in said county, to satisfy the amount due upon the judgment, with interest and costs. January 24, 1898, said Lavoie was, and for some time prior thereto had been, insane, and on that day he was so adjudged and committed to one of the asylums of this state. On the same day John Theriault, with knowledge of the incompetency of Lavoie, fraudulently induced him to execute and deliver to said Theriault a deed conveying to him the said lands, which were then the property of Lavoie, with intent on the part of said Theriault to hinder and delay said Lavoie's creditors, particularly plaintiff. When Theriault obtained said deed, he knew that Lavoie was insane and incompetent to make it, and also knew that Lavoie was largely indebted to plaintiff and to other parties. Theriault did not give any consideration for the lands. The indebtedness to plaintiff was contracted on

the faith of a promise made by Lavoie to secure the payment thereof by a mortgage on said land, which promise Lavoie intended in good faith to fulfil, but was prevented from doing so by his becoming insane. Lavoie died March 5, 1898, without leaving property sufficient to anywhere near pay his indebtedness.

The prayer for relief was that the conveyance to Theriault be declared void as to plaintiff, that Theriault be enjoined from selling or encumbering the lands, and that a lien be adjudged thereon in plaintiff's favor for the amount of its judgment and costs.

The defendants demurred to the complaint for want of facts stated therein sufficient to constitute a cause of action, and for defect of parties defendant in that the administrator of Lavoie's estate, his widow and heirs, were not joined as defendants. The demurrer was overruled and defendants appealed.

Messrs. W. M. Bowe and J. A. Anderson for appellants.

Mr. W. F. Bailey, with **Mr. W. H. Stafford**, for respondent:

Plaintiff's judgment became a lien.

Eastman v. Schettler, 13 Wis. 324; *Cornell v. Radway*, 22 Wis. 260; *Galloway v. Humilton*, 68 Wis. 651, 32 N. W. 636; *Evans v. Loughton*, 69 Wis. 138, 33 N. W. 573; *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169.

There are two lines of cases: One to the effect that such a judgment does not become a lien until proceedings are taken to subject the land to the payment of the judgment,—in other words, until an equitable levy is made upon the land, and a specific, not general, lien is created. The cases which so hold, which have not been overruled, are very few.

Miller v. Sherry, 2 Wall. 249, 17 L. ed. 830; *Kappleye v. International Bank*, 93 Ill. 396; *Neal v. Foster*, 36 Fed. Rep. 29; *Bridgman v. McKissick*, 15 Iowa, 260.

Our statute provides that a judgment, when docketed, shall, from the date of the rendition thereof, be a lien upon the real property in the county where docketed, etc.

Rev. Stat. § 2902.

Conveyances of any estate or interest therein, with intent to defraud creditors, are void as against creditors prejudiced.

Id. § 2320.

A conveyance is void as to creditors; the legal title does not pass as to them.

The other line of cases are to the effect that judgments, when rendered and docketed, become a lien at once, and take priority in their order.

Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; *White's Bank v. Farthing*, 101 N. Y. 344, 4 N. E. 734; *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852; *Smith v. Morse*, 2 Cal. 524; *Re Lowe*, 19 Fed. Rep. 589; *Clattery v. Jones*, 96 Mo. 216, 8 S. W. 554; *Mulford v. Peterson*, 35 N. J. L. 127; *Jacoby's Appeal*, 67 Pa. 435; *Henderson v. Henderson*, 133 Pa. 399, 19 Atl. 424; *Thomason v. Neeley*, 50 Miss. 313; *Eastman v. Schettler*, 13 Wis. 324; *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169. 51 L. R. A.

If the creditors obtain judgment against the debtor after the transfer, they acquire liens upon his property wherever the same are given by law, according to the dates of their respective judgments, in the same manner precisely as if no transfer had been made; for the transfer is a nullity as against them, and the legal, as well as the equitable, title remains in the debtor for the purpose of satisfying his debts.

Bump, *Fraud. Conv.* 3d ed. 474.

In this state, the judgments do not become liens upon the legal title; only upon the interest of the debtor in the land. If the grantee is but a naked trustee, without interest, the lien does not attach to his title. So a judgment against a grantee in a conveyance, absolute on its face, but which in fact is a mortgage, will not become a lien upon the interest of the mortgagee, but a judgment against such a grantor or mortgagor is a lien upon the interest of the mortgagor.

Main v. Bosworth, 77 Wis. 660, 46 N. W. 1043; *Evans v. Loughton*, 69 Wis. 138, 33 N. W. 573.

A settlement unreasonable in amount, though there be no intent to defraud existing creditors, is in law a fraudulent conveyance, impeachable even by subsequent creditors.

Sommermyer v. Schwartz, 89 Wis. 66, 61 N. W. 311; *Beck v. Cole*, 16 Wis. 96; *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722.

Intent alone is not sufficient to render a conveyance fraudulent, unless it is carried out so as to prejudice creditors; but where such is the natural and proximate result of the debtor's act it may be fraudulent, notwithstanding a good motive or intention.

8 Am. & Eng. Enc. Law, p. 753; *Lawson v. Funk*, 108 Ill. 502; *Goodman v. Wine-land*, 61 Md. 449; *Gardiner Bank v. Wheaton*, 8 Me. 373.

The effect of the English rule requiring reimbursement to the grantee would be to place lunatics on the same footing with persons of sound mind, with less effective means to protect the injured party against the fraud; for at law, as well as in equity, fraud or imposition may be relied on without reference to the mental capacity of the parties, except so far as such defect may give weight to other facts from which the fraud may be deduced.

Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

The deed of an insane person is ineffectual to convey a title to land good against the grantor or against his heirs or devisees, unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees.

Valpey v. Rea, 130 Mass. 384; *Rogers v. Blackwell*, 49 Mich. 193, 13 N. W. 512; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Van Deusen v. Sweet*, 5 N. Y. 378; *Burnham v. Mitchell*, 34 Wis. 117.

Marshall, J., delivered the opinion of the court:

Section 2902, Rev. Stat., is to the effect that a money judgment, when docketed as

provided by law, shall, for a period expiring ten years from the date of the rendition thereof, be a lien on the real property of the judgment debtor, except his homestead, in the county where the same is docketed. If the real estate which respondent seeks to reach in this action was the property of Lavoie, within the meaning of that section, when the judgment against him was docketed it obviously became a lien thereon. Section 2978 provides that, after the expiration of one year from the death of a judgment debtor, execution may be issued by permission of the court or the judge thereof upon good cause shown, against any property upon which such judgment shall have been a lien at the time of the death of such debtor, and may be executed in the same manner and with the same effect as if he were living. According to the complaint plaintiff was a judgment creditor of Lavoie when he died. All the facts exist and are properly alleged in the complaint requisite to the maintenance of the action to remove the apparent impediment to respondent's judgment lien, created by the deed of Lavoie to Theriault made prior to the rendition of the judgment, if, notwithstanding such deed, such judgment was in fact, at the time of the death of the grantor, a specific lien upon the land. It is conceded that, if the lien did not exist by virtue of the judgment alone, none was acquired by the execution issued thereon after Lavoie's death, because in that event the execution was wholly unauthorized by law, and void.

From what has preceded this is the first question to be solved in reviewing the decision of the circuit court overruling the demurrer to the complaint: Is a judgment, properly docketed in the county where real estate is located which the judgment debtor previously owned but before such docketing conveyed to another, a lien on such real estate if such conveyance is void under § 2320, Rev. Stat. That section provides that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, . . . made with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands . . . shall be void." The learned counsel for respondent contend that the word "void" in the section means absolutely void; that, as regards a person circumstanced as plaintiff was when Lavoie made his deed to Theriault, the title to the property attempted to be conveyed remains entirely unaffected by such attempt; and that the judgment attaches to and becomes a lien thereon accordingly. That such is the law in many and perhaps most jurisdictions, and is so laid down by many and perhaps most, if not all, of the elementary writers, as contended by the learned counsel for respondent, possibly cannot be successfully denied. But that the law is to the contrary as declared by this court as early, at least, as *Hyde v. Chapman*, 33 Wis. 391, decided in 1873, certainly cannot be gainsaid. The doctrine of that case was fully considered and approved by this court in *Gilbert v.* 51 L. R. A.

Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, decided in 1892. True, the decision there was made by a divided court, but that hardly takes much from its force as regards what the law is for this state, since it has existed for over a quarter of a century, and necessarily has become by that lapse of time a rule of property. We are not unconscious at all of the force of the attack now made upon the doctrine of this court. It is but a renewal of the attack made in *Gilbert v. Stockman*, where, notwithstanding strong judicial opposition, as indicated by the able and exhaustive dissenting opinion written by Mr. Justice Pinney, concurred in by Mr. Justice Winslow, the early view of the law declared in *Hyde v. Chapman* was adhered to. It is needless to speculate now upon how the court would then have decided, or as at present constituted would decide, if the question were presented as an original proposition. It will be readily admitted that the law of the state, as declared by its highest court, upon a careful consideration of the subject involved, should not be changed without some very strong reason therefor. A mere change in the personnel of the bench, and of individual opinions of judges, is not sufficient; and when the law as so declared has remained undisturbed for a long period of time, for example, twenty-five years or more, and necessarily become a rule of property, it should not be changed at all by mere judicial declaration. Under such circumstances courts must follow the maxim, *Stare decisis, et non quaeri movere*. (To adhere to decisions, and not disturb questions that have been established.)

The foregoing renders unnecessary any attempt even to review the able argument of counsel for respondent, by which the idea was vigorously pressed upon our attention and consideration that the word "void" in § 2320 means absolutely void as to creditors, and that a judgment against the fraudulent vendor attaches to the property fraudulently conveyed regardless of the conveyance. It is sufficient to say that the contrary is the law of this state, and that it is so firmly entrenched in our jurisprudence as not to be open to question. However, it is deemed best not to dismiss the subject without correcting the error counsel seems to have fallen into, that *Gilbert v. Stockman* and *Hyde v. Chapman* are out of harmony with other cases decided by this court. In endeavoring to make such correction we shall not attempt to defend the reasoning of prior decisions, but merely state the facts and conclusions of each case, treating the results as not now open to question.

In *Eastman v. Schettler*, 13 Wis. 324, upon which great reliance is placed to support the attack on *Gilbert v. Stockman*, it will be noted that, while the court said, *arguendo*, that, if the conveyance of the land was made with intent to defraud the judgment creditor, it was void, and the judgment became a lien upon it, the court was not speaking of the effect of the judgment by itself, but its effect under the circumstances of that case, which were that it had been enforced by a

seizure of the realty in question (so far as such a seizure can take place under an execution), a sale thereof under the execution, and the perfection of the sale by the making and delivering of a deed to the purchaser. Under those circumstances it was said that the purchaser could maintain an action to recover the land, because the deed conveyed to him the title thereto regardless of the fraudulent conveyance of the property prior to the rendition of the judgment.

In the *Gilbert Case* the rule of the *Eastman Case* was limited to its facts upon the theory that the proceedings under the execution created a lien upon the property, but that none existed before the levy under the execution, which is in harmony with the cases that uphold the right to proceed in equity in aid of an execution levy upon land which has been conveyed by the judgment debtor in fraud of his creditors, but deny the right in the absence of such levy, because, while the judgment of itself is not a lien upon the property, a lien thereon may be acquired by seizure thereof under the execution issued on the judgment.

In *Cornell v. Radway*, 22 Wis. 260, the sheriff had levied upon the property and advertised it for sale under an execution issued on the judgment. The court said the case belonged to that class where one is compelled to resort to a court of equity for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution, and not to the class where a person resorts to equity as a general creditor to obtain satisfaction of his debt; that, while in the latter class of cases all legal remedies must be exhausted as a condition precedent to the maintenance of the action, in the former the party has a right, under the established rules of equity jurisprudence, to invoke equity to remove a cloud upon an existing interest in real property. True, the court based its decision on *Gates v. Boomer*, 17 Wis. 455, remarking that such case was "an action by the plaintiffs, judgment creditors of one of the defendants, to have a deed executed by him to his codefendant set aside as a fraudulent obstruction to the proceedings of the plaintiffs, to enforce the lien of their judgments, and so that they might sell the property upon execution," and said, *arguendo* and partly outside the facts of the case, that "the judgment of the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution. . . . The existence of the lien without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court of equity jurisdiction," indicating that, to the writer of the opinion at least, the mere fact of proceedings having been had to enforce the judgment was without significance as regards whether the plaintiff was possessed of an interest in the property covered by the fraudulent conveyance, which equity would free from an existing cloud upon it. But the fact remains that these circumstances were present: an execution on the judgment and

proceedings thereon against the property of a levy under the execution by advertising the property for sale as provided by law, which circumstances, later in the history of similar litigation, came to have controlling significance, and without conflict with anything actually decided in the *Cornell Case* when tested by its facts.

It will be found that there is nothing in *Gates v. Boomer* to call for or justify the remark made in *Cornell v. Radway*, so far as such remark was outside the facts of the case. In the former case the facts were that while there was no execution levy, an execution had been issued and returned unsatisfied, and all the legal remedies of the judgment creditor to collect his debt had been exhausted without his being able to obtain any satisfaction thereof. In that situation the court held that the creditor, as to property fraudulently transferred by the judgment debtor, and upon which the creditor would, but for such transfer, have had an unclouded specific lien, was entitled to invoke the aid of equity to enforce his right to a lien by removing the fraudulent obstruction thereto. The case, said the court, belongs to the class where the issue of the execution gives the plaintiff a specific lien upon the property, but he is compelled to go to a court of equity for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution.

In *Galloway v. Hamilton*, 68 Wis. 651, 32 N. W. 636, the maintenance of an action in equity by a judgment creditor circumstanced somewhat different than respondent is, turned on the fact that a lien had been obtained by a levy upon the property under an execution, the prior cases in this court being referred to as in harmony with the decision. The court said: "If it be true that the real estate seized on that execution belonged to the judgment debtor, and a deed has been put upon record which purports to convey the legal title to another, which will have the effect to defeat or greatly impair the lien unless the deed is canceled, we suppose it is well settled that a court of equity will interfere and remove the inequitable obstruction. 'The equitable relief sought rests upon the fact that the execution has issued, and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation.'" After thus disposing of the point under consideration it is probably unfortunate that the court said, *arguendo*, and, as will be plainly seen, somewhat outside the case, quoting the *obiter* remark in *Cornell v. Radway* heretofore referred to: "Where the judgment of the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution, it would seem that the plaintiff is entitled to the aid of the court, whether execution has been issued and returned unsatisfied or not," thus in a measure keeping up the uncertainty as to whether a judgment, standing alone, is a specific lien upon the real property of the judgment debtor which

he fraudulently conveyed prior to its rendition, instead of its being a mere right to acquire a lien, which requires the issuance of an execution and an actual seizure of the property thereunder in order to ripen into such an interest in the *res* as will be recognized by a court of equity in an action to remove a cloud thereon by the owner of such interest. It should be said that the remark referred to was good law as applied to the case, because the attempted conveyance of the property was absolutely void for want of authority to make it, though the decision was not very clearly placed on that ground.

In *Evans v. Laughlin*, 69 Wis. 138, 33 N. W. 573, the property was seized under a writ of attachment. This proposition, among other things, was sufficiently involved to receive the attention of the court: Was the conveyance made to hinder and defraud creditors? the idea being that if such was its character no lien was acquired thereon by the attachment. On such proposition the court said, in effect, that, if it were to be decided in the affirmative, the judgment creditor would be at liberty, notwithstanding the conveyance, to seize the land on execution or attachment as the property of his debtor, and thereby acquire a specific lien at law which equity would lend its aid to protect.

In *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169, an action in equity, by a judgment creditor to remove a cloud from his lien upon property fraudulently mortgaged and conveyed by the judgment debtor, was sustained solely upon the ground that the plaintiff had in fact acquired a specific lien on such property by a seizure thereof under an execution issued on his judgment. True, "it was there said that the fraudulent deeds and mortgages . . . are absolutely void, and conveyed no estate to the grantees and mortgagees as against the claim of the plaintiff, and so the lien of the judgment and execution is perfect;" but it will be observed that the lien was spoken of as being created, not by the judgment, but as being single and created by the judgment and execution; and by a careful reading of the opinion it will be clearly seen that it proceeded to a conclusion on the theory that the fraudulent instruments were absolutely void only in the sense that they were void at the election of the judgment creditor,—that is, that they were voidable; that the term "absolutely void" was not appropriately used; that the title to the property was so affected by the fraudulent conveyances that without an actual seizure of it under an execution or attachment the creditor could not obtain a specific lien thereon but only the right to a lien; that upon such right being exercised by the specific act of election, to avoid the fraudulent transfers, of a seizure of the property, an actual interest therein was acquired, leaving such conveyances as mere clouds upon such interest, which equity would lend its aid to remove.

We have now reviewed the more important cases preceding *Gilbert v. Stockman*, and shown, it would seem, as regards any-
51 L. R. A.

thing actually decided therein, that they are all in harmony with the decision in that case and with what is here decided,—that is, that a judgment against a fraudulent vendor of real property, which has been duly docketed in the county where such real estate is located, does not of itself create a lien on such property, because the conveyance vests, in the fraudulent vendee, the title of his vendor, subject to the right of the defrauded creditors at their election to avoid it; that such creditor can only avoid the fraudulent transfer and obtain a specific lien upon the property covered by it by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property; that in the absence of such seizure the judgment creditor has only the right to a lien upon the property fraudulently conveyed and to enforce such lien for the satisfaction of his debt, which right, being strictly legal, cannot be protected in equity till the creditor has first exhausted all his legal remedies to that end, as indicated; that when the right to a lien upon the property fraudulently conveyed ripens into a lien in fact by an actual seizure of the property under attachment or execution, a court of equity will then lend its aid to free the lien from the cloud upon it created by the fraudulent conveyance.

Having disposed, adversely to the respondent, of the contention that its judgment and the docketing thereof in the county where the land in controversy lay created a specific lien upon the property, assuming that the prior conveyance thereof was void as to the creditors of the grantor because tainted with fraud, under § 2320, Rev. Stat., it is not necessary to decide the question, argued in the briefs of counsel, of whether the facts alleged in the complaint are sufficient to show that the deed was so tainted.

The only question left for consideration is this: Is the deed of an insane person, who has not been adjudged insane and placed under guardianship, merely voidable? If it is absolutely void, then, according to the complaint, the title to the property in question did not pass to Theriault by the conveyance under which he claims. In that event the respondent's judgment became a lien upon the property and the complaint shows a good cause of action in equity to remove the cloud upon such lien.

There is some conflict of authority in this country, and between the courts of this country and those of England, regarding the character of an insane person's deed. In England it is held that such a deed is absolutely void. *Ball v. Mannin*, 1 Dowl. & C. 380. There are a few authorities to the same effect in this country, most or all of which, upon careful examination, will be found to be quite undecisive and unsatisfactory. The text writers are in substantial accord that an insane person's deed conveys title to the grantee and is voidable only. Devlin, *Deeds*, § 73; 1 Washb. *Real Prop.*

5th ed. p. 486; 2 Kent, Com. 452; Kerr, Real Prop. § 2316; Pingrey, Real Prop. § 1281; 1 Jones, Real Prop. § 52; 1 Story, Eq. Jur. §§ 222, 228; 11 Am. & Eng. Enc. Law, 1st ed. p. 133. The only text writer that is out of line is Beach. He states the law in accordance with the English doctrine, in his late work on the Modern Law of Contracts, at § 1390, in a few words, without comment even to the extent of recognizing a conflict of authority on the subject. The only support for the text in the notes is a few New York cases, none of which support it in fact, the leading case being *Van Deusen v. Sweet*, 51 N. Y. 378, to which further reference will be hereafter made. The most prominent case cited is one decided in the supreme court of New York, *Brown v. Miles*, 16 N. Y. Supp. 251, reported in the regular series of state reports in 61 Hun, 453. That is cited as a definite judicial declaration that the great weight of authority is to the effect that an insane man's deed is absolutely void. The writer of the opinion so says, citing, however, only a few New York cases, none of which in fact support the doctrine to its full extent.

It is deemed proper to call special attention here to the careless manner in which the text above referred to was prepared, lest the profession be misled by it. It illustrates the danger of placing any great reliance on some of the modern text-books, and the importance of more care being exercised in their preparation.

In *Devlin on Deeds*, § 73, the law is stated thus: "The deed of a person *non compos mentis* who is not under guardianship transfers a seisin, and is merely voidable." That is supported by a large collection of cases from many states of the Union. In *Washburn on Real Property* it is said that infants and insane persons not under guardianship are in the same class, substantially, in respect to their acts being voidable and not void. Both of the textwriters specially referred to cite *Van Deusen v. Sweet*, 51 N. Y. 378, and *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504, which is based on the New York case, as exceptions to the great array of authority to which they call attention.

In *Van Deusen v. Sweet* the court did not go to the extent of holding that the deed of an insane person, though not under guardianship, is in all cases absolutely void. The decision was limited to cases where the insanity is of such a nature as to render the subject of it absolutely incompetent to act mentally in the transaction,—to persons so insane as to be wholly devoid of reason. It was said, in effect, that there is no doubt that a person may be insane and his mental unsoundness be of such a nature as to render his acts only voidable; that the mere fact of the insanity of the maker of a deed, regardless of the degree of insanity, is not sufficient to render the deed absolutely void if he is not, at the time of making it, under guardianship because of his infirmity.

There is strong reason for the idea that if a person is so utterly devoid of mental power as to be totally incapable of comprehending

the nature of his act in making a deed, or knowing that he is engaged in such a transaction, that the instrument should be held to have no legal existence for any purpose. That is as far as the New York court has gone.

If we were to hold in accordance with *Van Deusen v. Sweet*, it would not save the complaint from condemnation as not stating a cause of action, for there is no allegation in it in regard to Lavoie's condition at the time he made the deed, except that he was insane. The degree of his insanity is not alleged. In *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264, a complaint, held by the lower court, on the strength of *Van Deusen v. Sweet*, to state a good cause of action to avoid certain deeds as absolutely void, was condemned, without affirming the rule laid down in the *Van Deusen Case*, for want of allegations showing that the grantor of the deed was wholly without mental capacity. Though some twenty years had elapsed since the decision in that case, the court declined to say it was correctly decided, but said that, assuming its correctness, a complaint to annul the deed of an insane person not under guardianship is insufficient unless it shows that such person was absolutely and completely unable to understand or comprehend the nature of the transaction. Other New York cases are in the same line. *Riggs v. American Tract Soc.* 95 N. Y. 503; *Valentine v. Lunt*, 115 N. Y. 496, 22 N. E. 209.

Valpey v. Rea, 130 Mass. 384, is cited to our attention as holding that the deed of an insane person is absolutely void unless ratified by the grantor on recovering his reason. *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735, should be added. However, they do not go to the length contended for. In the one case it is said that the deed of an insane person is ineffectual to convey the title to land "against the grantor or against his heirs and devisees unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees." That language was repeated in the second case in connection with the following: "Such deed may be disaffirmed without returning the consideration money or placing the other party *in statu quo*." A careful analysis of the quoted language must lead to the conclusion that the Massachusetts court came far short of holding what respondent contends. A thing that "may be made good by ratification," or is not so binding but that it may be "disaffirmed," it would seem, must be said to be voidable only. That such was the sense in which those terms were used appears conclusively by the fact that numerous early Massachusetts cases were referred to as having established the doctrine declared, in all of which it was distinctly held that the deed or contractual act of an insane person is merely voidable. For example, in *Carrier v. Sears*, 4 Allen, 336, 81 Am. Dec. 707, it was said: "The contract of an insane person, or one obtained by fraud or duress, is voidable and not void." In *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414, after some other

not very well-considered remarks, it was said *arguendo*, speaking of the insane person as the demandant: "The estate is still in the demandant; for if it has passed, it has passed by the deed of an insane man never ratified or confirmed. That, in law, is impossible." The court, however, referred to *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744, saying that it settled the law for Massachusetts that the deed of an insane person is voidable only. In the *Allis Case* the lower court instructed the jury that the deed was absolutely void. That was held error on the appeal, the court remarking: "The jury should have been instructed that this fact [of insanity], if established, rendered the deed voidable." Numerous other Massachusetts cases to the same effect might be cited.

If any further support were needed for the view that the late Massachusetts cases do not change the rule early laid down and affirmed in that court, it is furnished by *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705, where language is used similar to that in *Valpey v. Rea* as regards ratification or confirmation being necessary to render an insane man's deed valid. What was meant by such language is clearly shown by the language of the decision, as follows: "The deed of an insane man not under guardianship is not void, but voidable," etc. "If under guardianship the deed is absolutely void." A multitude of cases to the same effect might be cited. We will refer to only a few of them. *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Nichol v. Thomas*, 53 Ind. 42; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Elston v. Jasper*, 45 Tex. 409; *Odum v. Riddick*, 104 N. C. 515, 7 L. R. A. 118, 10 S. E. 609; *Burnham v. Kidwell*, 113 Ill. 425; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 242.

Our attention is called to *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73, as holding to the contrary of the cases above cited. If counsel were right as to that case, we should hesitate before running counter to it on a new question in this court, unless there is such an overwhelming weight of authority against it as to clearly show that it is wrong. What is in fact decided in *Dexter v. Hall* is that a power of attorney made by an insane person is absolutely void. Reference is made to the doctrine of the English courts, that the deed of an insane person is classed with such person's power of attorney, but the court recognized that there may well be a distinction between an insane person's power of attorney and his deed. It was said, as regards the character of the former, that the decisions in England and in this country are in harmony, but, that, as regards the character of the latter, whether voidable or absolutely void, there is considerable conflict and inconsistency. The decision of the court, however, was confined, as it necessarily had to be, to 51 L. R. A.

the question before it, and we are unable to find that the doctrine announced has ever been extended in that court to deeds. In *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271, the subject was referred to, it being said that the deed of a person so bereft of reason as not to be able to distinguish between right and wrong is at least voidable.

There are cases where courts have reached the same conclusion, as to the scope of *Dexter v. Hall*, as that urged by respondent's counsel. For example, in *German Sav. & L. Soc. v. De Lashmutt*, 67 Fed. Rep. 399, decided in the circuit court for the district of Oregon, the following language is used: "Whatever differences of opinion once existed as to whether the deed of an insane person was void or voidable, the question is authoritatively settled that such deed is absolutely void," citing *Dexter v. Hall*, 15 Wall. 9, 21 L. ed. 73, and *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504. The latter case, it will be remembered, merely followed *Van Deusen v. Sweet* to the effect that the deed of a person so insane as to be wholly bereft of reason is absolutely void, and *Dexter v. Hall* does not attempt to decide the question at all. In *Parker v. Marco*, 76 Fed. Rep. 510, decided in the United States circuit court for the district of South Carolina, Mr. Justice Simonton, who delivered the opinion, said that in *Dexter v. Hall* "the question before the court was whether the deed of an insane person was void or voidable. To that question the courts directed its attention, and solved the doubts created by conflicting decisions in other jurisdictions, fixing the law in the Federal courts," which was afterwards amplified by Mr. Justice Clifford in *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271. How very far that statement is from what was in fact decided in those cases is clearly indicated by what has been said. No attempt was made to harmonize conflicting decisions in this country. As indicated, the law as settled in England was referred to, also the inconsistencies in the adjudications of this country, as to deeds of insane persons, without expressing any decided opinion as to the right of the matter, and then the question presented for adjudication was decided in harmony with the decisions of the English courts and those of this country as well.

We have now carried the discussion of the subjects presented by this appeal to a considerable length, though no greater, probably, than their importance warrants. We received much assistance from the able briefs of counsel on both sides of the controversy, and have pursued our investigations to a satisfactory conclusion. On the first branch of the case we have shown, as it seems, that there is a substantial harmony in the decisions of this court, from the beginning, on the lines laid down in *Gilbert v. Stockman*, which are tied to the idea expressed in that case that the word "void" in § 2320, Rev. Stat., means "voidable," and that the title to lands conveyed in fraud of creditors actually passes to the vendee, subject, however, to be divested at the election of any such creditor.

On the second branch of the case we have shown that there is substantial harmony in the decisions of this country contrary to the law as held by the English courts, that the deed of an insane person is voidable, not void, that the exceptions to that doctrine are few in number and are either based on a misconception of the authorities on which they are grounded, or follow the lead of *Van Deusen v. Sweet*, 51 N. Y. 378, which goes no further, as we have shown, than to hold that the deed of a person absolutely bereft of reason is absolutely void. We must hold that, at the time respondent's judgment was rendered, the judgment debtor did not have title to the land in controversy, hence that such judgment did not become a specific lien thereon, whether the deed to Theriault be considered as tainted with fraud under § 2320, Rev. Stat., or to be the deed of an insane person. In any event, the deed passed the title to the land to the grantee therein named, subject, however, to be divested according to law. Plaintiff not being possessed of a lien upon the land by virtue of his judgment, his right to enforce the judgment by execution did not survive the death of Lavoie, so no lien was acquired under the execution levy. The demurrer to the complaint, therefore, should have been sustained.

The order appealed from is reversed, and the cause remanded for further proceedings according to law.

STATE of Wisconsin *ex rel.* DAVIS &
STARR LUMBER COMPANY, *Appt.*,
v.

W. A. PORS, Clerk of Marshfield.

(.....Wis.....)

1. The fact that personal property which had been omitted from taxation for the previous year is no longer in existence, and therefore cannot be entered for the tax of the current year, does not prevent it from being entered for the omitted year under Rev. Stat. § 1059, as amended by Laws 1899, chap. 50, although the language of the statute is that in cases of omitted assessments the property shall be entered "once additionally" for each of the previous years (not exceeding three) that it was not taxed.
2. Jurisdiction of the assessors to assess property not now in existence or owned by the party to be taxed therefor is conferred by Rev. Stat. § 1059, as amended by Laws 1899, chap. 50, authorizing such assessment for a previous year in which it should have been made but was not, and that it shall be made "according to the assessors' best judgment," although ordinary assessments are required by § 1055 to be made upon actual view as far as practicable.
3. Personal property omitted from assessment prior to the amendment of Rev. Stat. § 1059, is subject to the provisions of

NOTE.—For earlier case in this series on constitutionality of statute authorizing assessment of property omitted from tax roll, see *South Nashville Street R. Co. v. Morrow* (Tenn.) 2 L. R. A. 858.

51 L. R. A.

that statute authorizing reassessment of property thus omitted in preceding years.

4. An assessor's report that lumber assessed is manufacturer's stock cannot be ignored and the property regarded by the board of review as merchandise, in the absence of any evidence to contradict the report.

(*Marshall and Bardeen, JJ., dissent.*)

(September 25, 1900.)

A PPEAL by relator from an order of the Circuit Court for Wood County dismissing a writ of certiorari issued to review an assessment of property alleged to have been omitted from the tax rolls. *Affirmed.*

Statement by Dodge, J.:

On November 4, 1899, a writ of certiorari was issued out of the circuit court to the respondent as clerk of the city of Marshfield, commanding him to send up for review the proceedings taken in reference to the assessment against the relator in 1899 of certain property omitted in 1898. From the return it appears that the relator was assessed, under the heading, "Value of Logs, Timber, Lumber, Ties, Poles, and Posts, Mfrs.' Stock," \$11,335, and in addition was assessed under the same heading \$14,604, marked "Omitted for the Year 1898." The latter item appears from the roll to have been made up in nearly equal parts of lumber and logs. The relator appeared before the board of review by its secretary, Burt E. De Yo, and its attorney, Hon. William F. Bailey, and objected to the assessment against it for lumber and logs omitted in 1898, and accompanying such objection filed the affidavit of said De Yo, not controverting the existence on May 1, 1898, of lumber and logs to the amount specified, but asserting that no part of the logs so existing on May 1, 1898, remained uncut or unmanufactured on the 1st day of May, 1899, and that none of them were in the city of Marshfield or elsewhere at the latter date; and further alleging that no part of the lumber owned by relator on May 1, 1899, or at any time subsequent thereto, or which was then situated in said city, was owned by said corporation on May 1, 1898, and that none of the lumber which it did own on May 1, 1898, was situated in the city of Marshfield on the 1st day of May, 1899. The records of the board state that the relator objected "on the ground that the assessor and the board have not the right or power to assess the personal property which was omitted in the assessment of said year 1898." The board listened to argument, submitted the question of law to the attorney general, and finally overruled the objection. No witnesses were sworn, and no evidence offered or taken, before the board of review, unless the affidavit of said De Yo is such. After the filing of the return, the respondent moved the court, upon the petition, writ, return, and its exhibits, and upon certain additional affidavits, to quash the writ. Those affidavits tended to

establish the existence at Marshfield, and appellant's ownership on May 1, 1898, of the lumber and logs so assessed, the inadvertent omission thereof, and that no taxes had been assessed or collected from the relator thereon for the year 1898. The court entered an order January 31, 1900, "that said writ of certiorari herein be, and the same hereby is, quashed and dismissed upon the merits;" from which order the relator appeals.

Mr. W. F. Bailey, for appellant:

Manufacturer's stock is that which the owner has on hand to be manufactured. This lumber was the manufactured article, the product of the sawlogs, which was the manufacturer's stock.

Such lumber was not assessable at Marshfield.

Mitchell v. Plover, 53 Wis. 548, 11 N. W. 27.

Statutes are not to be construed as having a retrospective effect, unless the intention of the legislature is clearly expressed that they shall so operate.

Seamans v. Carter, 15 Wis. 548, 82 Am. Dec. 696; *Finney v. Ackerman*, 21 Wis. 271; *Warner v. Trow*, 36 Wis. 195; *Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 663; *Hall v. Banks*, 79 Wis. 235, 48 N. W. 385.

Such a law, instead of being remedial, is in its nature penal. It is a statute that must receive a strict construction.

Dean v. Charlton, 27 Wis. 526; *Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48; *Bernier v. Becker*, 37 Ohio St. 72; *Shallow v. Salem*, 136 Mass. 136; *Kelley v. Boston & M. R. Co.* 135 Mass. 448; *Hastings v. Lane*, 15 Me. 134; *Johnson v. Burrell*, 2 Hill, 238; *Sanford v. Bennett*, 24 N. Y. 23; *Palmer v. Conly*, 4 Denio, 376; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Hackley v. Sprague*, 10 Wend. 113; *Higgins v. Bear River & A. Water & Min. Co.* 27 Cal. 153.

All reasonable doubts as to the intent of the legislature should be resolved in favor of the relator.

The status of property on the 1st day of May fixes irrevocably where it shall be assessed for taxation. If, in fact, the assessment is made later, it is not valid unless it could have been made the 1st day of May.

Hayden v. Roe, 66 Wis. 288, 28 N. W. 186; *Wilcox v. Rochester*, 129 N. Y. 247, 20 N. E. 99; *Day v. Pelican*, 94 Wis. 503, 69 N. W. 368.

The officer had no jurisdiction at all over the property. It was not subject to taxation. It was not even in existence.

Hayden v. Roe, 66 Wis. 288, 28 N. W. 186.

Messrs. B. R. Goggins and P. A. Williams, for respondent:

Only statutes which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Society for Propagation of Gospel v. Wheeler, 2 Gall. 139, Fed. Cas. No. 13,156; 51 L. R. A.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

Courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Twenty Per Cent Cases*, 87 U. S. 179, 22 L. ed. 339; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 401, 13 L. ed. 472; *Watson v. Mercer*, 8 Pet. 110, 8 L. ed. 884.

This state has the power to pass any law, though it be within the definition of retroactive or retrospective legislation, provided it is not *ex post facto* legislation or legislation impairing the obligation of contracts, and does not contravene the 14th Amendment of the Constitution of the United States.

A law which is made to operate upon past conditions, or conditions which have developed in the past, is not necessarily retroactive or retrospective legislation in the meaning of the law.

Klaus v. Green Bay, 34 Wis. 628; 23 Am. & Eng. Enc. Law, p. 452; *North Carolina R. Co. v. Alamance Comrs.* 82 N. C. 259; *People ex rel. Witherbee v. Essex County Supers.* 70 N. Y. 228; *People ex rel. Peake v. Columbia County Supers.* 43 N. Y. 130; 1 Kent, Com. p. 455; *Harrington v. Smith*, 28 Wis. 43; *Brown v. Pendergast*, 7 Allen, 427; *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 1 N. E. 680.

Where the language plainly shows the legislative intent that the statute should have a retrospective operation, and the omission to be cured is some act which the legislature might have dispensed with by a prior statute, the courts will so construe the act as to give it the retrospective operation intended.

23 Am. & Eng. Enc. Law, p. 452; *People ex rel. Witherbee v. Essex County Supers.* 70 N. Y. 236; *People ex rel. Peake v. Columbia County Supers.* 43 N. Y. 136; 1 Kent, Com. p. 455; *People ex rel. Collins v. Spicer*, 99 N. Y. 233, 1 N. E. 680.

Where the nature and purpose of the act show that it is remedial, the use of the future tense of the verb will not prevent its receiving a retroactive application.

Klaus v. Green Bay, 34 Wis. 628; *Plum v. Fond du Lac*, 51 Wis. 393, 8 N. W. 283; *State v. Duff*, 80 Wis. 13, 49 N. W. 23.

The purpose of the legislature in the enactment of chap. 50, Laws 1899, was to give the same right to reach the taxes on personal property omitted that, long theretofore, by law existed with reference to real estate.

This statute creates no new obligation, it imposes no new duty, and it attaches no new disability, in respect to any transactions or considerations already past. It cannot, therefore, be considered retroactive legislation within the meaning of that term, no matter what words are employed by the legislature.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Eastman v. McCarten* (N. H.) 45 Atl. 1081; *State ex rel. Sweet v. Cunningham*, 88 Wis. 87, 57 N. W. 1119, 59 N. W. 503; Cooley, Taxn. 2d ed. p. 270; Cooley, Taxn. 2d ed. p. 293; *North Carolina R. Co. v. Alamance Comrs.* 82 N. C. 259.

Where property is once made by a law a subject for taxation there is a legal liability created against the owner for such tax, and the municipality is ever thereafter entitled to collect and recover such tax, and the failure of assessment proceedings is no bar to the right of the government to collect such tax, even though such assessment and tax are by judgment of a competent court declared an absolute nullity.

Mills v. Charleton, 29 Wis. 417, 9 Am. Rep. 578; *Cross v. Milwaukee*, 19 Wis. 509; *Peters v. Myers*, 22 Wis. 602; *May v. Holdridge*, 23 Wis. 93; *Flanders v. Merrimack*, 48 Wis. 575, 4 N. W. 741; *Plumer v. Marathon County Supers.* 46 Wis. 171, 50 N. W. 416; *State ex rel. Brown County v. Myers*, 52 Wis. 633, 9 N. W. 777.

Relator owes this tax as a debt to the municipality.

Harrington v. Smith, 28 Wis. 43; *Brown v. Pendergast*, 7 Allen, 427; 7 Lawson, Rights, Rem. & Pr. pp. 5922, 5923.

It was the intention of the legislature to provide a remedy by which a tax justly due from a taxpayer for a previous year, but which for some reason was omitted from the assessment for that year, could be collected.

The fact that such property has at some specified time become exempt cannot have such retroactive effect as to make it exempt for the years when it was properly taxable.

Green Bay & M. Canal Co. v. Outagamie County, 76 Wis. 591, 45 N. W. 536; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *North Carolina R. Co. v. Alamance Comrs.* 82 N. C. 259.

Dodge, J., delivered the opinion of the court:

1. The circuit court having expressly declared that it quashed the writ of certiorari "on the merits," we, for the purposes of this review, shall consider its action as tantamount to a judgment of affirmance, in the light of *State ex rel. Gray v. Oconomowoc*, 104 Wis. 622, 628, 80 N. W. 942, and authorities there cited. Upon such consideration two principal questions arise, and have been debated with much vigor by counsel: First, whether § 1059, Rev. Stat., as amended by chapter 50, Laws 1899, authorizes reassessment upon any omitted personal property which between the time of its omission and the time of reassessment has passed out of existence, out of the ownership of the person assessed, or out of the assessment district; second, whether such act authorizes reassessment of personal property omitted prior to the amendment.

Section 1059, with the amendment in brackets, provides: "Real [or personal] property omitted from assessment in any 51 L. R. A.

of the three next previous years by mistake or inadvertence, unless previously reassessed for the same year or years, shall be entered once additionally for each previous year of such omission, designating each such additional entry as omitted for the year 18— (giving year of omission), and affixing a just valuation to each entry for a former year as the same should then have been assessed according to his best judgment, and taxes shall be apportioned and collected on the tax roll for such entry." This section had for many years served to authorize, and, with the aid of the general taxing machinery, to enable, the assessment and collection of omitted taxes on real estate. The addition of personal property to the subjects affected thereby could have had no purpose save to authorize and enable in like manner, and to the same extent, the collection of personal taxes which ought in previous years to have been paid, but, by reason of like omission to assess, had not been. This legislative purpose is entirely obvious, and should be given complete effect, unless insuperable obstacles prevent. *Harrington v. Smith*, 28 Wis. 43, 59; *Brown v. Pendergast*, 7 Allen, 427; 7 Lawson, Rights, Rem. & Pr. p. 5922.

The general purpose of legislation of this class, namely, to provide means for enforcing the obligation of each individual to contribute to the expenses of government according to the taxable property owned by him, whenever he shall have escaped or evaded that obligation, has many times received the commendation of this and other courts. It is promotive of, nay essential to, the constitutional behest that taxation be uniform. *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509; *Wilcox v. Eagle Twp.* 81 Mich. 271, 45 N. W. 987. This purpose must in large measure fail if a disposal, consumption, or removal of personal property after the time when assessment should have been made prevents its reassessment.

The principle at the foundation of these reassessment laws is that the owner of property is under obligation—some authorities say he is indebted—to the government to pay a sum proportioned to the property owned by him on May 1st of each year. *Warden v. Fond du Lac Supers.* 14 Wis. 618, 620; *Peters v. Myers*, 22 Wis. 602; *Flanders v. Merrimack*, 48 Wis. 567, 572, 4 N. W. 741; *Sturges v. Carter*, 114 U. S. 511, 518, 29 L. ed. 240, 243, 5 Sup. Ct. Rep. 1014. This obligation he owes primarily to the municipality in which certain classes of property are on that date situated, for the municipality, under our system, collects the taxes as trustee for the other branches of government, state, county, and school district.

Several obstacles are suggested by appellant to the enforcement of this statute, where the omitted property is either not owned by the same person, or is not within the same taxing district at the time of reassessment: First among these is the language of the statute requiring that it be

"entered once additionally" for each of the omitted years; the argument being that if the property cannot be entered originally against the person for assessment that year it cannot be entered "additionally" for preceding years. The language, of course, is not entirely apt as applied to the supposed situation, but it was used originally with reference to real estate, and accomplished the result of securing its reassessment for the years of omission. We have no doubt from the manner of the amendment that the legislative purpose contemplated the result rather than the clerical method by which it was accomplished. *Plum v. Fond du Lac*, 51 Wis. 393, 397, 8 N. W. 283. The appellant's objection is very technical and refined, hardly less so than would be the suggestion that the entry of any amount for preceding years must of necessity be "additional" to any sums otherwise assessable against the same person. The step thus criticised is but one of those leading to the ultimate result intended and commanded by the legislature, namely, that "taxes shall be apportioned and collected on the tax roll for such entry." We are satisfied that any matters of mere form in the procedure can and should be adjusted to accomplish this result.

Again, it is urged that if the property is not in existence it cannot be within the jurisdiction of the assessors. This contention loses sight of the consideration that the whole subject of taxation is within the control of the legislature, subject only to the constitutional requirement of uniformity, and that branch of the government can confer jurisdiction to apportion and collect taxes when and where it deems best. *Cross v. Milwaukee*, 19 Wis. 509; *North Carolina E. Co. v. Alamance Comrs.* 82 N. C. 259, 268. In the latter case the assessment rested with the township board of trustees at the time the tax should have been levied, but the function had before the time of reassessment been transferred to other officers. The latter were nevertheless held justified in taking the steps necessary for such reassessment and collection authorized by statute.

It is suggested that this construction, whereby assessors may assess property not in existence or not within their district, is inconsistent with the general policy of the statute (§ 1055), which directs ordinary valuation for assessment of personal property to be upon actual view as far as practicable. But the section under consideration (§ 1059) expressly excepts reassessments from that requirement by providing that they shall be "according to the assessor's best judgment." This objection was urged and refuted in *Cross v. Milwaukee*, 19 Wis. 509, where the property involved had been substantially changed in value by the burning of the buildings thereon.

We reach the conclusion that the legislature did not intend to limit the effect of the amendment of 1899 to such personal property as remains unchanged in ownership and location, but to include any and all

which by inadvertent omission escaped assessment, and that such intention is not incapable of enforcement under the circumstances presented in this case.

2. The second question, whether § 1059, as amended, authorizes the reassessment of personal property omitted from assessment prior to the amendment, is one of construction merely; for the power of the legislature to so authorize and direct has long since been placed beyond discussion. *Flanders v. Merrimack*, 48 Wis. 572, 4 N. W. 745, and cases there cited. A general rule of construction, sometimes said to apply to all statutes, and often repeated in our own decisions, is to the effect that statutes are not to be construed as having a retrospective effect unless the intention of the legislature is clearly expressed that they shall so operate. *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Finney v. Ackerman*, 21 Wis. 271; *Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 663; *Jochem v. Dutcher*, 104 Wis. 611, 80 N. W. 949. This rule is accompanied, however, by another equally well-settled, stated by Chancellor Kent (1 Com. 455), as follows: "This doctrine [prospective construction of statutes only] is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations." And by Cooley, *Taxn.* 2d ed. p. 293: "A remedial provision may well be presumed to have been intended to reach back for the purposes of justice. And in cases where a tax is levied to meet expenses previously incurred, or to pay the cost of something of which the persons to be taxed have already had the benefit, any presumption against an intent to give the law retroactive operation may be overcome by the apparent justice of such a construction." In *Klaus v. Green Bay*, 34 Wis. 628, 636, this distinction was recognized and applied to an act providing that subcontractors for state, county, town, city, or village might maintain an action to compel the payment to them of the amount due the principal contractor, and the act was held to confer the right of action, although the indebtedness had been incurred before its passage. We think it clear that the act here in question falls within the classification covered by the latter rule. It creates no new obligation, but is purely remedial. As we have already said, it is predicated upon the obligation of every individual to pay that proportion of the taxes warranted by his property existing at the time when assessment was omitted, and provides further remedial steps for the enforcement of such obligation and collection of the tax when it has failed of payment through some irregularity or omission in the steps otherwise prescribed. Considering, then, the construction of § 1059, it should be observed that both the form and purpose of the statute are addressed to regulating and direct-

ing the conduct of assessors, not to declaring rights or obligations or commanding conduct of those who omit to pay their taxes. The reference to omitted assessments is merely by way of description of a situation in which the assessor is commanded to act. Thus viewed, the statute is clearly prospective. It seeks, not to regulate or modify the effect of any acts already done, but to direct the doing of acts in the future, and, as to such acts, to "take effect and be in force from and after its passage and publication." The letter of the statute would have been disobeyed had an assessor in May, 1899, failed to enter upon his assessment roll any real or personal property omitted from assessment in any of the three next preceding years. Construing a very similar statute of Ohio, the Supreme Court of the United States said: "As this act took effect upon its passage, it authorized the auditor, in any future corrections and adjustments of taxes due, to extend his inquiries back for a period of four years. It did not require him to wait four years after its passage before he could give it full effect." *Sturges v. Carter*, 114 U. S. 513, 517, 29 L. ed. 241, 242, 5 Sup. Ct. Rep. 1017. This court, construing chapter 222, Laws 1885, providing that when lands once withdrawn from public sale are reoffered they shall first be offered at public sale, held the act to apply to lands withdrawn before its passage. It was said (Newman, J.): "This construction does not, as counsel urges, give the statute a retroactive operation. . . . It operates only upon a condition existing at the time of its passage or arising afterwards." *State ex rel. Sweet v. Cunningham*, 88 Wis. 81, 87, 57 N. W. 1119, 59 N. W. 504. The original of § 1210b, authorizing reassessment in suits, was unhesitatingly applied in the case of taxes unlawfully assessed before the act, in *Plumer v. Marathon County Supers*. 46 Wis. 171, 50 N. W. 416, and *Flanders v. Merrimack*, 48 Wis. 567, 4 N. W. 741. Other statutes affecting remedies have been held to apply immediately to the step directed, although the conditions upon which the law acted grew out of events or acts precedent to the legislation, where the language used was no clearer than that now under consideration. *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Klaus v. Green Bay*, 34 Wis. 628, 636; *Plum v. Fond du Lac*, 51 Wis. 393, 397, 8 N. W. 283; *Reed v. Madison*, 83 Wis. 171, 178, 17 L. R. A. 733, 53 N. W. 547; *Relyea v. Tomahawk Paper & Pulp Co.* 102 Wis. 306, 78 N. W. 412.

It is true there are cases, some of them cited above, which ignore the consideration that the legislation acts directly only on future acts, and deny to it even indirect retrospective effect upon precedent rights or conduct. We do not impugn the correctness of those decisions, applied as they were to legislation of a different class, not addressed merely to regulating or perfecting remedies for the enforcement of existing obligations. They do not conflict with the rule of such cases as those last cited, which fully justify

the conclusion that § 1059, with its amendment including personal property, was intended to take immediate effect according to its terms, and to regulate the conduct of assessors thereafter, without regard to whether the omissions to assess occurred before or after 1899; from which conclusion it results that the action of the assessor attacked by appellant was lawful and proper and that no error was committed by the board of review in refusing to set it aside.

3. One other contention on part of appellant demands brief consideration. He insists now, on authority of *Mitchell v. Plover*, 53 Wis. 548, 11 N. W. 27, that the lumber belonging to plaintiff was not manufacturers' stock, but merchants' goods. He made no contention and offered no evidence before the board of review that the assessor's designation of it on the roll as manufacturers' stock was not in accord with the fact. Obviously, lumber may be merchandise when kept for sale, or may be manufacturers' stock if held for the purpose of being manufactured into furniture, vehicles, or doors. In the absence of any evidence to the contrary, the board of review could not ignore the assessor's report that it was the latter, and committed no error in refraining from changing the assessment roll in that respect. The board of review does not appear to have acted either beyond its jurisdiction or contrary to law, and the circuit court properly quashed the writ of certiorari on the merits.

The order appealed from is affirmed.

Marshall, J., dissenting:

There is a trite expression in judicial literature which embodies the idea that compels me to dissent from the decision in this case, namely, it is not the province of the court to make the law, but to expound and apply it. The judicial function, and that of the lawmaking power, are each independent of the other. Those whose duty it is to exercise the one cannot properly cross the boundary line that separates it from the other; though it is true that such line is sometimes so indistinct that judges, deeply imbued with the idea of what was the legislative purpose in making a law, especially if that purpose be strongly promotive of public interests and good citizenship, will sometimes cross it to accomplish such purposes, apparently overlooking those safeguards to judicial footsteps that have been located along the judicial pathway by the accumulated wisdom of ages. It seems to the writer that those guides were not strictly observed in reaching the conclusion of the court in this case, else a contrary decision would have been the result.

A brief reference to well-recognized rules for judicial construction, which form some of the guides above referred to, and their application to the statute upon which this case turns, will sufficiently show the reasons why I cannot agree with the decision of the court.

We have first the rule that words which are plain, and in their literal sense lead to

no inconsistent or absurd consequence, must be presumed to have been used with their common and ordinary meaning; and that such presumption must absolutely prevail. *Absoluta sententia expositore non eget.* That rule has been a guide for the courts of this country and England through a period covered by the great body of our judicial records, and is often found stated in the language of Vattel, Law of Nations, bk. 2, § 263, thus: "It is not allowable to interpret what has no need of interpretation. . . . When its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it." Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless. That recognizes that the consequence of adhering to a literal reading of words used in a legislative enactment may of itself call for judicial construction of the act, and justify in some cases a violation of the letter of the law in order to reach the real spirit of it and give effect to the legislative will. But that is limited by the principle that neither rules of law nor of language can properly be violated to carry out a legislative idea, however clear it may be that the law was intended to convey such idea. That is to say, when interpretation of the words or construction of the language of an act is proper, a meaning cannot be properly ascribed thereto that is not within the reasonable meaning thereof; for while by judicial construction we may get the right meaning out of words, it is not within the legitimate sphere of judicial construction to put meaning into them. *State ex rel. Heiden v. Ryan*, 99 Wis. 123, 74 N. W. 544. As is often said: "Courts cannot go, by construction, beyond the reasonable meaning of language, whatever may be the consequences." Lord Tenterden, in *King v. Barham*, 8 Barn. & C. 99, treating of the same subject, said: "It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." Lord Campbell, recognizing the same limitation upon judicial construction, in *Coe v. Lawrence*, 1 El. & Bl. 516, used the following language: "I . . . cannot doubt what the legislature intended to do; but they have not carried it into effect. . . . It is better that we should adhere to the words they have used, than that we should strive to amend it."

It follows that if the words of an act reasonably admit of but one meaning, that meaning must be adopted regardless of the wisdom of the act or whether it will effect the legislative purpose; and that the power to go beyond the ordinary meaning of words is limited by the rule that if the language of an act be open to judicial construction,

a meaning cannot properly be ascribed to it that is not within the reasonable scope of such language, whatever may be the consequences of adhering to that limitation. To go beyond that is to alter the law and do what the legislature may have intended but failed to do. The ultimate end of judicial construction is not to determine what the legislature meant, but what the language used by the legislature means.

In view of what has been said and the fact that my brethren obviously consider the statute (Rev. Stat. § 1059) open to judicial construction, we would expect to find that established legal principles were applied to it in order to determine what the language used therein means. But if such application were made, we are unable to discover that it proceeded further than to determine that the legislature evidently intended to provide that personal property, omitted from the tax roll one year, shall be assessed for such year thereafter if the omission be discovered within three years, regardless of any change in the title in the meantime or even of the existence of the property at the time of remedying the omission. It is assumed, as we take it, that such situation justifies a construction that will effect the legislative idea, whether the meaning attached to the language under consideration is reasonably within its scope or not. No claim is made that the words, "shall be entered once additionally for each previous year of such omission," include within their reasonable meaning an entry not additional to an entry for the current year. But it is said we must hold that the legislature did not intend to limit the remedy to mistakes of assessors in omitting property from the assessment, to property still liable to assessment to the same person as at the time it was omitted, else the legislative purpose "in large measure must fail." That is, as we take it, the point under consideration is made to turn on a rule of construction which of itself does not justify attributing to words a meaning contrary to their literal sense,—a rule which, if followed regardless of its limitations, will often lead to an apparent failure to observe that the judicial office is *jus dicere*, not *jus dare*. Lord Westbury, in *Ex parte St. Sepulchre*, 33 L. J. Ch. N. S. 372, stating in a construction of a law to effect abstract justice, and a presumed legislative purpose, disregarding the limitations to which we have referred, said: "The vice chancellor is of opinion that what he denominates the abstract justice of the case requires this interpretation. . . . I cannot admit the principle that, in a matter of positive law, abstract justice requires or justifies any departure from established rules of interpretation. Those established rules no doubt admit of your putting a secondary meaning upon words where the ordinary and primary signification would lead to some absurdity, or some impossibility. But where the conclusion is merely that there is a *casus omissus*, for which the legislature had not provided, to alter the ordinary rules of interpretation

upon the principle of a duty due to abstract justice, is simply to legislate and not to interpret."

The force of the foregoing will appear by a careful study of the words of the statute under consideration: "Real [or personal] property omitted from assessment in any of the three next previous years by mistake or inadvertence . . . shall be entered once additionally for each previous year of such omission." As we look at those words, the first question that the judicial interpreter should solve is, Are they in themselves, or when applied to the subject to which they refer, ambiguous? If not, as we have seen, they must be taken in their literal sense. It would seem that the words are plain, and do not admit of any other meaning than that, when property is assessed for any year, it shall also be assessed once additionally for each of the three preceding years that it was by mistake or inadvertence omitted from the assessment roll. I do not understand that the contrary is held by my brethren, except for some judicial power of the court to give to words a meaning which will effect a plain legislative purpose, rather than that the purpose shall fail. But the court has no such legitimate power as we have seen. All must admit that it is impossible to do a thing "once additionally" till the thing has been originally done. That is too clear for serious discussion.

If we are right in the foregoing, then the law under consideration cannot be construed as the court has construed it except by rejecting entirely the significant word "additionally." That is what has in fact been done. If there is any rule of construction that will justify such a course, the writer is not aware of it. Words obviously omitted by mistake, which prevent an act having a sensible effect, and words necessarily implied, may be supplied by judicial construction; but when an act will admit of a reasonable construction that will give sensible effect to every part of it, words cannot be, by judicial construction, rejected merely because otherwise the scope of the law will be more limited in its operation than the legislature probably intended, and more than absolute justice requires.

In what has been said we have assumed that it was probably the legislative purpose to remedy mistakes in the omission of property from the assessment roll if discovered within three years from the commission of the mistake, regardless of a change in the ownership of the property in the meantime, or the consumption or destruction of the property itself. We are not willing, however, to admit that the proposition of the court on that point is correct. The use of the word "additionally" in the law, in my judgment is an insurmountable barrier to reaching such conclusion. All that is said in the opinion as to the public burdens meets with our hearty approval. What is here condemned is that which appears to be judicial legislation to effect the desired end.

51 L. R. A.

I will not further continue the discussion. The grounds of dissent have, in the main, been stated. No good can come from going on merely to further fortify the position here taken by a more careful analysis of the reasons given by the court for an affirmance of the judgment. It seems that the judgment should be reversed.

Bardeen, J., concurs.

LA CROSSE CITY RAILWAY COMPANY,
App't.,

v.

E. C. HIGBEE, Resp't.

(.....Wis.....)

- *1. The rule as regards whether a street railroad is an additional burden on the fee title to the street on which it is located, established in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461, applies to street railroads operated by electric power communicated by means of a trolley wire supported over the track by cross wires attached to poles set in the streets near the outer edge of the sidewalk lines, so far as the construction and operation of such roads fall within the principle of such case.
2. The doctrine of *Krueger v. Wisconsin Telephone Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041, namely, that any new use of a street which to any extent requires a permanent occupancy thereof is an additional burden on the fee, applicable to telephone lines, does not apply to electric street railroads, because such railroads are but an improved method of using the street to effect its original design. The two doctrines divide on whether the use of the street is new, having regard to the original purpose thereof, or the use is only a new mode of devoting the street to public travel,—its original purpose.
3. The principle of *Hobart v. Milwaukee City R. Co.* may be stated as follows: A railroad constructed on the grade of a street and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, and with private rights of abutting landowners, and for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden on the fee thereof.
4. A railroad satisfies the above essentials, regardless of the motive power used or how it is applied, if it be strictly a street railroad for the carriage of passengers on

*Headnotes by MARSHALL, J.

NOTE.—For earlier cases in this series on electric railroads as additional burdens on street, see note to *Western Railway of Alabama v. Alabama G. T. R. Co.* (Ala.) 17 L. R. A. on page 477; *State, Kennelly, Prosecutor, v. Jersey City* (N. J. L.) 26 L. R. A. 281; *State ex rel. Roebeling v. Trenton Pass. R. Co.* (N. J. L.) 33 L. R. A. 129; *Reid v. Norfolk City R. Co.* (Va.) 36 L. R. A. 274; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* (Wis.) 37 L. R. A. 856; *Jaynes v. Omaha Street R. Co.* (Neb.) 39 L. R. A. 751; *Snyder v. Fort Madison Street R. Co.* (Iowa) 41 L. R. A. 245; and *Birmingham Traction Co. v. Birmingham R. & E. Co.* (Ala.) 43 L. R. A. 233.

the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights.

5. A supporting trolley-wire pole, set in a street in front of the sidewalk, does not violate the above rule if it be placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located, and so as not to materially interfere with access to his lot outside the street line.

(September 25, 1900.)

APPEAL by complainant from an order of the Circuit Court for La Crosse County sustaining a demurrer to a bill filed to enjoin defendant from cutting down a pole which complainant had erected in front of his property. *Reversed.*

Statement by **Marshall, J.:**

Action to enjoin the defendant from cutting down an electric street railroad pole, which was erected in the usual way at the outer edge of the sidewalk on his property, on one of the streets of the city of La Crosse, Wisconsin. Sufficient facts are properly stated in the complaint to constitute a good cause of action against the defendant, if electric street railroad poles may be legally placed in a city street, when so located as not to materially interfere with public travel, or access to and egress from abutting property, without the consent of the owner of such property, or his being compensated for a taking of his property for the public use. The defendant interposed a general demurrer to the complaint, which was sustained, and plaintiff appealed.

Messrs. Losey, Woodward, & Lees, for appellant:

In *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, 23 S. W. 592, the bill of plaintiff to enjoin the construction and operation of such a railroad in front of its premises was dismissed on the merits.

Williams v. City Electric Street R. Co. 41 Fed. Rep. 556, holds that a street passenger railway, operated by steam motors, is not an additional burden upon the street.

The doctrine of this case is fully supported by *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 27 N. W. 839. See also *Ogden City R. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. 288.

Taggart v. Newport Street R. Co. 16 R. I. 608, 7 L. R. A. 206, 19 Atl. 326, squarely holds that an electric street railway built exactly like that of the plaintiff here, with its poles and wires, does not constitute an additional burden; and the same is true with the following cases:

Lockhart v. Craig Street R. Co. 139 Pa. 419, 21 Atl. 26; *Koch v. North Ave. R. Co.* 75 Md. 222, 15 L. R. A. 377, 23 Atl. 463; *Hulsey v. Rapid-Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859.

San Antonio Rapid Transit Street R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533, held 51 L. R. A.

that an "electrical street railway" did not impose an additional burden.

Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Asso. 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

In Michigan such electric road, with its poles and wires, does not constitute an additional burden upon the street.

People ex rel. Kunze v. Fort Wayne & E. R. Co. 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010; *Dean v. Ann Arbor Street R. Co.* 93 Mich. 330, 53 N. W. 396. See also *Houze v. West End Street R. Co.* 167 Mass. 46, 44 N. E. 380; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531; *Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Asso.* 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 36 Atl. 1107; *Reid v. Norfolk City R. Co.* 94 Va. 117, 36 L. R. A. 274, 26 S. E. 428; *Merrick v. Intramontaine R. Co.* 118 N. C. 1081, 24 S. E. 667; *Philadelphia, W. & B. R. Co. v. Wilmington City R. Co.* (Del.) 38 Atl. 1067; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 137, 43 L. R. A. 233, 24 So. 502; *Placke v. Union Depot R. Co.* 140 Mo. 634, 41 S. W. 915; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104; *Snyder v. Fort Madison Street R. Co.* 105 Iowa, 284, 41 L. R. A. 345, 75 N. W. 179; *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604; *Taylor v. Portsmouth, K. & Y. Street R. Co.* 91 Me. 193, 39 Atl. 560.

In *Lade v. Shepherd*, 2 Strange, 1004, it is said that the "making of a street was only a dedication of it to the public for the particular purpose of passing and repassing, but that the soil belonged to the owner."

Goodtitle ex dem. Chester v. Alker, 1 Burr. 133; *Cortelyou v. Van Brundt*, 2 Johns. 357, 3 Am. Dec. 439; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159.

Except in New York this doctrine has substantially disappeared.

The attempt in New York to maintain the ancient doctrine, and to reconcile it with the advance of civilization and the needs of growing cities, has led to hopeless confusion in the law of that state.

People v. Kerr, 27 N. Y. 201.

The easement in a city street is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate.

Elliot, Roads & Streets, pp. 305-307; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Montgomery v. Santa Ana Westminster R. Co.* 104 Cal. 189, 25 L. R. A. 654, 37 Pac. 786.

The rights usually conceded to the lot-owner are to excavate under the sidewalk, maintain hatchways therein, to build projecting bay windows and awnings, and temporarily to occupy part of the sidewalk while receiving or shipping goods.

Such rights are usually granted and regulated by municipal ordinance under the plenary powers of control over streets given by city charters.

Hibbard v. Chicago, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256; *Farrell v. New York*, 20 N. Y. S. R. 12, 5 N. Y. Supp. 672; 24 Am. & Eng. Enc. Law, pp. 37, 38; *Cooley*, Const. Lim. 5th ed. *555, 556.

The doctrine of *Krueger v. Wisconsin Telephone Co.* 27 Wis. 194, 9 Am. Rep. 461, should not be extended so as to place under its ban poles placed in the street for a different purpose.

Cater v. Northwestern Teleph. Exchange Co. 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Craig v. Rochester City & B. R. Co.* 39 N. Y. 404; *Palmer v. Larchmont Electric Co.* 158 N. Y. 231, 43 L. R. A. 672, 52 N. E. 1092; *Tompkins v. Hodgson*, 2 Hun, 146.

The abutter may have mandatory injunction to remedy any wrong to him resulting from construction or operation of the road not fairly or reasonably within the limits of the public grant, or an action to recover all special damages to his freehold in one assessment by a jury.

Doane v. Lake Street Elev. R. Co. 165 Ill. 523, 36 L. R. A. 97, 46 N. E. 520; *Ferguson v. Covington & C. Elev. R. Co.* 22 Ky. L. Rep. 371, 57 S. W. 400; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Kuhl v. Chicago & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155; *Fowler v. Des Moines & K. C. R. Co.* 91 Iowa, 533, 60 N. W. 116; *McLean v. Brush Electric Lighting Co.* 9 Ohio L. J. 65, 1 Am. Elec. Cas. 483; *Keasbey, Electric Wires*, § 111, note.

Messrs. Higbee & Bunge, for respondent:

The decision in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461, went upon the theory that the use of a street for a horse street-railway is substantially the use contemplated by the parties at the time of the dedication or condemnation of the street for public use.

Peculiarly different from this is the modern electric railway where, as in La Crosse, with double tracks on many streets and an authorized speed of 20 miles an hour, heavy motor cars, frequently with trailers attached, go whirling along business and residence streets every few minutes.

There is "far more difference in the use of mere horse power, as in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461, and electric power, as in the case of the defendant, than there is in the case of electricity and steam."

Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 571, 37 L. R. A. 856, 70 N. W. 678.

In *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* it was decided that an electric railway authorized to carry freight and baggage as well as passengers was an additional servitude upon a city street.

51 L. R. A.

While in *Krueger v. Wisconsin Telephone Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041, this court has reserved the question involved in the case at bar, on principle the decision in that case is absolutely controlling here.

The court clearly holds in that case that the transmission of intelligence is within the purpose for which a public street is dedicated or condemned; that the sending of telegrams or telephone messages is as much the transmission of intelligence as though the same were conveyed by postman. But the court was not willing to shut its eyes to the obvious truth that the means employed, and the method of the use, constituted an additional burden to the property owner for which compensation must be made.

See *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67.

Marshall, J., delivered the opinion of the court:

The decision appealed from, as we are informed, was made on the theory that the case is controlled by the conclusion reached in *Krueger v. Wisconsin Telephone Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041, regarding the right to maintain telephone poles in public highways without the consent of abutting property owners, and the reasoning that led to such conclusion. Counsel for respondent urge the same view in this court, so we are confronted at the outset with the question of whether the point now presented has been in effect decided and the law in regard to it established for this state against appellant's contention to the effect that an electric railway pole in a city street, properly placed, is not an additional burden upon the fee title to the land over which the street is laid.

We shall not discuss at any great length what was said in the *Krueger Case*, for the purpose of explaining and rendering the reasoning of the opinion there more clear and consistent with the conclusions reached here than they seem to have been to counsel for respondent and to the learned court that decided this case below. If there exist any necessity for making the opinion in the *Krueger Case* more definite and certain, it is not perceived here. What was said there should be read and considered with reference to the points decided, upon which the final decision was grounded. Such points are, first, the law governing the right of telegraph and similar companies to erect and maintain poles and lines on public streets and highways does not extend beyond the public right to the street, hence is subject to the private rights of the owners of the fee of the land covered by the streets, who must be dealt with independent of such law, if such poles constitute an additional burden upon such fee; second, as regards the contingency suggested, as between the rule in jurisdictions holding that any quasi public use of a street is permissible that is not so inconsistent with the original design thereof as to materially interfere therewith, under which telephone and telegraph lines in public streets

have been held not to be an additional burden upon the fee, and the rule adopted by the great majority of courts and supported generally by law writers,—that a new mode of using a public highway so wholly different from the original mode of use as to really constitute a new use affects private rights, though such use may in some degree affect the original design of the way, if it requires to some extent a permanent occupancy of the street, regardless of whether such occupancy materially interferes with the primary use of the street,—under which rule the maintenance of telegraph and telephone poles on public streets has been held to be an additional burden on the fee, for which the abutting owner must be compensated, the court inclines to and adopts the majority rule above, so far as relates to telephone lines. That course was followed, as was remarked, in view of the fact that the latter rule has the greater support, as indicated, and the further fact that a middle ground for street railways was adopted for this state in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461. All said in the opinion as to permanent occupancy of a street by a quasi public corporation, for a purpose not originally contemplated in the acquirement of the land covered by it for public use, being of itself a new burden upon the fee thereof, was said *arguendo*, and as mere backing for the extreme rule in favor of abutting property owners, adopted as to telephone lines, but which, as indicated in the opinion, has been, since the *Hobart Case*, contrary to the policy of the state regarding street railways, as the opinion clearly shows.

So, as we have seen, there is nothing in the *Krueger Case*, when rightly understood, and when, we may properly say, understood as the language of the opinion clearly indicates, to affect the question raised in this case. That is all we deem necessary to say regarding the *Krueger Case*. It established the law for this state, governing the question presented for decision and decided, and the opinion should not be read as in any way limiting the law regarding street railways, laid down in the early case in this court.

From what has been said this case is left to turn on whether a street-railroad pole, properly placed, is an additional burden on the fee of the land upon which it is located within the principle of *Hobart v. Milwaukee City R. Co.* Such principle, briefly stated, is that a railroad, constructed and operated in the street of a city at grade, so as not to materially interfere with its common use for public travel by ordinary modes, or with private rights of abutting landowners, for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden upon the fee thereof.

In *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 37 L. R. A. 856, 70 N. W. 678, the court pointed out the significance of the purpose of a street railway as indicated in the rule under consideration, namely, the carriage of passengers; also the significance of the place where

such purpose may be exercised, namely, in city streets; and it was held that a railway having for its purpose the carriage of freight, a commercial railway, is not covered by the *Hobart Case*.

In *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 83, 41 L. R. A. 575, 74 N. W. 533, the significance of that part of the rule of the *Hobart Case* relative to where a street railway may be constructed was again pointed out and discussed, and it was held that it does not extend to a purely country highway. So it will be seen that the law governing the subject under discussion, as laid down when first considered in this court, has not since been extended or limited. No reason is perceived and none contended for, as we understand it, why such law should now be extended. The issue raised must be tested accordingly.

It is claimed by appellant that no significance should be given to the fact that in the *Hobart Case* the motive power was obtained by the use of horses, while the contrary is urged by counsel for the respondent, attention being called to the following language of the chief justice in *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 37 L. R. A. 856, 70 N. W. 678: "There is certainly far more difference in the use of mere horse power, as in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461, and electric power, as in the case of the defendant, than there is in the case of electricity and steam." When that language is read with reference to the point under consideration, it will be seen that it was not intended to convey the idea that the difference between horses as a motive power and electricity is sufficient to render a street railroad an additional burden upon the fee of the land on which the street is located. The question to which the quoted language referred is, Why should an ordinary steam commercial railroad company be required to pay for its right of way in the public streets, to the owner of the fee of the land upon which the railroad is constructed, and an electric street railroad company be free from that burden? The mere difference in motive power would seem to be insufficient, it was said; and as a further reason why mere motive power should not be the test, the idea was suggested expressed in the language which counsel for respondent deem so significant. What would be fairly gathered from all that was said on the subject is that the motive power, of itself, is not sufficient to class an electric street railway with an ordinary railroad, as regards its being an added burden upon the fee. That is in line with all or nearly all authority on the subject. *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, 23 S. W. 592; *State, Roebbling, Prosecutrix, v. Trenton Pass. R. Co.* 58 N. J. L. 606, 33 L. R. A. 129, 34 Atl. 1090; *Reid v. Norfolk City R. Co.* 94 Va. 117, 36 L. R. A. 274, 26 S. E. 428; *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 363, 10 Atl. 47;

Newell v. Minneapolis, L. & M. R. Co. 35 Minn. 112, 27 N. W. 839; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Booth, Street Railways*, § 80; *Joyce, Electric Law*, §§ 344, 345.

The subject last referred to has been considered by the courts of most of the states of the Union, and many of the Federal courts, with the uniform result indicated. A brief reference to particular decisions will give point to what has been said.

In *People v. Kerr*, 27 N. Y. 188, Mr. Justice Emott, speaking for the court, said: "I do not attach any importance to the motive power. I have no doubt that steam will ultimately be applied to carriages upon common roads, and I suppose it might be used upon these iron ways without affecting the present question,"—the rights of abutting property owners.

In *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 27 N. W. 839, the right to use steam as a motive power to operate street cars was sustained, the evidence showing that the motor was so designed as not, in the operation of hauling street cars, to be materially different from horse or electric power as regards interference with ordinary public travel, or with private rights. The court said that the test to be applied, in determining whether a railway constructed on a street and operated by the use of a steam motor is an additional burden upon the fee, is whether it is in fact a "street railroad" as the term is commonly understood,—a railroad constructed and operated in aid of passenger travel on the street over which it runs, by taking on and discharging passengers at street crossings,—and whether it is constructed on the street grade and operated so as not to materially interfere with the ordinary common use of the street or with the access to abutting property. *Moses v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516, is to the same effect.

In *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, the court considered all the elements that can be suggested why the use of electricity as a motive power should render a street railroad operated by such power different from a street railroad operated by horse power, as regards being an additional servitude upon the fee of the street owned by the abutters, and it was decided against the contentions of the abutter on all points. The decision was subsequently referred to in a case involving the same subject, and affirmed, the court remarking that there is almost a consensus of judicial opinion in that direction.

So it follows that, in determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric, or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and 51 L. R. A.

not violate private rights, and either may be so used, and the road be so constructed and operated, as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question.

If the crucial test, to be applied in determining whether a street-railway company is entitled to a free right of way along a public street as against abutting property owners, were whether a different motive power is used than was contemplated when the street right of the public was acquired, all new discoveries of improved modes of travel would require, as has often been remarked, dealing with the owners of the fee of the land on which the streets are located before the public could have the benefit thereof. When a new mode of using the public streets and highways is adopted, the question arises of whether it violates the rights of the owners of the fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street,—the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the traction engine, automobile, and street railways, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations.

Here, as we have seen, appellant's railroad is not outside of the *Hobart Case* because of the motive power used. It is within the rule in that it is for the carriage of passengers, and is strictly a street railway. The complaint shows that the railway was constructed by legislative authority in all respects according to the ordinance of the city of La Crosse granting to appellant its franchises; that the poles, including the particular pole in question, were placed at the curb lines of the streets under the supervision and direction of the proper city official; and that the mode of construction adopted generally is the usual mode where electric power is used, and communicated to the car motor by means of an overhead trolley wire supported by cross wires attached to poles set at or

near the curb lines of the streets. No complaint is made against the use of the streets contemplated by appellant's franchise, unless the manner in which the road is constructed on respondent's property, or the manner in which it is operated, violates private rights.

The complaint was condemned by the trial court merely because a permanent occupancy of the street, to some extent, was shown; but that is not, of itself, material in cases of street railways. As has been shown, the reasoning which the learned judge supposed he was bound by does not apply, because, unlike a telephone line, the purpose of a street railroad is within the scope of the original design of the street. Any other view would condemn *Hobart v. Milwaukee City R. Co.* and the decisions of all the courts that have sustained the rule that the use of a street for street railway purposes does not of itself impose an additional burden upon the fee. It is useless at this late day to urge that the distinction so made is unreasonable. It has had the sanction of this and other courts for upwards of a quarter of a century, and is not now open to question.

On the question of whether the manner in which the road, with its appurtenances, was constructed, affects the rights of the defendant to recover for an additional burden upon the fee of the street, we must come down to the simple question of whether the pole, set at the outer edge of the sidewalk on defendant's premises, interferes with access to or egress from his property. We understand from the complaint that the pole was not located so as to interfere with any driveway or other avenue used for passage to or from the street to respondent's property outside of the street line. It merely prevented a person from stepping on or off the sidewalk at the precise point where the pole was located. That is not such an unreasonable interference with private property as to violate the rule that a street railway cannot be so constructed as to interfere with access to abutting property, without the consent of the owner thereof. As well might it be said that the mere fact that because of the location of the rails in the street one traveling with a vehicle must approach to or go from property abutting thereon at a different angle than he otherwise would, or the fact that he cannot as conveniently use the street in front of such property for ordinary temporary purposes incident to the occupancy thereof, is a violation of private rights. Interference with access to property, within the meaning of the street-railway cases, means some substantial interference. *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Joyce, Electric Law*, § 380. A street-railway pole, properly placed at the curb line of a street, no more interferes with access to or egress from property outside of the street line than a lamp post or hitching post or shade tree, and no more interferes with the ordinary use of the street for public travel.

We are aware that there is at least one case, decided in a court of last resort, where a different conclusion was reached. We refer to *Jaynes v. Omaha Street R. Co.* 53 Neb. 51 L. R. A.

631, 39 L. R. A. 751, 74 N. W. 67. The opinion there shows that the subject treated did not receive careful study. The conclusion reached is contrary to all the authorities cited by the court. A very few cases were cited,—but a small fraction of those where courts have considered the subject under discussion,—yet those referred to were all the Nebraska court could find, so said in the opinion. The decision was based on the theory that any exclusive occupancy of any part of a street by a street railway is a new burden on the fee title thereof. An effort was made to harmonize the contrary holdings in the few cases cited, with the opinion, which seems to have been successful in the judgment of the writer of the opinion, yet success was reached by the exercise of judicial ingenuity that has few parallels.

A single instance will give point to what is said in regard to the manner in which decided cases were brought into harmony with the decision of the Nebraska court. *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205, 19 Atl. 326, one of the leading cases on the subject, which has in a measure guided many courts, was referred to. There the plaintiff, who was the owner of property abutting on the street on which a horse railway was located, which it was proposed to change to an electric street railway operated by the overhead trolley system, desired to enjoin the railway company from erecting poles and wires in front of his property, on the ground that they would constitute an additional burden thereon. The court decided to the contrary, referring to the underlying principles of the horse railway cases to justify the conclusion reached, and saying that "it does not appear . . . that it [the street railway operated by electricity] occupies the streets or highways any more exclusively than if it were operated by horse power." That holding the Nebraska court quickly disposed of by the remark that "there is no question that the law of the case was correctly laid down, if the evidence, or the record on its face, sustains the finding of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway." There was no finding of fact involved in the case. What is referred to as a finding of fact is the conclusion of the appellate court as regards whether an electric railway, with its wires over the street supported by cross wires attached to poles set in the street, "at the front margin of the sidewalk," is an exclusive occupancy of the street so as to materially interfere with its primary use or violate private rights within the principles governing horse-railway cases. The decision is directly contrary to that in the *Jaynes Case*. The latter is out of harmony with all judicial and text-book authority. It was made, as it seems, by overlooking the distinction between a mere new mode of devoting a street to the use originally designed, which admits of some degree of permanent occupancy of the street without compensating the owner of the fee title, and an entirely new use of the street—a use inconsis-

ent with its original design—which does not admit of such occupancy.

If a mere challenge can raise a question for judicial consideration, however well settled the principles involved may be, we ought to go further and inquire as regards whether the manner in which plaintiff's road is operated, as shown by the complaint, justifies the conclusion that it cannot be classed with ordinary horse-power railroads, respecting its effects upon private rights. That is a field that has been explored over and over again, as the cases heretofore cited indicate. It would be a work of supererogation to go over it again at this late day. No new light can be shed upon it. The question has been illumined by the wisdom of eminent judges of most of the courts of last resort in this country, and, with the single exception mentioned, so far as we can discover, the conclusion has been reached that a street railway, having its tracks laid so as to conform to the surface of the street, regardless of the motive power used or how applied, so long as neither private rights nor the common use of the street for public travel is materially affected, is governed by the law early laid down as to street railways operated by horse power; and that the ordinary electric street railway with its trolley wire supported by cross wires attached to poles set near the outer edge of the sidewalks, with due regard to the abutting property owner's convenience, satisfies the essential mentioned. Such a railway is but an improved method of using the street for public travel, which was the original purpose to which it was devoted. So was the horse railroad in its day. The same principles that justify one without purchasing the right from abutting property owners, justify the other. There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property. An electric car, as compared with a horse car, in regard to freedom from interfering with private rights, is superior as regards relieving the street, because it moves more rapidly, is started and stopped with greater facility, and will readily move the greater number of persons the greater distance in a given time. It is superior as regards actually obstructing the street because of its more rapid motion and shorter stops. These considerations, and many others that might be mentioned, have moved courts to declare the law as here indicated. The following are a few of the multitude of cases directly on the subject: *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 363, 10 Atl. 47; *Taggart v. Newport Street R. Co.* 10 R. I. 608, 7 L. R. A. 205, 19 Atl. 326; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859; *Loockhart v. Craig Street R. Co.* 139 Pa. 419, 21 Atl. 26; *Cincinnati Inclined Plane R. Co. v. City & S. L. R. A.*

Suburban Tel. Asso. 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, 23 S. W. 592; *Dean v. Ann Arbor Street R. Co.* 93 Mich. 330, 53 N. W. 396; *Ogden City R. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. 288; *Howe v. West End Street R. Co.* 167 Mass. 46, 44 N. E. 386; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 137, 43 L. R. A. 233, 24 So. 502; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104; *Taylor v. Portsmouth, K. & Y. Street R. Co.* 91 Me. 193, 39 Atl. 560.

In *Booth on Street Railways*, published in 1892, after a review of all judicial authorities down to that time, the author said [p. 117]: "After a full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude," and "does not entitle abutting owners to compensation." In *Joyce on Electric Law*, published in June of this year, it is said that, in every state where a street railway operated by horse power has been held not to create a new burden upon the fee title to the street, entitling the owner of such title to compensation, the holding has been the same as regards an ordinary electric street railway, except in Nebraska in *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67. In *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104, a very well-considered case decided in 1893, it is said that, "with rare unanimity the courts have concurred in holding that an electric street railway, constructed and operated upon the streets by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the streets, but a legitimate use of the streets within the original general purpose of their dedication."

The length to which we have gone in considering the question presented on this appeal is only justified by the fact that the precise question has not before been submitted to this court for decision, and was reserved for further consideration in *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 83, 41 L. R. A. 575, 74 N. W. 538, in such a way as to invite its presentation when a proper case therefor should be made up. It seems clear that in reaching a conclusion that the demurrer to the complaint was improperly sustained, the principles of *Hobart v. Milwaukee City R. Co.* are followed and neither limited nor extended. It will be noted that this opinion does not lead to the conclusion that an electric street-railway pole may be placed at any point in the street near the outer edge of the sidewalk without being an added bur-

den upon the fee title. Reasonable regard must be had, in locating such poles, for the convenience of abutting property owners in the enjoyment of their property. We gather from the complaint that the pole in this

case was properly placed in respect to that rule.

The order appealed from is reversed, and the cause remanded for further proceedings according to law.

UTAH SUPREME COURT.

HERRIMAN IRRIGATION COMPANY,
Appt.,
v.
BUTTERFIELD MINING COMPANY *et al.*,
Respts.

(19 Utah, 453.)

- *1. Where the evidence shows that plaintiff's grantors and predecessors in interest appropriated the waters of a certain creek as early as 1852, and that the use thereof has been continuous by the appropriators and their successors from thence to the present time, a prima facie case is made out; and the burden is cast upon defendants to show that water diverted by them was their property, that they had a right to divert the same, and that they did not divert more than belonged to them.
2. Where one, without consent, intentionally confounds his property with property of the same kind belonging to a stranger, he will lose the whole, unless he can prove the quantity belonging to himself.
3. The burden of proving the allegations in a cross complaint necessary to entitle defendants to a decree rests upon them to the same extent as if they had brought an original action to obtain the relief sought in the cross complaint, and a failure to make such proof renders a decree for the cross complainant erroneous.
4. Where the evidence shows and the

*Headnotes by BASKIN, J.

NOTE.—Use of natural stream to convey appropriated water.

When the immense cost and waste often involved in the conveyance of appropriated water to its place of use confronted the appropriator the desire to take advantage for that purpose of any natural stream flowing in the right direction was of course strong, and it from the beginning received encouragement from the courts, so far as such encouragement could be given without injuring the rights of others. Indeed, the right to use natural streams as part of a ditch system is so reasonable that it has rarely, if ever, been questioned.

If appropriated water is turned into a gulch which for a portion of the year is dry, for the purpose of conveying it to the point where it is needed for use, there is no abandonment of it. But this use does not give an exclusive right to the use of the gulch, nor prevent other persons from using its channel to conduct water, so long as they do not interfere with the rights of the prior appropriator. *Hoffman v. Stone*, 7 Cal. 46.

Where water from an artificial ditch is turned into a natural watercourse and mingled with natural waters of the stream for the purpose of conducting it to a point where it is to be used, it is not thereby abandoned, but may be taken out and used by the person so conducting it, provided in so doing he does not diminish the quantity of natural waters of the stream 51 L. R. A.

trial court finds that certain springs which had for many years and uninterruptedly formed a portion of the water supply of a creek, the waters of which had been appropriated by plaintiff, were in some instances diminished in flow, and in others dried up, after the running of defendants' tunnels, the conclusion is irresistible that the tunnels cut the underground channels of the springs, and defendants could only acquire a right in such water flowing from the tunnels into the stream as was developed by percolation, and the plaintiff retains its original rights. This, too, although the underground channels of the springs are not traceable.

5. If a tunnel should be run by a party in the proper exercise of his dominion over his own real estate, which dries up the springs, whose channels are not traceable, but feeding a stream, the waters of which had previously been appropriated by another, and the water of the tunnel should be discharged, not into the stream, but at a point which renders it impossible to restore the same to the stream, would not these facts present an instance of *damnum absque injuria*?
6. Where water from a tunnel is discharged into a stream previously appropriated, it would be inequitable to deprive the first appropriator of his original rights, by allowing the diversion of water which would naturally flow into the stream, but which, on account of the tunnel, is dis-

to the injury of those who had previously appropriated them. *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769.

One who by his own efforts increases the flow of water in a stream is entitled to the benefit of it to the extent of the increase. *Platte Valley Irrig. Co. v. Buckers Irrig. Mill & Improv. Co.* 25 Colo. 77, 53 Pac. 334.

In *Malad Valley Irrig. Co. v. Campbell*, 2 Idaho, 383, 18 Pac. 52, the court, in deciding that improvement of the supply gives no right as against one who had appropriated all the water of the stream, said: We do not wish to be understood as deciding that one cannot bring water from a foreign source into a natural stream whose waters have been appropriated, and use the channel of the stream to convey the water thus brought and emptied in, to another point to be there diverted and used.

To effect an appropriation, any depression in the land may be used as part of the ditch for conducting the water, and so may the lower portion of the same channel from which the water is taken. *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7.

There are only a few limitations in the application of the general principle stated above. The first, and perhaps the most important, is that the water must be turned into the stream for the express purpose of conveying it, and with no intention to abandon it.

For where the water is turned into the stream as a matter of convenience and without inten-

charged into the stream at a point different from the natural flow.

7. Under § 3286, Rev. Stat., it is sufficient if a bill of exceptions be settled, signed, and filed within ninety days after the determination of a motion for a new trial.

(May 19, 1899.)

A PPEAL by plaintiff from a decree of the District Court for Salt Lake County in favor of defendants in a suit brought to enjoin the diversion of water which plaintiff claimed to have appropriated for irrigating and domestic purposes. *Reversed.*

The facts are stated in the opinion.

Messrs. King, Burton, & King, and Canon & Ferguson for appellant.

Messrs. Bennett, Harkness, Howat, Bradley & Richards, for respondents:

One who, in the pursuit of a lawful business, gathers percolating water in his own soil, is only gathering his own property, and may use it as he pleases; and he may turn it into any natural channel, and let it mix with other waters, and reclaim the water further down.

The essence of abandonment is the intention, and the intention must control unless there has been an adverse user sufficiently long to give a prescriptive right; and there is no such question here, for in 1894 the defendants diverted their water and applied it to a useful purpose.

Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 54 Pac. 247; *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108; *Judson v. Malloy*, 40 Cal. 299; *Smith v. Cushing*, 41 Cal. 97; *Myers v. Spooner*, 55 Cal. 257.

tion of recapturing, it becomes a part of the stream, and cannot be taken out again to the injury of riparian owners. *Schuls v. Sweeny*, 19 Nev. 359, 11 Pac. 253; *Wood v. Waud*, 3 Exch. 779.

If the water is turned into the stream without intention of recapturing, it becomes *publici juris*, and belongs to its appropriators according to priority of right. *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

If the water is turned into the stream merely to provide a way of escape for it, and with an intention of abandoning it, it cannot be reclaimed as against a prior appropriator of it. *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408.

If a canal company discharges surplus water from one of its levels into a river for the purpose of getting rid of it, it becomes a part of the river, and subject to the uses of the riparian owner, and the corporation cannot afterwards take it out of the river to the injury of such owner. *Adams v. Slater*, 8 Ill. App. 78.

A second limitation is that there must be no interference with the rights of other owners.

That water is turned into a stream for the purpose of conveying it to the point where needed gives no right to take out a quantity which will diminish that to which a prior appropriator is entitled. *Burnett v. Whitesides*, 15 Cal. 35.

A riparian owner may restrain the diversion of any water from the stream by one who has conducted water into it from a foreign source, 51 L. R. A.

Baskin, J., delivered the opinion of the court:

This is an action to enjoin the defendants from continuing to divert water which the plaintiff claims the exclusive right to use for irrigating and domestic purposes. The complaint alleges "that in the year 1850 the grantors and predecessors in interest of plaintiff located, settled upon, and began the cultivation of a large tract of land in the southwest part of Salt Lake county, Utah; that said land is sterile and arid, and is valuable only for agricultural purposes through irrigation; that continuously from said date until the present time the plaintiff's predecessors and stockholders have cultivated said land, and have laid out a town thereon, made homes and improvements, and have been, and are still, dependent upon said lands for their sustenance and support; that the only sources of supply from which water can be obtained for the irrigation of said lands are what are known as 'Rose creek' and 'Butterfield creek,' which rise from melting snow in the mountains surrounding Herriman, in said county, which in the year 1850 plaintiff's predecessors entered upon, and appropriated and used the waters therein for irrigation and domestic purposes upon the land; that said waters had not been appropriated prior to that time, and that thereafter plaintiff's predecessors and stockholders have appropriated and used during each year all of the waters of said streams for irrigating said lands and for domestic purposes, except when said waters were interfered with by defendants; that Butterfield creek was and is the particular source of supply, furnishing more than double the amount of water supplied by Rose

unless the latter shows that he is not taking from the stream more water than he turned into it. *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108; *Palge v. Rocky Ford Canal & Irrig. Co.* 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

Where an appropriator removes obstructions from the head of a stream, and opens up its channel, not for the purpose of using the natural flow of the stream, but as a channel through which he may conduct appropriated water to his land, the increased natural flow of the stream inures to the benefit of the riparian owner. *Palge v. Rocky Ford Canal & Irrig. Co.* 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

Another limitation is that the capacity of the stream must be considered, and no more water turned into it than can be safely carried within the banks, together with the water naturally flowing there, without overflowing adjacent property to its injury.

The adoption of a watercourse as part of a ditch system for the conveyance of water will not render the ditch owner liable for injuries caused by its overflow, further than it may have been caused by water discharged into it by him. *Richardson v. Kier*, 34 Cal. 68, 91 Am. Dec. 681.

But he will be liable for injuries caused by overflow which results from his failure to remove obstructions, or from his turning water into the stream which, together with that already flowing there, exceeds the capacity of the channel. *Richardson v. Kier*, 37 Cal. 263.

H. P. F.

creek; that all of the waters of said creeks are absolutely indispensable for irrigating said lands and for domestic and culinary purposes, and that without all of said waters said lands will become valueless, and the homes and improvements thereon belonging to plaintiff's stockholders will become worthless, and plaintiff and its stockholders will suffer great and irreparable loss and injury; that during the entire period from the year 1850 until the year 1894 plaintiff's grantors and predecessors in interest and plaintiff's stockholders had the free, full, and unrestricted use of all the waters of said streams, and that no person or persons made any claim thereto." The complaint further alleges that the defendants have wilfully diverted a portion of the water so as aforesaid owned and appropriated, from the natural channel, and deprived plaintiff's stockholders of its use, and threaten to continue to divert the same, and, if permitted to do so, the lands of plaintiff's stockholders will be made desolate, and their property be destroyed, to their great and irreparable damage.

Defendants deny that they have wrongfully diverted the water, and deny all of the other allegations of the complaint, and by way of cross complaint allege that "in the year 1892, and since then, the defendant Butterfield Mining Company owned a large number of mining claims near the point where it is alleged the waters of Butterfield creek were diverted, and has spent over \$200,000 in working and developing the same; that in 1892 it ran two tunnels, one called 'Queen tunnel,' commencing on the mountain about 1,000 feet above Butterfield creek, and continuing northwesterly into the mountain a distance of over 3,400 feet, and the other, called 'Butterfield tunnel,' commencing near Butterfield creek, about $2\frac{1}{4}$ miles above and southwesterly from the point where in the complaint it is alleged the waters of the creek are diverted; that, in the progress of the work on those tunnels, seepage water from the rocks and ground collected in the tunnels, and flowed therefrom; that on the 24th day of February, 1893, the defendant company posted at the mouth of the tunnels, and filed in the office of the recorder of the West Mountain mining district, notices of the appropriation of said waters for mining, manufacturing, agricultural, and other purposes, and that temporarily the water would run into Butterfield creek, and afterwards be diverted by said defendant company to the uses aforesaid: that in and since the year 1892 the defendants other than the Butterfield Mining Company took up, fenced, and have since occupied about 2,800 acres of land on the northerly side of said Butterfield creek, and from 2 to 4 miles southerly of the power house, and acquired from the defendant company the waters flowing from said tunnel to irrigate and reclaim the lands for cultivation, and for use thereon for farming and other purposes, and constructed a head gate in the channel of Butterfield creek about $2\frac{1}{4}$ miles above the power house, made a

ditch, and conducted by means thereof to their said lands the waters flowing from said channels; that at no time have defendants taken from said Butterfield creek at said head gate as much water as comes thereto from said tunnels, or decreased or diverted any of the natural flow of the creek at or below that point, but, on the contrary, have taken less water from said creek than the amount the natural flow was increased by the water coming in from said tunnels; that the plaintiff unlawfully and wrongfully claims at said head gate all the waters flowing from the tunnels of the defendant company, and claims the right and threatens to divert said waters from defendants' ditch, and defendants believe that, unless restrained, the plaintiff will so divert said waters, to the irreparable damage of said defendants. Defendants pray that the amount of water to which each of the parties is entitled at said head gate may be ascertained; that the plaintiff be enjoined pending the action, and by judgment perpetually enjoined, from diverting or in anywise interfering with the waters flowing from the tunnels from defendants' ditch at said head gate, and such other relief as may be equitable and proper." The answer to the cross complaint admits that said tunnels were run, but denies the allegation of the defendants that they have taken less water from Butterfield creek than the amount the natural flow was increased by the water coming in from said tunnels. It is also alleged in said answer to the cross complaint that said "tunnels driven by defendants intercepted waters which had been the natural sources of supply of Butterfield creek; that, by the construction of Butterfield tunnel, well-defined channels in which water was flowing to springs tributary to said Butterfield creek were intercepted, and the waters therein wrongfully and unlawfully diverted and prevented from continuing in said channel, where they had been flowing for a great many years, thereby cutting off a portion of the water supply of said plaintiff, and depriving it and its stockholders of the water to which they were entitled; that the Queen tunnel intercepted waters which had from beyond the memory of man flowed uninterruptedly and continuously into said Butterfield creek, and which since the year 1850 had been used by plaintiff's grantors and predecessors in interest upon their lands as set forth in plaintiff's complaint."

The only findings of the trial court necessary to be considered, in a decision of the case, are as follows: "Second. In or about the year 1852 various settlers upon lands in or near what is known as the village or settlement of Herriman, in Salt Lake county, Utah (being thirty or thirty-five in number, and the heads of families), appropriated for beneficial use in irrigating their lands all the waters flowing in Butterfield creek, at the point of diversion, which is about 2 miles above the village or settlement of Herriman, and the lands on which the water was used, and they and their successors in occupation and interest have ever since used

said waters for said land; that the persons entitled to the use of said waters organized the plaintiff corporation for the purpose of controlling the use and distribution of said waters according to the respective rights of the corporators and shareholders, and conveyed to it the said waters for such purposes, and the plaintiff corporation is the owner of, and represents all parties beneficially interested in the appropriation of, said waters, and the use thereof." "Sixth. That in each of said tunnels, as the work progressed, seepage waters from the adjoining rocks collected, and neither of the tunnels cut or diverted the waters of any underground channel or watercourse, or diverted any waters except those percolating in and from its mining ground by natural seepage; that considerable streams of water were thus formed in, and run from, said tunnels. A preponderance of the testimony shows, and I find, that, since the Queen and Butterfield tunnels were made, some springs on the northerly side of Butterfield creek, and near the bed of the creek and its branches, and which flowed into the creek and its branches, have dried, and some have diminished in flow. The most important of these are $1\frac{1}{2}$ miles from the line of the tunnels, and they were not the outlet of any subsurface watercourse or stream having any defined channel connecting them with or extending to or beneath the ground through which said tunnels extend. Seventh. That the said Butterfield Mining Company allowed the water from the Butterfield and Queen tunnels to run into the Butterfield creek, but without any intention to abandon the same or the use thereof, but with intention to take the same from the creek, and apply the same to any beneficial use." "Tenth. That in the year 1892, and following that date, the defendants other than the Butterfield Mining Company have occupied and fenced about 2,800 acres of land, situated from 1 to 4 miles below said tunnels, and procured from the defendant the Butterfield Mining Company the right to use the waters of said tunnels and to irrigate the same, and about the year 1894 made a head gate in the creek about 2 miles above where plaintiff diverts its waters, and from thence a ditch to their lands, and from that time until and since the commencement of this suit have claimed the right to divert to their lands the waters flowing from said tunnels, except so much thereof as was lost by seepage and evaporation, and have so used a part of said waters. Eleventh. That at no time have the defendants, or any of them, by means of said head gate, which is the same head gate mentioned in the complaint, and ditch, or in any way, diverted more water from said creek than was added to the natural flow at that point by waters flowing from said tunnel. Twelfth. The statements of facts in the cross complaint in relation to the development of water in the tunnels, and the use thereof made by the defendants, and the manner of such use, are substantially true; but I find the amount of water flowing naturally in the creek, and

51 L. R. A.

also from said tunnels, varies, and I make no finding as to the quantity of either." As conclusions of law the following findings were made: "First. That the plaintiff is entitled to all the waters naturally flowing in Butterfield creek at a point where it diverts the same. Second. That the defendants have not diverted any waters from said creek belonging to the plaintiff, or which it has a right to use. Third. That the defendants are entitled to the judgment dismissing plaintiff's complaint. Fourth. That the defendants are entitled to the judgment on their cross complaint as follows: Adjudging and confirming the title of the defendants the Butterfield Mining Company to the waters flowing from the Queen and Butterfield tunnels, and the right of said company, its licensees, its vendees, and the other defendants, to divert from Butterfield creek, at the head gate aforesaid, and perpetually use, 84 per cent of the waters flowing from the Butterfield and Queen tunnels. Fifth. That a commissioner should be appointed to measure the waters flowing from said tunnels, and to establish at said head gate, where the same is diverted by the defendants, suitable appliances and means for measuring and diverting to the use of the defendants 84 per cent of the waters flowing from said tunnels. Sixth. That upon the report of said commissioner, if confirmed by the court, both parties should be enjoined from interfering with the flow of the waters of said creek as established by him. Seventh. That in case either party claims, after such division, that the amount of water flowing from said tunnels has materially increased or decreased, that each party be at liberty, under the decree, to move the court for an order directing a new measurement thereof, and a new adjustment of the division at the head gate, at the expense of the party applying, and for a supplemental decree upon the report of its confirmation. Eighth. That the defendants are entitled to judgment for the costs of suit, except as to the proper charges and expenses of the commissioner, which should be fixed by the court, and paid by the defendants." A decree, from which plaintiff appeals, was entered on the cross complaint, in accordance with said conclusions of law.

The evidence, without conflict, establishes the facts, as found by the trial court, that plaintiff's stockholders as early as 1852 appropriated all of the waters of Butterfield creek for irrigation and domestic purposes, and continued to use the same in their individual capacity up to the incorporation of the plaintiff, when they transferred their rights to the plaintiff, and since then have enjoyed the use of said water as stockholders; that the defendants about the year 1894 erected a head gate in the natural channel of Butterfield creek, above the point where plaintiff diverts its water, and from such head gate, through a ditch dug by them, or under their authority, diverted from the natural channel of said creek a portion of the water flowing therein. Upon the proof of these undisputed facts, the plaintiff made

a prima facie case, and the burden was cast upon the defendants to show by decisive proof that the quantity of water diverted by them from the natural channel of said creek, flowing into the same from said tunnels, was their property, that they had a right to divert the same, and that they did not divert more than belonged to them. In the case of *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 153, 70 Am. Dec. 769, water from an artificial ditch was turned by its owner into a natural watercourse, and mingled with natural water of the stream, previously appropriated by another, for the purpose of conducting it, in the natural channel of said stream, to another point, to be there taken out and used. The prior appropriator brought an action for the diversion of the water, and Mr. Justice Field, in the decision rendered in the case, said: "The burden of proof rests with the party causing the mixture [of the water]. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled." In the case of *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108, an action by the owner of land was instituted to restrain the defendants from maintaining a dam in a stream running through the land, and from interfering with the flow of water. The defendants admitted the construction of a dam, but denied that the channel was a natural watercourse, and alleged that the water was conducted into the channel by them from a foreign source. The court found that the stream was a natural watercourse, and granted a perpetual injunction. The court in its opinion, said: "If it be conceded that, as against a riparian owner below, a person not such may turn into a natural stream water which would not naturally flow therein, and again divert the quantity of water which he led to the stream, the fact that he has conducted some water to it will not authorize him to divert all the water of the stream; and it is for him who has thus interfered with the natural flow to show that he has not taken from the stream more water than he led into it. Otherwise, the plaintiff riparian proprietor is entitled to an injunction prohibiting the diversion of any water."

The defendant corporation having, without the consent of plaintiff, suffered the water from said tunnels to flow into the natural channel of Butterfield creek and commingle with the waters of the stream previously appropriated by plaintiff, it assumed the burden, when it afterwards claimed the right to divert any portion of the mingled water, of clearly showing the quantity owned by it, and that such diversion does not diminish the quantity of water previously appropriated by the plaintiff; and, if the conditions are such after the commingling of the water that that fact cannot be established, then the defendants must lose all right to divert any of the water flowing in

the natural channel in said creek, for it is an elementary principle, firmly established, that one who without consent, intentionally confounds his property with the property of a stranger, though they be of the same kind, will lose the whole, unless he can prove the true quantity belonging to himself. *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233-236, cases cited, and note. See also numerous cases in note to *Pulcifer v. Page* (Me.) 54 Am. Dec. 582; *Starr v. Winegar*, 3 Hun, 491; 2 Kent, Com. 13th ed. 364, 365; *Story*, Eq. Jur. § 468; *Story*, Bailm. § 40.

The burden of making such proof was on the defendants for the additional reason that the decree dismissed plaintiff's complaint, and awarded to the defendants the relief sought by them in the cross complaint. The burden of proving the allegations of the cross complaint, necessary to entitle the defendants to the decree rendered, rested upon them in the same manner and to the same extent that it would have done had they instituted an original action to obtain the relief prayed for in the cross complaint; and as proof of the quantity of the confused water which defendants are entitled to, if any, and that only such quantity is being diverted by them, was required, under the well-settled principle before announced, to justify the decree, if there has been a failure to make such proof, and a failure to make proper findings of these facts by the court, it follows that the decree is erroneous, and must be reversed, under plaintiff's exception thereto.

It being impracticable to accurately measure the quantity of water running in a natural or artificial channel, we do not think the defendants are required to prove the quantity with such nicety as to show the exact number of miners' inches or cubic feet, but must show such an approximation to the amount as to make it clearly appear that the diversion does not materially diminish the water previously appropriated by, and belonging to, the plaintiff. If such an approximation is not ascertainable, the plaintiff is entitled to all of the water in the natural channel of Butterfield creek.

The court, in the sixth finding of facts, found that "neither of the tunnels cut or diverted the waters of any underground channel or watercourse, or diverted any waters except those percolating in and from its mining ground by natural seepage." The second and fourth findings of the conclusions of law have no other basis than the facts thus found. If these facts are supported by the evidence, then the conclusion of law based upon them is correct; otherwise, both of said conclusions, and the decree made in pursuance thereof, are erroneous. The testimony establishes, beyond question, that numerous springs which have constantly flowed and discharged into Butterfield creek and its tributaries large quantities of water, from a period as far back as thirty-eight years up to the time said tunnels were run, have been, ever since said tunnels were completed, dried up, and no longer continue to discharge any water.

On this branch of the case the court found, in the sixth finding of facts, before quoted from, that "a preponderance of the testimony shows, and I find, that, since the Queen and Butterfield tunnels were made, some springs on the northerly side of Butterfield creek and near the bed of the creek and its branches, and which flowed into the creek and its branches, have dried, and some have diminished in flow. The most important of these are $1\frac{1}{2}$ miles from the line of the tunnels, and they were not the outlet of any subsurface watercourse or stream having any defined channel connecting them with or extending to or beneath the ground through which said tunnels extend." The last sentence just quoted from said finding, and the portion of said finding before quoted, are not consistent with the first sentence just quoted, and are not warranted by the evidence. There was no testimony tending to show that these springs were dried up from any other cause than the running of said tunnels. They had been known to flow continually for thirty-eight years. They ceased to flow when said tunnels were driven into the mountains from which they issued. By common experience, we know that deep tunnels very frequently dry up, not only the springs in their immediate vicinity, but also those remotely situated; that such results only follow when the tunnels cut the underground channels through which the veins of water which supply the springs flow. The development of percolating water might diminish the flow of springs in the vicinity of a deep tunnel, because the underground channels of springs are supplied by percolation of water from the surface, but would not entirely dry them up,—especially those remotely situated. From the evidence and the findings that a number of springs (the evidence showed that there were about thirteen of them), which previously to the running of said tunnels had so continuously flowed for so many years, were dried up, the conclusion is irresistible that said tunnels cut the underground channels through which said springs were supplied. This being so, as the waters which supplied these springs were diverted from their natural channel and discharged into the natural channel of Butterfield creek at a different point than the one at which they naturally flowed into the stream, we are clearly of the opinion that the defendant company did not acquire a right to any of the water flowing from said tunnels, except such as was developed by percolation, and that the plaintiff retains the right to all the water flowing in the natural channel of Butterfield creek, diminished only to the extent of the increase of the quantity of water which naturally flowed in the channel of Butterfield creek before said tunnels were run and said springs were dried up. This right of plaintiff is not affected because the underground channels of said springs are not traceable.

Query: If a tunnel should be run by a party in the proper exercise of his dominion over his own real estate, which dries up the

springs whose channels are not traceable, but feeding a stream the waters of which had previously been appropriated by another, and the water of the tunnel should be discharged, not in the stream but at a point which renders it impossible to restore the same to the stream, would not these facts present an instance of *damnum absque injuria*? But where the water from such a tunnel is discharged into the stream previously appropriated, a different principle governs. In such a case it would be inequitable to deprive the first appropriator of his original rights, and allow the defendants to take from the stream the waters of the springs which naturally flowed into the same, but which, on account of the tunnels, were discharged into the stream at a point different from the natural flow.

In the case at bar, George W. Keel, the manager of the defendant company, testified that "the two tunnels were constructed for mining purposes, and we never thought of obtaining water when we commenced the tunnels." So that the preservation of plaintiff's original rights does not deprive the defendant company of any benefit to obtain which the tunnels were run. The *onus* of showing such increase is on the defendants. The defendant company is entitled to the use of such increase, in carrying out the purposes of its creation as a corporation, in any manner it chooses, and in doing so to use the natural channel of Butterfield creek to conduct such increase to any point where the diversion of the same may become necessary. The evidence fails to show the amount of such increase, if there is any. In the twelfth finding the trial court states that "I find the amount of water flowing naturally in the creek, and also from said tunnels, varies, and I make no findings as to the quantity of either." The court in the opinion rendered in the case, and which is in the record, on this subject further said: "There is a conflict in the evidence as to whether the water from these tunnels increased the volume of water in Butterfield creek during the dry season; that is, during the months of July, August and September. The testimony of the witnesses for the plaintiff, except W. H. Freeman, tends to show that there was no increase, while the testimony of the witnesses called for the defendants all tends to show that the flow or volume was doubled. I cannot find from the evidence, definitely, how much the tunnel waters have increased the volume of water in the creek, because no measurement of the creek water was taken before the tunnels were made, but I think there is no doubt that there has been a considerable increase of the volume of water in the creek at all seasons by means of the tunnels."

It follows that the eleventh finding and that part of the sixth in which it is found that the "said springs were not the outlet of any subsurface watercourse or stream having any defined channel connecting them with or extending to or beneath the ground through which said tunnels extend" are erroneous, and are not supported by the evi-

dence, and that plaintiff's exceptions to them on that ground are well taken, and that the decree awarding the defendants all of the water flowing from said tunnel into Butterfield creek, except 16 per cent, deducted on account of loss by evaporation, seepage, and waste, is erroneous.

The respondent made a motion to strike out of the record appellant's bill of exceptions. It appears that a motion for a new trial was made by appellant and was overruled. Rev. Stat. § 3286, provides that "a bill of exceptions shall in all cases be prepared, settled, signed, and filed within ninety days after the entry of judgment, or after notice of the same if the

action were tried [by the court] without a jury, or after the determination of a motion for a new trial." The bill of exceptions in this case was prepared, settled, signed, and duly authenticated by the trial court within ninety days after the motion for a new trial was overruled. The motion to strike out the same is therefore denied. It is ordered that the decree of the court below be reversed, at the cost of defendants, and that the cause be remanded for a new trial.

Bartch, Ch. J., and McCarty, District Judge, concur.

MISSOURI SUPREME COURT.

KANSAS & TEXAS COAL RAILWAY,
Plff. in Err.,
v.

NORTHWESTERN COAL & MINING COMPANY *et al.*

(.....Mo.....)

1. A railroad of a regularly organized and chartered railroad company is a public railroad for which the power of eminent domain may be exercised, notwithstanding the fact that the road is short and built chiefly for the purpose of conveying the product of a coal company which is composed of substantially the same persons that organized the railroad company, since the railroad company, under Const. art. 12, § 14, will be a common carrier obliged to serve all people alike.
2. The right of a railroad company organized chiefly for the benefit of a coal company, to condemn land for the road, is not precluded by Rev. Stat. 1889, § 1119, giving the coal company the right to have a switch connection with an existing railroad, and §§ 9559 and 9560, providing for the construction of a tramway for such coal.
3. The selection by a railroad company of the location of its proposed road being given by statute to such company, the court has no right to deny the exercise of the power of eminent domain to condemn such right of way because it thinks some other location is as good or better.
4. Land used by a mining corporation for railroad purposes without charter authority is not within the protection of Rev. Stat. 1889, § 2741, declaring that the right to appropriate for a railroad lands held by any corporation shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the land is authorized to put it.

5. Condemnation of the land of a coal company for a railroad track, although its use for railroad purposes would materially interfere with the coal company's authorized use of its land for mining purposes, is not precluded by Rev. Stat. 1889, § 2741, declaring that the right to appropriate for a railroad lands held by any corporation shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the land is authorized to put it.

6. Courts in eminent-domain cases must deal with the conditions that exist at the time the condemnation is asked, and cannot take into account conditions that may or may not arise or be created thereafter.

(Burgess, Ch. J., and Valliant and Gantt, JJ., dissent.)

(October Term, 1900.)

ERROR to the Circuit Court for Macon County to review a judgment in favor of defendants in a proceeding to condemn a right of way for the construction of a railroad. *Reversed.*

The facts are stated in the opinions.

Mr. Adiel Sherwood, for plaintiff in error:

So far as concerns railroads, there is no question for the courts to determine, for the same power which declares that what is a public use shall be a judicial question also declares that a use for railroad purposes is a public use.

Thompson v. Chicago, S. F. & C. R. Co. 110 Mo. 147, 19 S. W. 77.

Courts will take judicial notice that the taking of private property for a railway is a taking for public use.

NOTE.—There are earlier authorities in this series on the question of the right to exercise eminent domain for a railroad which is chiefly for the advantage of a private business as follows: *Butte, A. & P. R. Co. v. Montana Union R. Co.* (Mont.) 31 L. R. A. 298 (which refers to a railroad for the benefit of private mines and ore houses); *Bridal Veil Lumbering Co. v. Johnson* (Or.) 34 L. R. A. 368 (railroad for lumber business); *Kettle River R. Co. v. East-*

ern R. Co. (Minn.) 6 L. R. A. 111 (railroad to stone quarry).

As to exercise of power of eminent domain for railroad terminal, see *Ryan v. Louisville & N. Terminal Co.* (Tenn.) 45 L. R. A. 303.

As to condemnation for railroad sidings to private establishments, see *St. Louis, I. M. & S. R. Co. v. Petty* (Ark.) 20 L. R. A. 434, and *note*.

Walther v. Warner, 25 Mo. 277; *Thompson v. Chicago, S. F. & O. R. Co.* 110 Mo. 147, 19 S. W. 77; *Dickey v. Tennison*, 27 Mo. 373.

Whether a proposed road will subserve the public need or convenience is a question for the legislature, and not for the judiciary.

Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577.

Discretion is vested in the officers of a corporation possessing the power, to fix the location of the line of improvement.

Colorado E. R. Co. v. Union P. R. Co. 41 Fed. Rep. 293; *O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151, 28 N. E. 923; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 609, 80 Am. Dec. 791; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Schmidt v. Densmore*, 42 Mo. 225; *Deitrichs v. Lincoln & N. W. R. Co.* 13 Neb. 361, 13 N. W. 624; *Re Boston & A. R. Co.* 53 N. Y. 574; *Stockton & D. R. Co. v. Brown*, 9 H. L. Cas. 246; *New York O. & H. R. Co. v. Metropolitan Gaslight Co.* 5 Hun. 201, 63 N. Y. 326; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 112.

The owner of land devoted to private use cannot question the selection of his property.

Coffman v. Griffin, 17 W. Va. 178.

Nor can he show that another location would be less harmful.

New York & E. R. Co. v. Young, 33 Pa. 175; *Evcsfield v. Midsussea R. Co.* 3 De G. & J. 286; *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. 82, 28 S. W. 483.

The courts will hold the use public, unless it manifestly has no tendency to promote such use.

Welton v. Dickson, 38 Neb. 767, 22 L. R. A. 496, 57 N. W. 550.

When the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain.

Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333.

The test of what constitutes a public use is the following: Will all persons upon demand be served by a corporation which claims to be fulfilling a public purpose or use, and upon refusal can they enforce that demand in the courts?

Varner v. Martin, 21 W. Va. 534; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Wood v. Bedford & B. R. Co.* 8 Phila. 94; *Re New York, L. & W. R. Co.* 99 N. Y. 12, 1 N. E. 27; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *Mills, Em. Dom. § 14*; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 44; *Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 14 L. R. A. 114, 49 N. W. 894; *Bonaparte v. Camden & A. R. Co.* Baldw. 205, Fed. Cas. No. 1,617; *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902, 989; *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461, 6 L. R. A. 111, 43 N. W. 469; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *Lumbard v. Stearns*, 4 Cush. 60.

If all of the people of a state, or all of the 51 L. R. A.

people of a small community, have the right to demand and receive service which the corporation holds itself out to the public as intending and able to furnish, then the use or purpose is a public use, notwithstanding the fact that but a small portion of the people of a state, or but one or two people in a small community, desire to avail themselves of the privilege.

Talbot v. Hudson, 16 Gray, 417; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 297; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 43; *Bloomfield & R. Natural Gaslight Co. v. Richardson*, 63 Barb. 437; *Fanning v. Gilliland (Or.)* 61 Pac. 636; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Tusculumbia, O. & D. R. Co.* 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Co.* 18 N. J. Eq. 54; *O'Reiley v. Kankakee Valley Draining Co.* 32 Ind. 169; *Riche v. Bar Harbor Water Co.* 75 Me. 91; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 100; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ross v. Davis*, 97 Ind. 79; *Lindsay Irrig. Co. v. Mehrtens*, 97 Cal. 676, 32 Pac. 802; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; *Miller v. Craig*, 11 N. J. Eq. 175; *Seely v. Sebastian*, 4 Or. 27.

Public use and public convenience are interchangeable terms.

Pittsburgh v. Scott, 1 Pa. St. 309; *Talbot v. Hudson*, 16 Gray, 417.

The term "public use" is flexible, and not limited to uses known at the time a state constitution was adopted. All useful improvements may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy a reasonable public demand for facilities of travel, for transmission of intelligence, or of commodities, would be a public use.

State, Trenton & N. B. Turnp. Co., Prosecutors, v. American & E. Commercial News Co. 43 N. J. L. 384; *Concord R. Co. v. Greeley*, 17 N. H. 47; *New Orleans, M. & T. R. Co. v. Southern & A. Teleg. Co.* 53 Ala. 211; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Paxton & H. Irrig. Canal & Land Co. v. Farmers & M. Irrig. & Land Co.* 45 Neb. 884, 29 L. R. A. 853, 64 N. W. 343; *Talbot v. Hudson*, 16 Gray, 417; *Township Bd. of Edu. v. Hackmann*, 48 Mo. 243; *Cape Girardeau & B. Macadamized & Gravel Road Co. v. Renfro*, 58 Mo. 265; *Lafayette Pl. Road Co. v. New Albany & S. R. Co.* 13 Ind. 90, 74 Am. Dec. 246; *Higginson v. Nahant*, 11 Allen, 530; *Southwest Pennsylvania Pipe Lines v. Directors of Poor*, 1 Pa. Co. Ct. 460; *Mount Washington Road Co.'s Petition*, 35 N. H. 134; *Balch v. Essex County Comrs.* 103 Mass. 106; *St. Louis County Ct. v. Griswold*, 58 Mo. 175; *Re Towanda Bridge Co.* 91 Pa. 216; *Commissioners of Parks and Boulevards v. Moesta*, 91 Mich. 149, 51 N. W. 903; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Hazen v. Essex Co.* 12 Cush. 475; *Re United States*, 96 N. Y. 227; *Calk-*

- ing v. Baldwin*, 4 Wend. 667, 21 Am. Dec. 168; *Williard v. Hamilton*, 7 Ohio, pt. 2, p. 111, 30 Am. Dec. 195; *Re Townsend*, 39 N. Y. 171; *Chesapeake & O. Canal Co. v. Key*, 3 Cranch C. C. 599, Fed. Cas. No. 2, 649; *Re Main & H. Street Canal*, 50 How. Pr. 70; *Morris Canal & Bkg. Co. v. State*, 24 N. J. L. 62; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Atty. Gen. v. Edison Telephone Co. L. R. 6 Q. B. Div. 244*; *York Telephone Co. v. Keesey*, 5 Pa. Dist. R. 366; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382; *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 166, 42 N. E. 640; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Bloomfield & R. Natural Gaslight Co. v. Richardson*, 63 Barb. 437; *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 120 Ind. 581, 6 L. R. A. 579, 22 N. E. 778; *Johnston v. People's Natural Gas Co. (Pa.)* 5 Cent. Rep. 564; *Oury v. Goodwin (Ariz.)* 26 Pac. 376; *San Luis Land, Canal & Improv. Co. v. Kenilworth Canal Co.* 3 Colo. App. 244, 32 Pac. 860; *Lieberman v. Chicago & S. S. Rapid Transit R. Co.* 141 Ill. 140, 30 N. E. 544; *Chicago, B. & Q. R. Co. v. Wilson*, 17 Ill. 123; *Hannibal & St. J. R. Co. v. Muder*, 49 Mo. 165; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358; *State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield Comrs.* 20 N. J. L. 510, 67 Am. Dec. 409; *Southern P. R. Co. v. Raymond*, 53 Cal. 223; *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 5 Hun, 201, 63 N. Y. 326; *Boyd v. Negley*, 40 Pa. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 43, 518, 4 Atl. 318; *Re New York C. & H. R. R. Co.* 77 N. Y. 248; *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Fisher v. Chicago & S. R. Co.* 104 Ill. 323; *Reusch v. Chicago, B. & Q. R. Co.* 57 Iowa, 687, 11 N. W. 647; *United States v. Oregon R. & Nav. Co.* 9 Sawy. 61, 16 Fed. Rep. 524; *Haldeman v. Pennsylvania C. R. Co.* 50 Pa. 425; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Arnold v. Covington & C. Bridge Co.* 1 Duv. 372; *Young v. Buckingham*, 5 Ohio, 485; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Mithoff v. Carrollton*, 12 La. Ann. 185; *Cottrill v. Myrick*, 12 Me. 222; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63; *Patterson v. Mississippi & R. River Boom Co.* 3 Dill. 465, Fed. Cas. No. 10,829; 98 U. S. 403, 25 L. ed. 206; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *Re Burns*, 155 N. Y. 23, 49 N. E. 246; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Hildreth v. Lowell*, 11 Gray, 345; *Lumbard v. Stearns*, 4 Cush. 60; *Wayland v. Middlesex County Comrs.* 4 Gray, 500; *Fleming's Appeal*, 65 Pa. 444; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 10 Mo. App. 401; *Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70, Fed. Cas. No. 7,007; *Pearson v. Johnson*, 54 Miss. 250; *Pittsburgh v. Scott*, 1 Pa. St. 309; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744; *Lyon v. McDonald*, 78 Tex. 71, 9 L. R. A. 295, 14 S. W. 261; *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902, 989; *Re Girard College Grounds*, 10 Phila. 145; *University of Minnesota v. St. Paul & N. P. R. Co.* 36 Minn. 447, 31 N. W. 936; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Lewis, Em. Dom. § 266*; *Lake Shore & M. S. R. Co. v. Chicago*, 148 Ill. 509, 37 N. E. 88, 91; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842; *Illinois C. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill. 333; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506; *Little Miami and Columbus & X. R. Cos. v. Dayton*, 23 Ohio St. 510; *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 21; *Illinois C. R. Co. v. Chicago*, 141 Ill. 586, 17 L. R. A. 530, 30 N. E. 1044; *Lake Shore & M. S. R. Co. v. Chicago*, 151 Ill. 359, 37 N. E. 880; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Rev. Stat. 1889, § 2543*; *Rev. Stat. 1899, § 1035*.
- Private property taken for a highway is taken for a public use, though the highway accommodates but a single family.
- Lewis v. Washington*, 5 Gratt. 265; *Roberts v. Williams*, 15 Ark. 43; *Paine v. Leicester*, 22 Vt. 44; *Drake v. Clay*, Sneed (Ky.) 139; *Johnson v. Clayton County Supers.* 61 Iowa, 89, 15 N. W. 856; *Pagels v. Oaks*, 64 Iowa, 198, 19 N. W. 905.
- Or though it be a mere cul de sac.
- Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *People v. Van Alstyne*, 3 Keyes, 35; *Sheaff v. People*, 87 Ill. 189; *Fanning v. Gilliland (Or.)* 61 Pac. 636; *Masters v. McHolland*, 12 Kan. 17.
- When it is determined that a taking for railroad purposes is a public use, the fact that some of the stockholders of the plaintiff company are the same as those of the Kansas & Texas Coal Company, which company owns large tracts of lands underlaid with coal, over some or all of which the projected road will run, makes no difference, and evidence thereof is not admissible, as the essentials of the legal test have been met, and discussion is at an end.
- Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 44; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 324.
- The fact that a corporation, plaintiff in a

condemnation proceeding, is a corporation *de facto*, and not *de jure*; or that advantage of the corporation laws has been taken by its promoters for their own private purposes, whereby such laws are abused; or that the corporation is defectively organized and hence has no legal capacity to sue,—are questions for the state in a *quo warranto* proceeding, and cannot be raised in a condemnation suit by answer, or between private parties in chancery.

Catholic Church v. Tobbein, 82 Mo. 418; *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Aurora & C. R. Co. v. Miller*, 56 Ind. 88; *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *Henry v. Centralia & C. R. Co.* 121 Ill. 266, 12 N. E. 744; *Brown v. Calumet River R. Co.* 125 Ill. 664, 18 N. E. 283; *King v. Pasmore*, 3 T. R. 199; *Rea v. Carmarthen*, 2 Burr. 869; *State v. Paterson & H. Turnp. Co.* 21 N. J. L. 9; *Atty. Gen. ex rel. Pettie v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *Oooley*, Const. Lim. 5th ed. 311.

If Rev. Stat. 1889, § 2741, does apply to every conceivable kind of corporation organized under the laws of this state, or any other state, territory, or country which may own property in this state, then said section is void as a limitation upon the power of eminent domain because in violation of § 4, art. 12, of the Missouri Constitution.

Thomas v. Wabash, St. L. & P. R. Co. 7 L. R. A. 145, 40 Fed. Rep. 126; *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. 92, 28 S. W. 483; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Kansas City & S. F. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451; *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. 326; *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902, 989.

A corporation, though organized for private gain, may exercise the power of eminent domain, if the use be public.

Leisse v. St. Louis & I. M. R. Co. 2 Mo. App. 105; *North Missouri R. Co. v. Gott*, 25 Mo. 540.

Enterprises using the power of eminent domain are often of private benefit. When capable of furthering a public use the private benefit is immaterial.

Talbot v. Hudson, 16 Gray, 417; *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 161, 24 N. E. 323; *South Chicago R. Co. v. Dix*, 109 Ill. 237; *State, Kean, Prosecutor, v. Elizabeth*, 54 N. J. L. 402, 24 Atl. 495; *Brown v. Beaty*, 34 Miss. 227, 69 Am. Dec. 389; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *Bloodgood v. Mohawk & H. Rivers R. Co.* 18 Wend. 9, 31 Am. Dec. 313.

To defeat a proceeding to appropriate land for a railroad, it is not competent for the landowner to prove that the corporators procured the incorporation for their private purposes merely, and are exercising the corporate privileges in abuse of the law, or that

there is no public necessity for the road; compliance with statute authorizing incorporation is a legislative declaration of necessity.

Powers v. Hazelton & L. R. Co. 33 Ohio St. 429; *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. 94, 28 S. W. 483; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *Aurora & C. R. Co. v. Miller*, 56 Ind. 88; *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80.

A court of justice in passing upon the question whether or not a use is public will view its legal aspects only, and will not consider an allegation that the corporation may not fully perform its public duties.

Ligare v. Chicago, 139 Ill. 46, 28 N. E. 934; *Re Staten Island Rapid Transit Co.* 103 N. Y. 251, 8 N. E. 548; *State, Slingerland, Prosecutor, v. Newark*, 54 N. J. L. 62, 23 Atl. 129; *Talbot v. Hudson*, 16 Gray, 417; *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 243, 562; *Aurora & C. R. Co. v. Miller*, 56 Ind. 88; *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80.

Property devoted to one public use by one corporation may be taken by another corporation to devote to another public use.

Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 460; *Sunderland Bridge Case*, 122 Mass. 459; *Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076; *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326, Affirming 5 Hun, 201; *Hamor v. Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40; *Bellona Co.'s Case*, 3 Bland. Ch. 442; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556; *Boston Water-Power Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1.

The right to condemnation must be determined solely by the condition of things at the time the condemnation proceeding is filed in court, and not by some scheme or purpose originated afterwards.

Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 504, 31 L. R. A. 298, 41 Pac. 232; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 145; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Illinois & M. Canal v. Chicago & R. I. R. Co.* 14 Ill. 314; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552; *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.* 35 Mich. 265, 24 Am. Rep. 545; *Southern P. R. Co. v. Southern California R. Co.* 111 Cal. 221, 43 Pac. 602; *Hagner v. Pennsylvania S. Valley R. Co.* 154 Pa. 475, 25 Atl. 1082; *Carris v. Waterloo Highway Comrs.* 2 Hill, 443; *State v. Waldron*, 17 N. J. L. 368.

Messrs. Ben Eli Guthrie and Dysart & Mitchell, for defendants in error:

Plaintiff can have no power to condemn land except as granted by law.

In this case the limitation is part of the grant, and if for any cause the limitation fails, the grant goes with it, and plaintiff is absolutely devoid of all power to condemn.

St. Joseph Terminal R. Co. v. Hannibal & St. J. R. Co. 94 Mo. 535, 6 S. W. 691.

The constitutionality of the limitation of Rev. Stat. 1899, § 1272, has never been called in question, although it has received the attention of this court more than once.

St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co. 125 Mo. 82, 28 S. W. 483; *St. Joseph Terminal R. Co. v. Hannibal & St. J. R. Co.* 94 Mo. 535, 6 S. W. 691; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451.

It has never been doubted that it was competent for the legislature to exempt certain property from the exercise of eminent domain.

10 Am. & Eng. Enc. Law, 2d ed. p. 1099; *Willoughby v. Shipman*, 28 Mo. 50.

A party seeking to appropriate private property for an alleged public use must show, first, a legislative warrant; second, that it is a true railroad within the meaning of the Constitution and the law; third, that the taking is in fact for a public use.

Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; *Denver R. Land & Coal Co. v. Union P. R. Co.* 34 Fed. Rep. 386; *Rock Split Rock Cable Road Co.* 128 N. Y. 408, 28 N. E. 500; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Wisconsin Water Co. v. Winans*, 85 Wis. 25, 20 L. R. A. 662, 54 N. W. 1003.

The use to which plaintiff seeks to put the land condemned is a private use. Its only purpose is to take out to the market the coal of the Kansas & Texas Coal Company. The evidence clearly shows that that is the only business that there can be for it. There is no other demand for the railroad. It is simply to get to coal mines, and that is not a public use.

Denver R. Land & Coal Co. v. Union P. R. Co. 34 Fed. Rep. 386; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Weidenfeld v. Sugar Run R. Co.* 48 Fed. Rep. 615; *Edgewood R. Co.'s Appeal*, 79 Pa. 257; *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. 309; *Pittsburg, W. & K. R. Co. v. Benwood Iron-Works*, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453; *Kyle v. Texas & N. O. R. Co.* (Tex. App.) 4 L. R. A. 275; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. Rep. 273.

Plaintiff's object is wrong *in toto*. It is simply to shut the defendant operators, its rivals in business, out of the market, and make them absolutely dependent on plaintiff and its owner. It hems and shuts them in, puts them out of business, leaves their properties a wreck on their hands without value to anyone save and except plaintiff's master and owner alone, who is left "monarch of all it surveys." This, neither law nor equity will tolerate.

Chattanooga Terminal R. Co. v. Felton, 69 Fed. Rep. 273.

Whether the structure will serve public or private purposes is the question; not whether the builder is a private or public agency. 51 L. R. A.

Ligare v. Chicago, 139 Ill. 46, 28 N. E. 934.

The court will look to see to what use the property sought to be condemned is proposed to be put.

Macon v. Harris, 73 Ga. 428; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934.

To reach a coal region is not a public use. *McCandless's Appeal*, 70 Pa. 210; *Macon v. Harris*, 73 Ga. 428; *Re Rochester, H. & L. R. Co.* 110 N. Y. 119, 17 N. E. 678; *State v. Railway Co.* 40 Ohio St. 504; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *Varner v. Martin*, 21 W. Va. 534.

On petition for rehearing.

Rev. Stat. 1899, § 1272, is constitutional under the uniform decisions of this court.

If an act comprehends and affects all of a designated class, equally and without discrimination, the act is valid, and not repugnant to that provision of the Constitution which prohibits special or class legislation.

Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369; *Hamman v. Central Coal & Coke Co.* 156 Mo. 232, 56 S. W. 1091; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *Lynch v. Murphy*, 119 Mo. 164, 24 S. W. 774.

The ruling that the action of the railroad company is binding on the court abridges the privileges and immunities of the property owner. It deprives him of his property without due process of law. It denies him the equal protection of the law.

State v. Juloc, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Wynchamer v. People*, 13 N. Y. 378; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303.

A big railroad corporation has no right to take private property for a private purpose. Yet that is just what this little one is trying to do. And it has no more right to do so than the big ones.

Pittsburg, W. & K. R. Co. v. Benwood Iron-Works, 31 W. Va. 770, 2 L. R. A. 680, 8 S. E. 453.

Corn, wheat, and potatoes are much more important articles of trade and necessity. Apply the theory of the opinion, and every big farmer may start a railroad and condemn property to build it. But this is not a public use, but a private use.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

In passing upon the salient facts in a case like this, courts and juries are presumed to distinguish between substance and legal fiction, and see and weigh men and their motives as human experience and common sense reveal them in the daily affairs of life and business, and then set a compass, as far as may be, to their greed and not tempt to wrong and oppression by leaving open the road thereto.

Newell v. People ex rel. Phelps, 7 N. Y. 9; *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. ed. 68; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303.

It is not enough that private interests will be subserved, or that private property will be enhanced in value. There must be a pub-

lie interest applicable to a community of persons to be benefited.

Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288.

Marshall, J., delivered the opinion of the court:

The plaintiff is a duly organized and chartered railroad company, under the provisions of article 2 of chapter 42, Revised Statutes of Missouri 1889, for the purpose of constructing and operating a broad-gauge railroad "for public use in the conveyance of persons and property from a point in, at, or near the town of Ardmore, Macon county, Missouri, to a point in, at, or near the town of Bevier, in the same county and state, a distance of 10 miles or more." The plaintiff is also the lessee for a term of twenty years from July 1st, 1899, from the Wabash Railroad, of its branch railroad from Excello to Ardmore. So that the plaintiff's railroad, with the leased line aforesaid, will form a continuous railroad from the town of Excello on the Wabash Railroad, to the town of Bevier on the Hannibal & St. Joseph Railroad. The defendant, the Northwestern Coal & Mining Company, is a business corporation organized under the provisions of art. 8 of chapter 42, Rev. Stat. 1889, for the purpose of acquiring, selling, and operating coal lands and coal mines, and to buy, sell, and deal in merchandise, and to own, operate, and sell electric light and power plants, and to furnish and sell electric light and power. The said defendant holds as owner or lessee considerable land on which there have been opened and are being operated coal mines, and in connection with the defendant Watson owns a railroad and right of way therefor, beginning at a mine owned by defendant Watson and located several thousand feet southeast of the coal company's mine, and extending in a general northwardly direction to and beyond the mine of the coal company, called mine No. 7, and to or near a bridge over Sulphur creek, at which point it connects with a railroad owned by the Kansas & Texas Coal Company (likewise a business corporation), and over which last-named road the cars of the railroad owned by the defendant coal company and Watson are run under a contract therefor with the Kansas & Texas Coal Company for a distance of about 1,300 feet, to the town of Bevier, on the line of the Hannibal & St. Joseph railroad. In this way the output of coal from the Watson mine and the Northwestern Coal & Mining Company's mine No. 7 is transported to the line of the Hannibal & St. Joseph Railroad and over that road to the markets of the world.

The mine of the Northwestern Coal & Mining Company, called mine No. 7, was leased by that company to the Kansas & Texas Coal Company on the 15th of March, 1898, for a term beginning on the 1st of January, 1898, "until such time as the coal in and underlying said lands shall be entirely worked and in the manner" provided in the lease, unless the lease is sooner terminated as therein provided.

The lease provided that the lessor was to receive a royalty of 5½ cents per ton of 2,000 pounds, and that the lessee should so operate the mine as that the royalty should exceed or equal the sum of \$550 a month, and the lessee should also pay such royalty of 5½ cents per ton on all coal mined in excess of 120,000 tons a year. The lessor reserved the right to cancel the lease on the 1st of April, 1901, or on the 1st of April of any subsequent year by giving six months' notice of intention so to do. Under the terms of this lease the Kansas & Texas Coal Company is, and at all the times since the date of the lease has been, operating mine No. 7, and the average daily output of the mine is 700 tons, while that from the Watson mine is from 500 to 600 tons daily.

The railroad of the Kansas & Texas Coal Company, over which the cars of the defendants run from Sulphur creek to Bevier, extends southwestwardly from the intersection of those roads to mine No. 43, which mine is also operated by the Kansas & Texas Coal Company.

This was the condition of affairs on the 16th of April, 1899, when the Kansas & Texas Coal Railway instituted this proceeding, under the provisions of art. 8, chap. 42, Rev. Stat. 1889, for the purpose of condemning a right of way over five pieces of real estate, three of which pieces lie immediately east of the main line of the railroad of the Northwestern Coal & Mining Company, and such strips commence 7 feet east of the center line of the main or most eastward track of the Northwestern Coal Company's railroad, and extend from Sulphur creek for a distance of some 3,700 feet to a point 1,700 feet south of mine No. 7, where it is proposed to cross the railroad of the Northwestern Coal Company. In other words, the purpose of this suit is to condemn a right of way for the plaintiff railroad, beginning at Sulphur creek and paralleling the most easterly track of the Northwestern Coal Company's railroad for a distance of 3,700 feet, and there crossing the defendant's track, so as to proceed to the town of Ardmore. The western line of the right of way sought to be acquired by the plaintiff is 7 feet from the center of the defendant's main or most easterly track, and the center of the plaintiff's track is 14 feet from the center of the defendant's main track.

The plaintiff's petition is in the usual and proper form. The answer of the defendant the Northwestern Coal & Mining Company is a general denial and special defenses. The special defenses are: First, that the plaintiff has not the right to condemn land. Second, that the St. Louis Trust Company is a necessary party defendant because it is the holder of bonds issued by the Kansas & Texas Coal Company. Third, that the plaintiff is not a public-railroad corporation and has no intention to build a railroad for public use, "but that the plaintiff corporation has been promoted and organized by and is owned and belongs to, the defendant, the Kansas & Texas Coal Company; that said coal company and said railway have the same officers

and largely, if not entirely, the same stockholders; that the Kansas & Texas Coal Company owns and controls a large number of mines and coal lands in Macon county near Bevier and Ardmore and between those two places, and has furnished the plaintiff company about \$70,000 to build the road, and holds a mortgage therefor on the plaintiff company's property; that the plaintiff railroad is organized solely in the interest and for the benefit of the Kansas & Texas Coal Company, and avers that it would be a fraud to take the defendant's property for the purpose of right of way for the plaintiff railway. Fourth, that the defendant coal company is engaged in the mining business near Bevier, and owns the land the plaintiff railway proposes to condemn, and in connection with defendant Watson it has built and owns and operates a railroad to carry its coal to the Hannibal & St. Joseph Railroad for shipment to the markets; that it has only a right of way of 40 feet, and that all of it is necessary for the proper operation of its mines and railroad; that plaintiff's proposed right of way is within 7 feet of the center line of defendant's railroad, and if plaintiff is allowed to condemn the right of way so described, it will largely, if not wholly, destroy the defendant's business, and that the plaintiff ought not to be allowed, under the guise of building a railroad, to destroy the business of the defendant for the benefit of its rival in business, the Kansas & Texas Coal Company. Fifth, that the construction of the plaintiff's road as contemplated would also ruin Watson's business, and would force him and the defendant coal company to use the plaintiff's road, and put them at the plaintiff's mercy as to charges and railroad rates. Sixth, that there is no necessity for the plaintiff to condemn this land, because it owns a right of way 100 feet wide adjoining the defendant's right of way on the east, and the plaintiff could and should be compelled to build the road on the land it already owns. Seventh, that it is inequitable, unjust, and contrary to law and good conscience to allow the plaintiff to condemn this land, since it is not for a public purpose, but for the benefit of the Kansas & Texas Coal Company, and that "its business would be greatly injured, not to say ruined, by allowing plaintiff to build and construct the railroad upon the line marked out." The answer asks that the petition be dismissed, that the court refuse to appoint commissioners to assess damages, and that the plaintiff be enjoined from condemning or attempting to condemn a right of way along the specified line, or from building a railroad thereon.

The trial court heard evidence upon the issues so raised by the answer, and decided that the plaintiff had a right to condemn land, as the purpose was a public use, but that the condemnation and use by the plaintiff railroad of the three tracts of land owned by the defendant coal company would materially interfere with the uses which the defendant coal company is authorized by law to subject such lands to, and therefore the 51 L. R. A.

plaintiff could not condemn this land under Rev. Stat. 1889, § 2741, and hence the court refused to appoint commissioners to assess the damages, and entered a final judgment for the defendants. After proper steps the plaintiff brought the case to this court by writ of error.

I. The plaintiff is a regularly organized and chartered railroad company under the laws of this state, and therefore it has power of eminent domain to condemn land for a right of way not exceeding 100 feet wide. This is conceded by defendants as a general proposition, in this case, and it is further conceded by the defendants that a railroad charter regular on its face cannot be attacked or questioned collaterally or in any manner except by quo warranto. But it is contended by the defendants, first that the plaintiff is a private, and not a public, railroad, and therefore it has no power of eminent domain; and, second, that the use to which the land here attempted to be condemned and appropriated and applied is a private, and not a public, use.

In support of the first contention it is claimed that the plaintiff is a mere tool or creature of the Kansas & Texas Coal Company; that the officers and directors of the two are the same, and the stockholders substantially the same; that the Coal Company furnished \$70,000 to the plaintiff to build its railroad, and holds a mortgage on its property for that amount; and that the coal company owns large coal mines and large tracts of coal lands in Macon county, near Bevier and Ardmore and between those places, and that the plaintiff is organized solely for the purpose of benefiting the coal company, and hence the plaintiff is a private, and not a public, railroad. And in support of the second contention it is claimed that, the first contention being true, the use to which the land is to be applied, is a private, and not a public, use.

If, as it is conceded, the plaintiff is a regularly organized railroad company, and its charter and rights cannot be questioned except by quo warranto, it is difficult to understand how the courts in a proceeding of this character can hear evidence as to whether the officers, directors, or stockholders of the plaintiff company are the same as those of the Kansas & Texas Coal Company, or whether the coal company loaned the plaintiff company \$70,000 or any other sum. For if all this be conceded it would avail nothing in this case, unless the rights inherent to and expressly granted to a railroad company could be inquired into and taken away from such a company in a collateral proceeding. *National Docks Co. v. Central R. Co.* 32 N. J. Eq. loc. cit. 755-760. But aside from this the contention is untenable. There is nothing in the letter or spirit or policy of the law which prohibits the same persons from forming and conducting two or more different corporations, one a business, and the other a railroad, company. Neither is there any prohibition in the law against a railroad company borrowing money, on bonds secured by mortgage on its property,

to build and operate its road, from a business corporation rather than from a bank, a trust company, or an individual.

The second contention is equally untenable. The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus to do so if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be the transportation of coal produced by the Kansas & Texas Coal Company does not destroy the character of the plaintiff as a railroad company, nor convert it into a private, and not a public, railroad; nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right of way, and therefore a public use. So long as the company holds its charter, it speaks in the name of the state when it comes into court and asks to condemn land for a railroad right of way, and it would be intolerable that, whenever it seeks to exercise the extraordinary power by this summary process, the courts should stop to inquire into the charter or regularity or legality of its organization, or into the motives of the incorporators, or their relations to or holdings in other corporations of a different character. The law is settled in this and other states that the use of land for railroad tracks is a public use. *Thompson v. Chicago, S. F. & O. R. Co.* 110 Mo. loc. cit. 160, 19 S. W. 77; *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. 82, 28 S. W. 483; *Dietrich v. Murdock*, 42 Mo. 279; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. loc. cit. 328; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 44; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884; *Arkansas & O. R. Co. v. St. Louis & S. F. R. Co.* 103 Fed. Rep. 747.

So that, while it is true that the Constitution, art. 2, § 20, provides "that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public," it is also true that it has been judicially determined that the use of land for a railroad right of way is a public use, and not a mere private use.

There can be no doubt that if the Wabash Railroad was asking to condemn this land to extend its branch that now runs from Excelsior to Ardmore so as to reach these coal mines, or if the Hannibal & St. Joseph Railroad was seeking to condemn a right of way for a branch from Bevier to these coal fields, it would be a condemnation of land for a public use. And if either of these existing roads did this they would serve the same public purpose, get the same business, and act under and be subject to the same laws, as the plaintiff is seeking to do. There is no difference in right or in principle whether it

be done by either of these great railroad systems as a mere branch thereof, or whether it be done by the plaintiff, whose road and leased line is only about a dozen miles in length. The length of the road does not determine the right or the nature or character of the use of the land. Many roads of less mileage than the plaintiff's serve most useful public purposes, are almost indispensable to commerce, and are veritable gold mines to their owners. The output from mine No. 7, leased by the defendant coal company to the Kansas & Texas Coal Co., averages 700 tons a day. This alone is quite a considerable business, and if the plaintiff company serves no other purpose than to help to get that much coal to the markets every day it will serve a most useful public purpose, even if it gets no other business, and, as herein pointed out, it can be compelled to carry other freights and passengers.

This case is not without precedent in the law, and all of the defenses that are made here have been made and held insufficient in other cases. A reference to a few will suffice. *Dietrich v. Murdock*, 42 Mo. 279; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 298, 41 Pac. 232; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 44; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

The cases of *Dietrich v. Murdock*, 42 Mo. 279; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 298, 41 Pac. 232; *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 44; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; and *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659, are in all essential particulars similar to the case at bar. They were cases where an existing railroad was endeavoring to condemn a right of way for a railroad that would reach coal or mineral mines, and transport the products thereof to the markets, or where a new railroad company organized practically for that purpose was seeking to do the same thing. In *Dietrich v. Murdock*, 42 Mo. 279; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; and *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429,—the same persons owned the coal mines and the railroad, and the railroad was organized princi-

pally to transport the products of the coal mines to the market, and precisely the same objections and defenses were made in those cases as are made in this case; yet in each instance the right of eminent domain was sustained and the use declared to be a public use. These precedents are in entire consonance with reason, principle, and the spirit, letter, and policy of the law, and abundantly support the ruling of the trial court in this regard.

(Of course, if a railroad company should undertake to condemn land for a purpose that was not within the scope of the powers and purposes legally allowed to railroads, such a proceeding would not only be *ultra vires*, but would be a taking of land for a private use. But the condemnation of land for the purpose of constructing and operating thereon a railroad, in its very nature and essence, cannot be the taking of land for any other than a public use.

Section 14 of art. 12 of our Constitution declares: "Railroads heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in the state, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." And the general assembly has passed such laws (Rev. Stat. 1899, art. 2, chap. 12, §§ 1126 *et seq.*), and provided for punishing any railroad that refuses to receive freight or passengers (*Ibid.* § 1122), and has required the railroad commissioners to see to the enforcement of the law (*Ibid.* §§ 1145 *et seq.*), and has expressly prescribed that mandamus shall lie to enforce the rights so secured, and in addition imposes a fine for a violation of the law (*Ibid.* § 1154).

If the Constitution is to be respected it follows, as surely as the shadow does the sun, that land condemned by a railroad can only be used for a public purpose,—is a public highway,—and therefore cannot be used for private purposes. The land so appropriated and used is as much a public highway as a street in a city, so far as the use is concerned, and can no more be employed or used for private uses than a street can be.

This is the purpose and this the use for which the land is sought to be condemned. The right must exist unless it be true that the length of the road or the volume of business likely to be done at once limits or qualifies or takes away the right, or changes the character of the use. Such a contention manifestly disproves itself. But authority is not wanting to show that the courts have always refused to put any such construction upon such provisions in a constitution or in the laws. *Talbot v. Hudson*, 16 Gray, 417; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *State, De Camp, Prosec-*

utor, v. Hibernia Underground R. Co. 47 N. J. L. 44; *Bloomfield & R. Natural Gaslight Co. v. Richardson*, 63 Barb. loc. cit. 448; *Fanning v. Gilliland* (Or.) 61 Pac. 636; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Tusculumbia, C. & D. R. Co.* 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Co.* 18 N. J. Eq. 54; *O'Reiley v. Kankakee Valley Draining Co.* 32 Ind. 169; *Riche v. Bar Harbor Water Co.* 75 Me. 91; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ross v. Davis*, 97 Ind. 79; *Lindsay Irrig. Co. v. Mehrlens*, 97 Cal. 676, 32 Pac. 802; *Pocantio Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246.

These cases decided that the principle is the same whether all the people of the state, or only all the people of the same locality, have a right to demand and receive service from the corporation,—then the use or purpose is public and not private.

In *Dietrich v. Murdock*, 42 Mo. loc. cit. 283, this court settled the law on this subject in this state, in the following concise and clear annunciation:

"The legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was to some extent at least to be subserved by its creation. What the precise degree of its usefulness to the public might be is not, in our view of the case, necessary to be determined. We think that the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. The 6th section of the act under which this company claimed its corporate existence declares that 'said company shall have the exclusive power to acquire, own, and employ steam power, or animal power, locomotives, cars, and carriages necessary for the transportation of passengers, coal, and every description of personal property on said road for themselves and other persons.' Whether the private interests of this company were such as to require the construction of this road, or constituted the main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the state. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to an action for damages. It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a roadbed

was a rightful exercise of legislative discretion."

To my mind the principle is axiomatic—a truism—and needs no precedent to prove or support it. It is absolutely incomprehensible to my mind to contend for such a construction in the face of the Constitution and laws of this state. If the plaintiff condemns this land, the Constitution at once imposes it with a public use. The plaintiff cannot use it for any other purpose. It must serve all people alike, or it can be compelled by mandamus to do so, and forced if it refuses. The fact that all the people of the state do not need it does not change its character or the use it can legally put the land to. No railroad serves all the people. It can only serve the public living along its line or desiring to travel over it, and if it does this its rights and powers and duties are the same under the Constitution and laws of this state, whether it is only 10 miles long, or is a monster railroad girding the state from one end to another.

II. The defendants contend, however, that there is no necessity for this railroad or this proceeding, because the Kansas & Texas Coal Company has an ample remedy under Rev. Stat. 1889, § 1119; that is, that section provides that when any person owns a coal, lead, iron, or zinc mine located near or within a reasonable distance of any railroad track, and the railroad commissioners are of opinion that the amount of business is sufficient to justify it, such owner may, at his own expense, build and keep in repair a switch leading from the railroad to such mine, and the railroad company is required to furnish the switch-stand and frog and other necessary material for making connection with its track and to make such connection,—the mine owner to pay the actual cost thereof.

It is apparent, however, that this could only be done where the mine owner owns the ground or right of way over which the switch is to run. If he does not own it he is, of course, not in a position to construct a private switch, for he has no power to condemn a right of way, and cannot demand that the railroad company shall exercise its power of eminent domain to acquire such a right of way.

This thought evidently came to defendants' counsel when making this claim, for they follow it up by calling attention to Rev. Stat. 1899, §§ 9559 and 9560, as affording another remedy. That is, those sections provide that if any person owns land lying within 20 miles of a railroad, and has no access to such railroad by any public road running from such lands to such railroad, "convenient for mining, agricultural, or commercial purposes," such owner may petition the county court for the establishment of a private road, and the court shall appoint commissioners to assess the damages to the owners of the lands through which such private road will pass, and the proceedings shall be the same as provided for the establishment of a private road (Rev. Stat. 1899, §§ 9459 *et seq.*), the petitioner to pay the damages; but such owner may construct and use on

such private road a tramway for the purpose of hauling and carrying coal and other products to such railroad, and such road shall not be less than 20 nor more than 40 feet wide.

In other words, the contention amounts to this, that the Texas & Kansas Coal Company, a business corporation, without the power of eminent domain, may in this way have the county court condemn a private road, not less than 20 nor more than 40 feet wide, and that company may construct thereon a tramway for hauling its coal to the railroad, and in this way other persons' land or even defendants' land may be condemned for a use which it is claimed is a private, and not a public, use, but the plaintiff railroad cannot condemn this land.

Even if all this be true it is no defense to this action. Neither of the remedies afforded by these provisions of the statutes is exclusive, nor do they supersede or take away the right of eminent domain possessed by the plaintiff. It may also be doubted if the last-named remedies would be adequate even for the transportation of the volume of coal now being produced. Seven hundred tons of coal a day may possibly be moved over such a tramway along a private road, but it would be rather an obsolete method of hauling that much freight every day in the year, and might have a tendency to increase the price of coal to the consumers. A wagon train of sufficient number might haul 700 tons of coal a day, but it would scarcely be deemed an up-to-date method of transporting that much freight. A tramway is better than a wagon train, but is as much inferior to a railroad train as it is superior to a wagon train for such purposes.

III. The defendants further claim that there is no necessity for locating the plaintiff's railroad at the proposed place, and that it could just as easily be located somewhere else (as, for instance, on the 100-foot strip to the east of this property which is owned by the Kansas & Texas Coal Company) where it would not interfere with the defendant's road or its business.

The answer to this is obvious. The railroad company has the right of eminent domain; it is given the privilege by the legislature to select the location it prefers upon paying therefor, and therefore the courts have no right to deny the exercise of the power vested in the company, either absolutely or because the court may think some other location is as good or better.

In speaking on this subject, Lewis (Em. Dom. § 286) says: "This is a matter which rests wholly with the legislature. The legislature may designate the particular property to be taken, or this may be left to the discretion of those upon whom the authority is conferred, with or without limitations. In the absence of any statutory provision the particular route to be followed between designated points, in case of a railroad or similar way, rests in the discretion of the company."

This question, however, was set at rest in this state in the case of *St. Louis, H. & K.*

City R. Co. v. Hannibal Union Depot Co. 125 Mo. loc. cit. 93, 94, 28 S. W. 483, where Macfarlane, J., said:

"But it is said that there is no such necessity for the appropriation of a part of defendants' property as justifies the exercise of the power of eminent domain. The use of land for railroad tracks has ever been regarded as a public use. Counsel does not question this proposition, but insists that defendants' property ought to be exempt if plaintiff has other routes over the lands of other proprietors which could be used in reaching the terminus of the road. In other words, that defendants' property, being already devoted to one public use, cannot be taken unless the necessity is so absolute that without it the grant itself will be defeated; that the necessity must be beyond plaintiff's control; and not one created by itself for its own convenience, or for the sake of economy.

"It is undoubtedly true that 'the right of eminent domain rests upon necessity and that alone. Beyond this there is no right.' *Pennsylvania R. Co.'s Appeal*, 93 Pa. 150. But it is also true that the sovereignty must be the judge of the necessity of taking the property, and the legislature has delegated to railroad corporations the right to exercise the power, and the courts of this state have always held the use of land by a railroad to be for a public use. The sovereignty has lodged with railroad companies the power of selecting and adopting their own routes, subject only to such limitations as have been imposed. Whenever the use of private property, on the line adopted, is necessary, the necessity exists. There is no distinction in this respect between private and corporate property, except when the exercise of the power as to the latter should 'materially interfere with the uses, to which, by law, the corporation holding the same is authorized,' to apply it."

The defendant is in error in saying the plaintiff owns a right of way 100 feet wide lying just east of the land sought to be condemned. The plaintiff does not own any such land. The Kansas & Texas Coal Company owns a strip of land 100 feet wide which lies east of the defendant coal company's land, and by refusing to recognize the separate identities of the plaintiff and the Kansas & Texas Coal Company, and treating the latter as the owner of the plaintiff, the defendants base their claim that the plaintiff owns the hundred-foot strip. This contention is without legal foundation. The Kansas & Texas Coal Company would have the same right to object to the condemnation of its land that the defendants have to object to the condemnation of their land. If the contention were well founded the result would be that the plaintiff could not condemn any land, for every other landowner would likewise have the same right to object to his land being condemned. Yet in *McGrew's Case* the right of condemnation was held to exist, and McGrew's land was taken notwithstanding it was used as a coal mine.

IV. The defendants next insist, and the 51 L. R. A.

trial court decided, that this plaintiff cannot condemn this land because the use of the land by the plaintiff for a railroad track would materially interfere with the use of the land to which by law the defendant coal company is authorized to put the land.

This contention and decision is based upon a construction put upon Rev. Stat. 1889, § 2741 (Rev. Stat. 1899, § 1272). That section is as follows: "In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone, or telegraph company shall be limited to such use as shall not materially interfere with the uses to which, by law, the corporation holding the same is authorized to put said lines," etc.

The plaintiff contends, first, that this statute only applies to any corporation that possesses the power of eminent domain and has already applied the land to a public use, and that it does not apply to land owned by a business corporation organized for private gain and that performs no public function and renders no public service, and that the defendant coal company is not within this class; and, second, that if this is not so, then the section is void because in conflict with § 4 of art. 12 of the Constitution, which provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right;" and, third, that the proposed use of the land by the plaintiff company will not materially interfere with the use thereof by the defendant coal company.

Rev. Stat. 1889, § 2741, first appeared in the statutes of this state as Rev. Stat. 1865, chap. 66, § 8, and has been continued in the revisions in the same words ever since, except that the word "telephone" has been inserted between the words "railroad" and "telegraph."

This Rev. Stat. 1889, § 2741, follows Rev. Stat. 1889, § 2740, which provides: "No telephone or telegraph company shall, by virtue of this article, be authorized to enter or appropriate any dwelling, barn, store, warehouse, or similar building, erected for any agricultural, commercial, or manufacturing purposes, or to erect poles so near thereto as materially to inconvenience the owner in their use or to occasion any injury thereto," and this section was Rev. Stat. 1865, chap. 66, § 7, except that the word "telephone" has been added.

It has been decided in this and other jurisdictions, and is the accepted law, that the fact that land sought to be condemned for a public use is held, owned, and used by a corporation organized for private gain is no defense to the right of condemnation.

Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co. 142 Pa. 580, 21 Atl. 902, 989; *Lewis, Em. Dom.* § 274, and cases cited.

The same principle is declared even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain, and is using the same for a public purpose. *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. 82, 28 S. W. 483; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478; *Lewis, Em. Dom.* § 274, and cases cited. The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose, in the same manner, that it was used by the corporation that first appropriated it to such use and purpose. *Lewis, Em. Dom.* § 276. In other words, every corporation holds property subject to the right of the state to take it for another public use, whenever in the discretion of the legislature the exigencies require its use for such other purpose; and this is true even as to the franchise itself of any corporation. *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. loc. cit. 580, 21 Atl. 902, 989; *Sunderland Bridge Case*, 122 Mass. 450; *Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076; *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326; *Bellona Co.'s Case*, 3 Bland Ch. 442; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 716; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1.

This is what is meant by § 4 of art. 12 of the Constitution, which declares that the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of any incorporated company already or hereafter organized, and subjecting them to public use the same as that of individuals.

In *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, it was held that the property of an individual coal miner might be taken for railroad purposes. In *Chicago, P. & St. L. R. Co. v. Wolf*, 137 Ill. loc. cit. 365, 27 N. E. 78, the property of a coal mining company was held subject to condemnation for railroad purposes, notwithstanding the construction of the railroad would destroy a tramway that extended from the shaft of the mine to the tracks of another railroad. In *St. Louis, H. & K. City R. Co. v. Hannibal Union Depot Co.* 125 Mo. loc. cit. 92, 28 S. W. 483, the property of a corporation used for a union depot was held subject to condemnation for railroad purposes. In the *Twelfth Street Market Case*, 142 Pa. 580, 21 Atl. 902, 989, the property of a corporation used as a public market was held subject to condemnation for railroad purposes.

In the light of this constitutional provision and of these adjudications in this and 51 L. R. A.

even in other states that have no such constitutional reservation, it cannot be said that the legislature intended by § 2741 to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it and has already devoted it to one use authorized by law.

It goes without saying that one railroad company could not condemn the right of way of another railroad company, and use it for the same purpose as the first company was using it. But the state has the power to condemn and take away, not only the right of way of a railroad company, but also its franchises.

Applying these principles to the case at bar we find that the defendant company's charter does not authorize it to hold or use land for railroad purposes, but that it is only authorized to buy, sell, and operate coal lands and coal mines, to buy and sell merchandise, and to own and operate electric light and power plants, and to sell electric light and power. The power to build and operate a railroad is not expressly conferred, nor is it necessarily implied in the powers conferred. So, while the defendant coal company can own and use lands for mining coal, that is the full extent of the use which its charter gives it to make of this land. And if it be true, as was decided in *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, that the property of an individual miner used for mining coal can be condemned for railroad purposes, then it follows that under § 4 of art. 12 of the Constitution the property of any incorporated company used for the purpose of mining coal is likewise subject to condemnation, and this and all courts are expressly prohibited by that section of the Constitution from construing the property of an incorporated company exempt from condemnation when the property is held by an individual would be subject to condemnation.

The legislature therefore has not said by § 2741 that property held as this property is held shall be exempt from condemnation; and if the legislature had said so, it would be an unconstitutional act, because it did not make property held and used in like manner by an individual also exempt from condemnation.

It is within the province of the legislature to exempt any kind of property from the power of eminent domain delegated by the state to a corporation, and § 2740 does exempt dwelling houses, etc., from being taken or used by telegraph or telephone companies, but under the Constitution it is beyond the power of the legislature to exempt any class of property from condemnation if it is owned by any kind of an incorporated company, and to make it subject to condemnation if it is owned by an individual.

V. The circuit court, however, assumed that § 2741 was a valid enactment, and held that the condemnation of this land by the plaintiff for railroad purposes would materially interfere with the use to which the defendant was authorized by law to apply it.

It has already been pointed out that the defendant coal company has no power under its charter to construct, operate, or maintain a railroad, and hence it is not authorized to use any part of the land for railroad purposes.

But aside from this, the facts are simply these: The center of the defendant's track will be 14 feet from the center of the plaintiff's track. The defendant's testimony shows that tracks 13 feet from center to center is a safe construction. The evidence further shows that the New York Central and Pennsylvania roads have parallel tracks whose centers are only 12 feet and 2 inches apart. Assuming that the cars are 9 feet in width, a car on one road would extend 4½ feet towards the cars on the other road, so the two would occupy 9 feet of the 14-foot space between the centers of the two tracks. This would leave a space of 5 feet between passing cars. It needs nothing but common sense to determine that, as cars must run on fixed rails, there can be no danger in running cars on separate tracks when they cannot get closer than 5 feet to each other. It is too plain to admit of debate that the plaintiff's railroad so constructed could not interfere in any manner with the operation of the defendant's railroad.

The plaintiff's railroad could not interfere with the operation of the mine, for the shaft to the mine (which is operated by the Kansas & Texas Coal Company, and not by the defendant coal company) is from 56 to 72 feet west of the west line of the strip sought to be condemned and where the plaintiff's railroad will run. The switch or loading tracks used by the defendant company are located on this strip of 56 to 72 feet of land, and are all between the main track of the defendant company and the shaft to the mine. So that it cannot be said that the construction of the plaintiff's road will in any manner whatever interfere with the operation of the mine, or the use to which the defendant has applied or is authorized to apply the land. But even if it did so interfere, the *McGrew Case*, 104 Mo. 282, 15 S. W. 931, is ample authority for holding that the land is not exempt from condemnation for railroad purposes. The defendants evidently realized that this is true, for they seek to strengthen their case by showing that they contemplate opening a new mine south of the Watson mine, and had already surveyed and located a track to such new mine, which will leave the track running to mine No. 7, and run to the Watson mine, and that it will need the land here sought to be condemned to use for such new track.

Courts must deal in cases like this with the conditions that exist at the time the condemnation is asked, and cannot take into ac-

count conditions that may or may not arise or be created thereafter. *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 298, 41 Pac. 232; *Colorado E. R. Co. v. Union P. R. Co.* 41 Fed. 293.

It furthermore appears from the record herein that the defendant company on the 21st of February, 1899, proposed to the plaintiff company to accept \$3,000 for the right of way here sought to be condemned, with an agreement as to crossings and protection to defendant's road, where the grade of the plaintiff's road is below that of defendant's road. The plaintiff offered \$300 and refused to pay \$3,000. Manifestly it cannot be true that the location and operation of the plaintiff's railroad upon this land would materially interfere with the present or future use of the land for mining purposes, or with the operation of the defendant's railroad, much less that it would practically destroy defendant's business and road if the defendant was willing to sell this identical land to the plaintiff for a railroad right of way for \$3,000. The real dispute between the plaintiff and defendants, therefore, is the difference between \$3,000, the price the defendants offered to take, and \$300, the price the plaintiff offers to give for the property in question to be used for a railroad right of way.

It follows from what has been said that the circuit court erred in refusing to appoint commissioners to assess the damages for the taking of the land for railroad purposes, and in entering judgment for the defendants, and therefore the judgment of the Circuit Court is reversed, and the cause remanded, with directions to appoint such commissioners and proceed in accordance herewith.

Sherwood, Robinson, and Brace, JJ., concur.

Valliant, J., dissenting:

The principle of law involved in this suit is so important, and the consequences that may result from the establishment of the doctrine contended for by the plaintiff are so serious, that I feel constrained at least briefly to express the reasons why I am unable to concur in the opinion of the majority of the court.

The evidence in the record showed to the satisfaction of the trial court, and it shows to my satisfaction, that this is a controversy between two rival coal companies, wherein one, having assumed for the purpose the legal garb of a railroad corporation, is endeavoring to shut its rival from the market and reduce it to a dependency. The Kansas & Texas Oil Company and the Northwestern Coal & Mining Company are both owners and operators of coal mines in the same vicinity, and rivals in business. Each company owns railroad tracks which it uses for the sole purpose of carrying the products of its own mines to a convenient point on the nearest public railroad. The defendant company is incorporated under the general statute relating to business and manufacturing corporations, and the Kansas & Texas

Coal Company is a corporation of like character. But the stockholders and officers of the latter company have availed themselves of the provisions of the general statute in relation to railroads, and have taken out a charter under that statute also, under the name of the Kansas & Texas Coal Railway; and that corporation holds title to the railroad tracks in the service of the Kansas & Texas Coal Company, and is the plaintiff in this case. The identification of the two corporations in actual unity of interest and personnel of the incorporation is shown beyond question. That the so-called railroad corporation is but the agent of the coal company of that name, with no business past, present, or in contemplation but that of carrying the coal company's product to the nearest railroad, is also beyond question. Now the Kansas & Texas Coal Company proposes in this proceeding, in the name and in the garb of its *alter ego*, the Kansas & Texas Coal Railway, to condemn a right of way over the property of the defendant coal company for the construction of other railroad tracks which are in fact designed for the exclusive use of the Kansas & Texas Coal Company. The defendant by its answer says, and by its proof shows, that this is in fact but the taking of private property for a private use; that if the plaintiff is permitted to do as it proposes it will shut the defendant out from market and ruin its business; that it is an abuse, not a use, of the power of eminent domain. But the court is asked to say in reply: That question of fact we cannot look into. The plaintiff comes with a charter in due form which denominates it a railroad corporation. No one but the state can question its right to exercise all the prerogatives of a railroad corporation, and if it condemns land for its use no one can question that that is a public use; its charter is conclusive on that point; and if the effect is to shut you out from market except upon such terms as your rival may see fit to prescribe, still, the court cannot look beyond the charter for the real truth.

The defendant shows by its answer and evidence that the plaintiff's demand is for but a wanton destruction of defendant's business; that the plaintiff already has a right of way just as available as that sought to be condemned. But we are told that our answer to the defendant must be, We cannot dictate to a railroad corporation where it will locate its lines, nor can we question its motives. The defendant, being only a mining corporation, has no power to condemn; therefore if its rival in this proceeding is permitted to lay its tracks, as it may and as it is apprehended it will, the defendant cannot cross the tracks with its railroad, and is shut in. The evidence shows that if the plaintiff lays and operates its tracks so close to those of the defendant, while there may yet be room for trains to pass, still the appliances required for conveniently and economically handling its business cannot be used, and even the lives of its employees will be endangered. But the answer to all this is that the charter is conclusive, and the 61 L. R. A.

courts are not only powerless to grant any relief, but must even suffer themselves to be used to effect the gross wrong and abuse. If that is the law we are in a bad way. If courts are so encrusted in form that they are not only powerless to do right, but must even yield themselves as instruments to effect a wrong, we are far from perfection. I do not believe that that is the law. When a suitor comes into court and asks its aid, the court has a right to know in what character he comes, real or fictitious. In my opinion, therefore, when the trial judge became satisfied that the real plaintiff in this case was the Kansas & Texas Coal Company wearing the mask of a railroad corporation, he had the authority, and it was his duty, to refuse to appoint commissioners looking to a condemnation of the defendant's property. Even if a real railroad corporation should come into court seeking to condemn land ostensibly for railroad use, and it should be shown to the court, as clearly as the true facts were shown in this case, that the real object was to obtain a site for a summer villa for its president, the court should refuse to appoint commissioners. Property taken for the real use of a real railroad company is taken for a public use, and the courts so declare as a matter of law; but the courts have never declared that all property sought to be taken in the name of a railroad corporation is conclusively adjudged to be sought for a public use, and that no inquiry into the truth can be had.

It is argued in behalf of plaintiff in error that a railroad corporation chartered for the sole purpose of carrying to market the product of coal mines owned by the same men who own the railroad is engaged in a public service and may exercise the right of eminent domain, and numerous cases are cited as supporting that proposition. But that proposition does not measure up to the point the plaintiff seeks to reach in this case. If it has ever been decided that a coal company could take on itself the character of a railroad company for its own private use, and exercise the right of eminent domain for the sole purpose of closing out its rival in business, and preventing another coal mining company from bringing its product to market, and that the courts were bound to assist it in that purpose, I have not seen such decision, and indeed would not care to see it. There is nothing in the condemnation procedure prescribed by our statute that marks such narrow bounds for the court as to reduce it to a mere ministerial office without judgment or discretion. And if there is no precedent for the court in such matter to exercise a judicial power to reach the truth and justice of the case, it is our duty to make a precedent.

It is also argued that, whatever may be the purpose of the plaintiff in seeking to condemn its right of way over defendant's land, when its road is once built it becomes a public highway, and the plaintiff can be compelled by mandamus to carry the defendant's coal on the same terms that it carries the coal of the Kansas & Texas Coal Com-

pany. True as that may be in theory, courts cannot pretend not to know that it is only theory. The court should not require the defendant to submit to a wrong in the first place, with a half promise to redress his injury at some future time.

The trial court was of the opinion that the condemnation of the 40-foot strip of defendant in question, and the subjecting of it to the use of the plaintiff's purpose, would materially interfere with that use; that defendant corporation had by law the right to use it, and the condemnation was therefore forbidden by Rev. Stat. 1889, § 2802, now Rev. Stat. 1899, § 1349. That section provides that when the property sought to be condemned is already held by a corporation, the right to condemn "shall be limited to such use as shall not materially interfere with the uses to which by law the corporation holding the same is authorized to put said property." Art. 12, § 4, of the Constitution, ordains that the power of eminent domain shall not be so abridged as to prevent "the taking . . . of the property and franchises of incorporated companies, . . . and subjecting them to the public use the same as that of individuals." But that does not mean that the property of a corporation which is already being applied to a particular public use may be taken from it by another corporation for the purpose of applying it to the same or even to another public use, if thereby the public use which it is already serving is to be destroyed or impaired. So this section of the statute is not repugnant to that clause of the Constitution. It is contended by plaintiff that the corporation whose property is by the statute protected to some extent from condemnation is only a corporation which has the right to exercise eminent domain, and that the property so exempted is such as is held by it, either by grant or condemnation for a public use. On the other hand it seems to be argued that it applies to all property of all corporations. I am not inclined to the extreme view of either side of that question. But I think that the statute was intended to limit the condemnation of property held by a corporation for a public use, even though the corporation was not such as is authorized to exercise the right of eminent domain, and I do not think that it was designed to affect property that is held for merely private use. We may suppose two concerns each conducting the same kind of business, 51 L. R. A.

say a mercantile business side by side; the one is owned by a corporation, the other by an individual. The law could not have contemplated that the property of the individual might be taken, and that of the corporation exempt. And on the other hand we recognize that there are corporations whose property is being used for a public purpose, yet which have not the power to condemn because they are not organized under the statute which confers such power. Many street-railroad companies and some other corporations are of this character; they are public carriers and their property is in public use, but they are not organized under the general railroad statute. Now, it is argued in this case that, although the defendant corporation owns and operates a railroad, yet, as it is not chartered as a railroad corporation, its railroad is not devoted to a public use; whereas the plaintiff being so chartered its use is a public use. But we have seen that the actual use, past, present, and prospective, to which the railroad of each corporation is devoted, is exactly the same. The fact is the same in each instance. If a difference exists it is only in theory, and that theory purely fictitious. We are asked to say that it is lawful for the plaintiff to condemn the defendant's property on the theory that in defendant's hands it is being devoted to private use; yet when condemned it is in plaintiff's hand to be in fact devoted to exactly the same character of use; that the charter makes one private and the other public, though they are in fact the same. If there is any force in the decisions referred to, which hold that a railroad designed and used exclusively to bring to market the product of a coal mine is in a public service, they establish the fact that the use to which the defendant is devoting the 40-foot strip in question is a public use, and that being so the plaintiff, even if it be a railroad corporation, is by the terms of the statute quoted forbidden to impair the defendant's use of the same.

For these reasons the action of the trial court in refusing to appoint commissioners was right, and its judgment should be affirmed.

Burgess, Ch. J., and Gantt, J., concur in the above views.

Petition for rehearing denied March 26, 1901.

NEW YORK COURT OF APPEALS.

BUFFALO & LANCASTER LAND COMPANY, Appt.,
v.

BELLEVUE LAND & IMPROVEMENT COMPANY, Resp't.

(165 N. Y. 247.)

1. The omission of a statement in an order of reversal by an appellate court, that the reversal is upon the facts, is immaterial in a case where there are no disputed questions of fact.
2. Failure to run street cars as often as every half hour, for part of one winter, on account of unusually heavy snow falls and high winds, by which the road was blocked and it was made practically impossible some of the time to run cars over it, where all usual means were used to keep the track open, and the road was operated as well as similar roads in the vicinity, is held not to justify a purchaser of land who sustained no damage thereby, in rescinding his contract for the land, by the terms of which the vendor agreed to construct and operate the street railway, and run cars every half hour "as such street railroads are usually run," until the land is sold, or, in default thereof, to take back the land, return the consideration, and pay a specified sum as liquidated damages.

(January 8, 1901.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Erie County in favor of plaintiff in an action brought to rescind a contract because of defendant's breach, and to compel it to perform certain affirmative clauses which had been provided in case of such breach. *Affirmed.*

The facts are stated in the opinion.

Mr. Simon Fleischmann, with *Mr. Charles Edwards Woodbridge*, for appellant:

The covenant for the operation of the road at stated intervals on each day was absolute and unqualified; and the further phrase, "as such railroads are usually run," refers to the general manner of operating the road, not to the time or frequency of running cars, which is covered by that specific clause.

Effect must be given, if possible, to every part of an agreement; and it is only when there is an inconsistency or repugnancy which is totally irreconcilable that a discrimination will be made as to which part shall be made to yield to the other.

Barhydt v. Ellis, 45 N. Y. 107; *Beach*, *Modern Law of Contracts*, § 718; *Ripley v.*

Larmouth, 56 Barb. 21; *Holmes v. Hubbard*, 60 N. Y. 183; *Spofford v. Pearsall*, 138 N. Y. 57, 33 N. E. 834; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85.

Where there is no room for doubt or question as to the meaning and intent of the language employed in a written instrument, the apparent meaning must be regarded as the intended one.

Christopher & T. Street R. Co. v. Twenty-third Street R. Co. 149 N. Y. 51, 43 N. E. 538; *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059; *Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 24 C. C. A. 616, 47 U. S. App. 531, 79 Fed. 331.

There can be no doubt as to the exact meaning of the covenant for the operation of the road, and, even if there were, it should be construed strictly against the covenantor and liberally in favor of the covenantee.

Belden v. Burke, 72 Hun, 51, 25 N. Y. Supp. 601; *Marvin v. Stone*, 2 Cow. 781; *Jackson v. Builders' Wood Working Co.* 91 Hun, 435, 36 N. Y. Supp. 227; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661; *Howell v. Long Island R. Co.* 37 Hun, 381, 107 N. Y. 684, 14 N. E. 611.

To fail to give this provision due effect is virtually to make for the parties a contract different from that they have made for themselves, and this the court cannot do.

Foster v. Joliet, 27 Fed. 899.

The failure to run the cars during the winter of 1894 and 1895 constituted a breach of the covenant that the road should be operated.

2 Pom. Spec. Perf. § 2.

Whether there has been a substantial performance of a contract is a question of fact depending upon all the circumstances of the case, and is to be found in that form by the trial court.

Murphy v. Stickley Simonds Co. 82 Hun, 158, 31 N. Y. Supp. 295; *Phillip v. Gallant*, 62 N. Y. 256; *Nolan v. Whitney*, 88 N. Y. 648; *Bracco v. Tighe*, 75 Hun, 140, 27 N. Y. Supp. 34; *Monteverde v. Queens County Supers.* 78 Hun, 267, 28 N. Y. Supp. 918; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Woodward v. Fuller*, 80 N. Y. 312; *Beach*, *Modern Law of Contracts*, § 293.

The mere fact that no specific benefit to the plaintiff was shown by the running of the road, or detriment by its failure to run, is not material.

New York & N. E. R. Co. v. Providence, 16 R. I. 746, 19 Atl. 759.

The court cannot set up a measure of damages for a breach of a contract different from that provided in the contract.

NOTE.—The above case depends primarily, no doubt, on the construction of the contract in determining whether or not the intention of the parties had been carried out by what was done by way of performance. But as this involves the extent of modification of the strict provision for cars every half hour by the general reference to the way such roads are usually

run, it fairly involves the effect of intervening impossibilities and difficulties as affecting that question. On this matter of intervening impossibilities there is a note with the case of *Stewart v. Stone* (N. Y.) 14 L. R. A. 215. A later case in this series is *Remy v. Olds* (Cal.) 21 L. R. A. 645, and note.

Zachary v. Swanger, 1 Or. 92; *Winch v. Mutual Ben. Ice Co.* 9 Daly, 177; *Holmes v. Holmes*, 12 Barb. 137, Affirmed 9 N. Y. 525; *Hovell v. Long Island R. Co.* 37 Hun, 381, Affirmed in 107 N. Y. 684, 14 N. E. 611; *Swain v. Scamens*, 9 Wall. 254, 19 L. ed. 554; *Poster v. Joliet*, 27 Fed. Rep. 899; *MacKnight Flintic Stone Co. v. New York*, 13 App. Div. 231, 43 N. Y. Supp. 139; *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256; *Mount Morris v. King*, 77 Hun, 18, 28 N. Y. Supp. 281.

The contract is that the defendant would take back the land, and refund the purchase money, and pay the liquidated damages, upon the happening of a certain event, which has occurred.

In cases of this kind it is only necessary to show that the event has happened.

Slosson v. Beadle, 7 Johns. 72; *McNitt v. Clark*, 7 Johns. 465; *Jacquinet v. Boutron*, 19 La. Ann. 30; *Brown v. Slee*, 103 U. S. 828, 26 L. ed. 618; *Deverill v. Burnell*, L. R. 8 C. P. 475; *Pom. Spec. Perf.* § 50.

Even in the absence of the alternative covenant, which provided for the consequences of a cessation of the operation of the road, the difficulty of such operation by reason of the heavy snow falls during the winter in question, in accordance with the contract, had it amounted to an impossibility, was no excuse for such failure of performance.

Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Cobb v. Harmon*, 23 N. Y. 148; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Bigler v. Hall*, 54 N. Y. 167; *Jennison v. Know*, 15 Daly, 178, 4 N. Y. Supp. 894; *Dermott v. Jones*, 2 Wall. 1, *sub nom. Ingle v. Jones*, 17 L. ed. 762; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. 440; *Dodge v. Van Lear*, 5 Cranch C. C. 278, Fed. Cas. No. 3,956; *Meriwether v. Loundes County*, 89 Ala. 362, 7 So. 198; *Beach, Modern Law of Contracts*, §§ 217, 218, 773; 1 Story, Eq. Jur. 13th ed. § 101, p. 104; *Warth v. Mack*, 25 C. C. A. 235, 51 U. S. App. 133, 79 Fed. 915; *Boker v. Demorest Mfg. Co.* 28 Misc. 263, 59 N. Y. Supp. 326; *Kelly v. Fejervary* (Iowa) 78 N. W. 828; *Dexter v. Norton*, 47 N. Y. 62; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 29 N. E. 595; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

The enforcement of the alternative covenant was not a matter of discretion, but of absolute right.

Giles v. Austin, 62 N. Y. 486; *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316; *Bispham, Eq.* § 181; *Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 405; *Frain v. Klein*, 18 App. Div. 65, 45 N. Y. Supp. 394.

Even in cases of specific performance or other equitable actions, where a contract is fair at its inception, no unfairness, hardship, or inequality subsequently arising, however unforeseen, or change of circum-

stances, however unexpected, will prevent its enforcement.

Pom. Spec. Perf. §§ 177, 189; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; *Lee v. Kirby*, 104 Mass. 420; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Fry, Spec. Perf.* 116, also chap. 6; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

Mr. John G. Milburn, for respondent:

Upon the particular findings as to what was done and what was not done, the question as to whether they constitute performance or not turns upon a question of law,—the proper construction of the contract,—and is reviewable as such by this court, whatever the form of the finding of the court of first instance may be.

Fielden v. Lahens, 2 Abb. App. Dec. 111; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165; *Pratt v. Foote*, 9 N. Y. 463; *Lake Shore Nat. Bank v. Butler Colliery Co.* 51 Hun, 63, 3 N. Y. Supp. 771; *Jerome v. Queen City Cycle Co.* 163 N. Y. 357, 57 N. E. 485.

If the particular findings show performance according to the construction put upon the contract by this court, they will control a general finding of nonperformance, though designated a finding of fact.

Bennett v. Luchan, 76 N. Y. 386; *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 433.

The contract is not an absolute and unqualified agreement to run cars every half hour from 7 A. M. to 8 P. M. each day under all conditions and circumstances.

Delaware, L. & W. R. Co. v. Bowns, 58 N. Y. 573; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391; *Stapenhorst v. Wolff*, 3 Jones & S. 25, Affirmed in 65 N. Y. 596; *O'Brien v. Miller*, 168 U. S. 297, 42 L. ed. 473, 18 Sup. Ct. Rep. 140; *Gillet v. Bank of America*, 160 N. Y. 555, 55 N. E. 292; *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204.

The rule is that *vis major* is not an excuse for nonperformance, when the contract is absolute.

Another doctrine has, however, grown out of the stringency of this rule of performance, which has resulted in radically limiting it.

While leaving the doctrine of strict performance untouched, the tendency has grown up to so construe contracts that its operation is very much circumscribed.

Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489; *Stewart v. Stone*, 127 N. Y. 507, 14 L. R. A. 215, 29 N. E. 595; *Worth v. Edmonds*, 62 Barb. 40; *Taylor v. Caldwell*, 3 Best. & S. 826; *Lovering v. Buck Mountain Coal Co.* 54 Pa. 291; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; *Clifford v. Watts*, L. R. 5 C. P. 576.

There was substantial performance of the contract as to the operation of the railroad.

Miller v. Benjamin, 142 N. Y. 613, 37 N. E. 631; *Hosley v. Black*, 28 N. Y. 438; *Pallman v. Smith*, 135 Pa. 188, 19 Atl. 981;

Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

Even if the failure to run cars regularly during the winter of 1894-95 was a breach of the provision of the contract that a car should be run every half hour, the right to return the land under the contract did not accrue.

The mere failure to run cars every half hour at times during the winter of 1894-95 did not establish that the railroad had not been constructed, maintained, and operated as provided in the contract, so that the plaintiff was entitled to a cancellation of the mortgage, the return of the moneys paid, and the \$5,000 liquidated damages, because (1) the road was operated within the meaning of the contract, notwithstanding that failure; and (2) the clause is conjunctive, and only in the case of a failure to build and maintain, as well as a failure to operate, might it be invoked.

Mount Morris v. King, 77 Hun, 18, 28 N. Y. Supp. 281.

Such covenants or conditions are not favored in the law, and they are always construed strictly.

Rose v. Hawley, 141 N. Y. 366, 36 N. E. 335; *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298; *Craig v. Wells*, 11 N. Y. 315; *Hoyt v. Kimball*, 49 N. H. 327; *Merrifield v. Cobleigh*, 4 Cush. 178.

It is not enough to show that the letter of the condition is violated, but it must appear that its true spirit and purpose have been wilfully disregarded by the grantee.

Rose v. Hawley, 141 N. Y. 378, 36 N. E. 335; *Leggett v. New York Mut. L. Ins. Co.* 53 N. Y. 394.

The plaintiff is not entitled to the aid of a court of equity, considering the circumstances, to enforce the covenant as to a reconveyance, etc., and the payment of liquidated damages.

Pom. Spec. Perf. of Contracts, 2d ed. § 185; *London v. Nash*, 3 Atk. 512, 1 Ves. Sr. 12; *Oil Creek R. Co. v. Atlantic & G. W. R. Co.* 57 Pa. 65; *Livingston v. Tompkins*, 4 Johns. Ch. 431; *Warner v. Bennett*, 31 Conn. 468; *White v. Port Huron & M. R. Co.* 13 Mich. 356; *Story*, Eq. Jur. § 1319.

O'Brien, J., delivered the opinion of the court:

This is an action to rescind a contract for a breach by the defendant, and to compel the latter to specifically perform certain alternative provisions thereof. The contract in terms, as is claimed, bound the defendant to do various things that it failed to do: (1) To build, maintain, and operate an electric street-railroad through certain lands which it conveyed to the plaintiff's grantors; (2) failing in that, to accept a reconveyance of the lands, and to cancel a purchase-money mortgage given by such grantors; (3) to refund to the plaintiff any sums of money paid on the mortgage or on the purchase price of the land; (4) to pay \$5,000 liquidated damages for the violation of the agreement.

On the 1st day of June, 1892, the defendant

agreed to sell and convey to several individuals named a tract of land containing about 118 acres, for the sum of \$71,136, to be paid at times therein expressed, in cash to the amount of about \$18,000, when the defendant was to convey to the purchasers the land by a warranty deed, and the purchasers were to secure the balance of the purchase money by bond and mortgage. The cash payments were made, the property conveyed by the defendant, and the purchase-money mortgage delivered by the purchasers in accordance with the agreement. The defendant also agreed that an electric street-railroad should be constructed, maintained, and operated through the land from the railroad system in Buffalo to the village of Lancaster, the construction of the same to be commenced on or before July 1, 1892, and the road to be completed and in operation on or before May 1, 1893, and that such railroad should be maintained in good condition and operated until the land should be sold. In February, 1893, the individual purchasers of the land under this contract became incorporated, and the corporation thus formed is the plaintiff in this action. These individuals were about to convey the lands to the plaintiff, but, as it was supposed that the defendant's covenant with respect to the street railroad was good only until the lands were sold, the two corporations, on March 1, 1893, entered into another agreement in writing, in which the defendant is described as the party of the first part, and the plaintiff as the party of the second part, the material parts of which are as follows:

"That in consideration of the premises and the sum of \$1 paid by the party of the second part to the party of the first part, and for other good and valuable considerations, the party of the first part agrees, in case the parties to said agreement of the second part shall make the conveyance hereinbefore recited, that an electric street-railroad shall be constructed, maintained, and operated connected with the street-railroad system of the city of Buffalo, and running thence to the village of Lancaster, and that said railroad shall run over said land, and in and along a certain street or highway 100 feet wide as the same is now located, which street or highway runs in a direction parallel or nearly parallel to the northerly line of said land; that said street railway shall be completed and in operation on or before the 1st day of May, 1893; that said railway shall be maintained in good condition and in operation until the said land shall be sold by the party of the second part; and that, after the completion of said railroad, cars shall be run thereon for the convenience of passengers as often as once every half hour from 7 A. M. to 8 P. M. each day, as such street railroads are usually run, until said land is sold. The party of the first part further covenants that, in case said street railway shall not be constructed, maintained, and operated as hereinbefore provided, the said party of the first part will, at the request of the party of the sec-

ond part, take back the said land, provided said land shall be free and clear from all liens and encumbrances, except a mortgage made by the parties to said agreement of the second part, to the party of the first part, to secure the payment of the sum of fifty-five thousand five hundred and eighty (\$55,580) dollars, which mortgage bears even date herewith, and except also taxes and assessments levied or assessed thereon since the 1st day of June, 1892, and except, also, any encumbrances upon said land, or any defects in the title thereto of the party of the second part which existed at the time of the delivery of the deed to the parties to said agreement of the second part; and thereupon the party of the first part will repay to the party of the second part all money which has or may be paid to the party of the first part, pursuant to the terms of said agreement, and all moneys which may have been paid on said mortgage or the bond to secure which the same is given, and all moneys which may have been paid on account of taxes and assessments levied or assessed upon said premises since the 1st day of June, 1892, and will pay to the party of the second part the further sum of five thousand (\$5,000) dollars, which it is hereby agreed shall be full liquidated damages for the breach of the foregoing covenant for the construction, maintenance, and operation of said street railway; and the party of the first part will thereupon, at the request of the party of the second part, discharge said mortgage."

The court found, and it is undisputed, that the defendant built the railroad and put it in operation, and that it was operated down to the time of the trial, except during the winter of 1894-95, as to which period a special finding was made in the following words: "That during the whole or a substantial part of the period elapsing from December 1, 1894, to April 1, 1895, cars were not run on the said electric street-railway as often as once every half hour from 7 A. M. to 8 P. M. of each day, and that during said period there was a substantial failure to run cars on said electric street-railway on the days and at the times and intervals required by said contract set forth in the above ninth finding of fact; that the winter of 1894 and 1895 was of unusual severity, and the failure to run said cars over or on said railroad as aforesaid was caused and resulted from said railroad becoming blocked with snow and snowdrifts, caused by heavy snow falls and high winds, rendering it practically impossible to run cars over said railroad while the said snow and snowdrifts continued on the said railroad, and the same were removed from said railroad with the appliances and assistance usually and ordinarily employed for that purpose by street railroads, and when the same were so removed from said railroad the running of cars was resumed and continued, a car passing over said railroad once every half hour, until the railroad became blocked again in the manner hereinbefore set forth." The court further found that it was practi-

cally impossible for the defendant to operate the railroad during the winter of 1894-95 in such a way as to pass through the lands every half hour, and that the interruption of the regular time was not due to any omission on the part of the defendant or the parties operating the road, but to the heavy storms prevailing at those times; that the stoppage of the cars at those times was for the purpose of cleaning the snow from the track; and that during the time mentioned the road was operated as similar railroads were in the city of Buffalo. It was also found that since the end of the year 1893, up to the time of the trial, there was practically no market for the sale of the land embraced in the contract, and that the plaintiff sustained no damage in consequence of the omission to run the cars regularly every half hour at the times referred to, and lost no opportunity to sell the land by reason of such omission.

The trial court rendered judgment for the plaintiff for the relief demanded, which was the restoration of the purchase money of the land, so far as paid, and all money paid on the mortgage by the plaintiff; but on appeal to the appellate division the judgment was reversed, and a new trial granted, and no statement appears in the order that the reversal was on the facts. The form of the order of reversal is not material in a case where there are no disputed questions of fact. *O'Brien v. East River Bridge Co.* 161 N. Y. 539, 48 L. R. A. 122, 56 N. E. 74; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 46 L. R. A. 839, 51 N. E. 997. All the findings of the trial court stand in the case, and the only question is whether they sustain the judgment. If they do not, then it was properly reversed. The court found, not only what was done by the defendant in the performance of the contract, but what was not done, and all of the findings must be read together, and when thus read they must show a breach of the contract on the part of the defendant in order to support the judgment for the plaintiff at the trial.

The agreement to run passenger cars on the road as often as once every half hour was not literally or absolutely performed, and the question is whether the omission in that respect constitutes such a breach of the defendant's contract as to give to the plaintiff the right to rescind, and to demand from the defendant the restoration of the benefits received under it. We do not think that it would be a fair construction of the contract to hold that the defendant was absolutely bound to run a car every half hour each day under all circumstances and conditions, whether possible or not, or that an omission in that regard, under the circumstances and conditions found, was a breach of the contract to operate the railroad in the manner specified. The whole contract, and its purpose and object, must be brought into view, and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do

things that were impossible. The construction for which the learned counsel for the plaintiff contends would be unreasonable, and would place the defendant at the mercy of the elements, since it is well known that the operation of railroads is frequently interrupted by storms such as are mentioned in the findings in this case.

The accepted canons of interpretation are opposed to a construction that would visit upon the defendant all the consequences of a breach as specified in the agreement. *Delaware, L. & W. R. Co. v. Bowns*, 58 N. Y. 573; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391; *O'Brien v. Miller*, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Horgan v. New York*, 160 N. Y. 516, 55 N. E. 204. It is a well-settled rule of law that where a party, by his own contract, absolutely engages to do an act, it is his own fault and folly that he did not thereby provide against contingencies, and exempt himself from responsibility in certain events. In such cases performance is not excused by inevitable accident or other contingency, although not foreseen or under the control of the party. When the contract is absolute, the *vis major* is not an excuse for nonperformance. *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256; *Harmony v. Bingham*, 12 N. Y. 99. But there are many contracts from which by their very nature a condition may be implied that a party will be relieved from the consequences of nonperformance in some slight particular, where the obligation is qualified, or when performance is rendered impossible without his fault, and we think the contract in question belonged to that class. *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595; *Deater v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Worth v. Edmonds*, 52 Barb. 40; *Lorillard v. Clyde*, 142 N. Y. 450, 24 L. R. A. 113, 37 N. E.

489; *Taylor v. Caldwell*, 3 Best & S. 826; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; *Clifford v. Watts*, L. R. 5 C. P. 577.

In this case the covenant to run the cars every half hour was qualified, not only by the nature of the contract and the act to be performed, but by the use of the words, "as such street railroads are usually run." We are of opinion that there was no substantial breach of the agreement upon the facts found at the trial, when they are all taken together, since the railroad was constructed, maintained, and operated in conformity with the agreement, when reasonably and fairly construed.

This conclusion renders it unnecessary to deal with another point argued by the learned counsel for the defendant, to the effect that, even if there was a breach of the agreement to run cars every half hour, yet the alternative clause is conjunctive, and could be invoked by the plaintiff only in case of omission on the part of the defendant, not only to operate, but to build and maintain. He contends that the clause could not come into operation unless the defendant failed to do all these things. This construction would seem, upon the bare statement of the proposition, without examination of the authorities cited, to be almost as unreasonable as that for which the plaintiff's counsel contends with respect to the scope and meaning of the obligation to run cars every half hour. But since it is of no importance in the case, in the view we have taken of the other question, it is not needful to consider it.

The order and judgment of reversal should be affirmed, and judgment absolute ordered for the defendant on the stipulation, with costs.

Parker, Ch. J., and Bartlett, Haight, Martin, Vann, and Landon, JJ., concur.

MICHIGAN SUPREME COURT.

Fannie B. MILLER

v.

DETROIT, YPSILANTI, & ANN ARBOR RAILWAY, *Plff. in Err.*

(.....Mich.....)

A street railway company has a right to remove shade trees within the limits of the public highway for the construction of its road, as authorized by the township authorities, without compensation for damages to the abutting owner; but it must first give him notice and an opportunity to remove the trees as he may see fit.

(*Hooker, J., dissents.*)

(November 18, 1900.)

ERROR to the Circuit Court for Washtenaw County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful destruction of shade trees. *Affirmed.*

Statement by Grant, J.:

Plaintiff recovered a judgment in the court below of \$275 for the destruction of eleven shade trees in front of her property, dug up and removed by the defendant in the construction of its railway. Plaintiff's

NOTE.—As to the ownership and control of trees in highway, there is a note in this series with the case of *Chase v. Oshkosh* (Wis.) 15 L. R. A. 563; also the cases of *State, Avia, Prosecutor, v. Vineland* (N. J. L.) 23 L. R. A. 685; *Tate v. Greenboro* (N. C.) 24 L. R. A. 671; *Dalley v. State* (Ohio) 24 L. R. A. 724; *Mt. Carmel v. Shaw* (Ill.) 27 L. R. A. 580; 51 L. R. A.

Vanderhurst v. Tholcke (Cal.) 35 L. R. A. 267; and *Stretch v. Cassopolis* (Mich.) *ante*, 345.

As to cutting of trees to make way for telephone wires, see *Bradley v. Southern New England Teleph. Co.* (Conn.) 32 L. R. A. 280; *Southern Bell Teleph. & Teleg. Co. v. Francis* (Ala.) 31 L. R. A. 198; *Wyant v. Central Telephone Co.* (Mich.) 47 L. R. A. 497.

land is situated in the township of Ypsilanti. The proper township authorities granted a franchise to the defendant's assignors for the construction of the railway, and fixed its location 20 feet from the center of the highway. This location of the roadbed evidently made it necessary to remove the trees.

Mr. John D. MacKay, with *Messrs. Outcheon & Stellwagen*, for plaintiff in error:

Officers of municipalities, charged with the duty of making their streets safe and convenient for the use of the increasing traffic, have ample authority and large discretion in all matters of construction and improvement, including street grades.

If a street railway company, acting under the authority of the city council in laying its tracks, changes the grade of the street to conform to the new grade duly established by the municipality, and does the work in a proper and skilful manner and in accordance with the direction of the public authorities, it will not be liable to abutting owners for any incidental damage they may sustain.

Booth, Street Railways, 92; *Brigys v. Lewiston & A. Horse R.* 79 Me. 363, 10 Atl. 47; *Denniston v. Clark*, 125 Mass. 216.

A street commissioner is justified in removing trees standing within the limits of the street, if such removal is reasonably necessary for the proper construction of a sidewalk which he is ordered by the city council to build.

Wilson v. Simmons, 89 Me. 292, 36 Atl. 380. No trespass was committed on plaintiff's land.

Wyant v. Central Telephone Co. 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928.

The measure of damages in such cases is the value of the timber standing upon the land and the diminished value of the estate, by reason of its removal.

Skeels v. Starrett, 57 Mich. 354, 24 N. W. 98; *Miller v. Wellman*, 75 Mich. 353, 42 N. W. 843.

A street railway of this description is not an additional burden on the street.

Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; *People ex rel. Kunze v. Fort Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010; *Dean v. Ann Arbor Street R. Co.* 93 Mich. 330, 53 N. W. 396; *Nieman v. Detroit Suburban Street R. Co.* 103 Mich. 256, 61 N. W. 519.

There was no taking of private property. The trees were wholly outside plaintiff's land, and upon toll-road ground. The whole of this highway was liable to be used for the convenience of the public.

Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them, and will not be enjoined from cutting them down where necessary in order to build a sidewalk.

Mt. Carmel v. Shaw, 155 Ill. 37, 27 L. R. A. 580, 39 N. E. 584; *Detroit City R. Co. v. Mills*, 85 Mich. 653, 48 N. W. 1007; *Wyant* 51 L. R. A.

v. Central Telephone Co. 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928.

On petition for rehearing.

At the common law the weight of authority is overwhelmingly against the necessity of notice.

See *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499; *Southern Bell Teleph. Co. v. Francois*, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1; 2 Dill. Mun. Corp. 686, 688; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 51 N. W. 560; *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 707; *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980; *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74.

Mr. John P. Kirk, with *Mr. Tracy L. Towner*, for defendant in error:

Michigan laws have always aimed to encourage the planting and to secure the preservation of trees in highways.

Comp. Laws 1897, §§ 4159, 4164, 4165, 4188.

The public have simply a right of passage over the highway. The owner of land through which the highway passes is the owner of the soil and timber, except what is necessary to make bridges, or otherwise aid in making the highway passable.

Williams v. Michigan C. R. Co. 2 Mich. 264, 55 Am. Dec. 59.

Trees in the highway are the property of the adjacent owner, and if they encroach upon the highway and must be removed, he has a right, and must be afforded a reasonable opportunity, to take them as living trees, and transplant them elsewhere.

Clark v. Dasso, 34 Mich. 86; *People's Ice Co. v. The Excelsior*, 44 Mich. 233, 38 Am. Rep. 246, 6 N. W. 636.

The street railway act of 1855, as amended (How. Anno. Stat. chap. 94) confers no power upon a company organized under it to construct, maintain, and operate a railroad along the traveled portion of a public country highway, with the consent of the township authorities, upon a roadbed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting landowners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road.

Nichols v. Ann Arbor & Y. Street R. Co. 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538. See also *Barber v. Saginaw Union Street R. Co.* 83 Mich. 299, 47 N. W. 219; *Potter v. Saginaw Union Street R. Co.* 83 Mich. 285, 10 L. R. A. 176, 47 N. W. 217; *Taylor v. Bay City Street R. Co.* 101 Mich. 140, 59 N. W. 447.

A railroad company must not use the street in such a manner as to injure or destroy private property abutting on the street, without condemnation or recompense.

Riedinger v. Marquette & W. R. Co. 62 Mich. 29, 28 N. W. 775.

When standing trees are cut down the rule of damages should fairly be the amount of which the value of the estate is diminished by their destruction.

Skeels v. Starrett, 57 Mich. 354, 24 N. W. 98. See also *Miller v. Wellman*, 75 Mich. 353, 42 N. W. 843.

Grant, J., delivered the opinion of the court:

The principal and important question in the case is, Has a street-railway company the right to remove shade trees within the limits of the public highway, for the construction of its road as established by the township authorities without compensation for damages? The same principle was involved in *Wyant v. Central Telephone Co.* 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928. We there distinctly held that a telephone company had the right to cut out the branches of the trees along the public highway under a franchise similar to that here conveyed. The same necessity may exist for the removal of trees as may exist for the removal of their branches. The principle is the same in either case. It is established beyond controversy that municipal authorities have the entire control over their highways, streets, and sidewalks, and may remove shade trees whenever they are an obstruction to the use of the highway for public travel, without compensation to the owner. *Vanderhurst v. Tholcke*, 113 Cal. 147, 36 L. R. A. 267, 45 Pac. 286; *Everett v. Council Bluffs*, 46 Iowa, 66; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380. It is true that these trees were lawfully planted, and that they are the private property of the abutting owner. It is also true that one planting trees in the public highway plants them with the understanding that they can remain there only so long as the space occupied by them is not required for public use. These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied. *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1. When a man dedicates his land for a public highway, or it has been condemned for that purpose, and he has been compensated, it is definitely understood by him that whatever he may lawfully do within the boundaries of that highway is done with the right of the lawful authorities to appropriate the entire width of the highway for purposes of travel, if it shall become necessary. Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street-railway companies, telephone companies, and the like to do so, when such companies are lawfully entitled to the use of the streets. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its road should be constructed. The township authorities might possibly fix, as 51 L. R. A.

a condition to the grant, the payment of damages for the destruction of shade trees. The legislature undoubtedly has the power to provide that abutting owners should be compensated for the damage that must result to them in the destruction of their trees. That, however, is a matter for the determination of the legislature, and not for the courts. The legislature has granted the power to do it without compensation. The township authorities have not provided for it. Courts are therefore powerless. But there is one fatal defect in the defendant's proceedings. It secured no greater rights by its franchise than the municipality had. The law gives neither the right to remove shade trees without notice to the owner, and an opportunity given to him to remove them as he may see fit. *Clark v. Dasso*, 34 Mich. 86. Under that decision plaintiff was entitled to recover for damages, and the judgment must therefore be affirmed. See also *Stretch v. Cassopolis* (Mich.) ante, 345, 84 N. W. 51.

Judgment affirmed.

Montgomery, Ch. J., and **Moore and Long, JJ.**, concurred.

Hooker, J., dissenting:

If it be conceded that the abutting owner has a qualified property in shade trees, in the highway, adjoining his premises, as he has in the grass, by reason of his ownership of the fee, it is held, like the grass, subject to the right of the public, through its officers, to make such use of the highway as the public interests may require, though the grass or the trees should thereby suffer injury or destruction. The origin of the idea that the owner is entitled to notice of removal is in the statute, chapter 28 of the Revised Statutes of 1846 (see Comp. Laws 1871, § 1317), which chapter was designed to encourage the planting of shade trees. The section cited imposed a penalty on the wilful injury or destruction of such trees, but provided that the board of highway commissioners might order their removal. As was said in *Wyant v. Central Telephone Co.* 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928, this statute was construed in *Clark v. Dasso*, 34 Mich. 86, and it was held to require notice and a reasonable opportunity to the owner to remove the trees. This statute is no longer in existence. It was amended in 1875 (Pub. Acts 1875, p. 97; How. (Mich.) Anno. Stat. §§ 1408 et seq.; Comp. Laws 1897, §§ 4163 et seq.), and, while the planting of shade trees is still encouraged, the former provision requiring notice before removal was omitted in the subsequent legislation. *Clark v. Dasso*, 34 Mich. 86, rests upon this statute and apparently proceeds on the theory that the statute by implication forbade the removal of shade trees by the authorities, except in the manner therein prescribed. In my opinion, it has never been the rule at common law that the authorities must, before using or mending any portion of the public highway, give notice to the abutting owner that

his grass or trees were to be injured or destroyed, unless removed, and then wait for such removal for such a period of time as a jury might say afterwards would have been reasonable; *e. g.* until the grass should grow and ripen, or the leaves fall, and sap descend from the trees. *Makepeace v. Worden*, 1 N. H. 16; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980; *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735, 6 So. 230; *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 51 N. W. 560; *Livingston v. Wolf*, 136 Pa. 519, 20 Atl. 551; *Tate v. Greensboro*, 114 N. C. 393, 24 L. R. A. 671, 19 S. E. 767. In that case the commissioner had sold the trees to another, who cut and removed them. This was held not within the act, and in this connection plaintiff's property rights were discussed. It cannot be supposed that the distinguished jurist who wrote the opinion intended to intimate that previous to the enactment of the statute the local authorities could not lawfully remove trees from the highway, or that it was ever necessary to call out a jury to determine the necessity and the damage, before they could act. Manifestly, it was right to say that a commissioner had not the right to appropriate property of the abutting owner upon no better ground than the statement of the would-be purchaser that it ought to be removed. If right in the conclusion that the common law did not require notice before removal, and that the only statutory requirement of the kind has been repealed, we should not invade the legislative domain by establishing such a rule. But this is not all. The claim of the plaintiff rests upon the proposition that the defendant is a trespasser, and, if it is, it is so, not because it had no right to have the trees removed, which is indisputable, but because it had

them removed without giving notice, and a reasonable opportunity to the plaintiff to remove them, notwithstanding the fact that it has not appropriated them, or deprived him of them, when cut. The alleged right of recovery is not left to depend upon the infliction of actual and unnecessary damage, but upon the omission of a technical notice, which it is claimed may alone constitute a trespass, if counsel's theory is correct. If this is so, the rule must extend to the cutting of any tree by the highway commissioner without notice and reasonable delay, no matter how great the exigency, and although it may be a benefit instead of an injury to the abutting owner; and if this is so as to a tree, it is also true of the grass or the shrubs that spontaneously grow upon the borders of the highway. I think this position is untenable. We have held in the *Case of Wyant* that the cutting of branches was not actionable unless excessive or unnecessary injury was inflicted, and that should be the rule here. If the cutting of a tree without notice is a trespass, the cutting half of a tree without notice is a trespass. In this case we might perhaps hold that an injury resulting from the cutting of these trees without giving an opportunity to save them was actionable if there was any evidence that the plaintiff had a desire to remove them, or would have done so had the opportunity been given, or that he did not have knowledge of the intention to cut them long before they were cut, or that such cutting involved damage. He never intimated a desire to remove them. There is no testimony tending to show that he could profitably do so, or that anyone along the entire line of the road considered the removal of trees by any other method than their destruction feasible or economical. The court left but two questions to the jury: (1) Did the defendant cause the removal of the trees? (2) What was the damages? I am of the opinion that this was error, and the judgment should be reversed.

Rehearing denied.

MONTANA SUPREME COURT.

STATE of Montana *ex rel.* Edward SCHARNIKOW

v.

Thomas S. HOGAN, Secretary of State.

STATE of Montana *ex rel.* J. M. KENNEDY *et al.*

v.

Martin MARTIN, Clerk of Deer Lodge County.

(.....Mont.....)

1. The common-law office of the writ of prohibition is not enlarged so as to

NOTE.—The use of the writ of prohibition as an exercise of a constitutional grant or inherent power of superintending control over inferior courts is considered at much length in a note to *State ex rel. Fourth Nat. Bank v. Johnson* (Wis.) 51 L. R. A. 38. 51 L. R. A.

reach proceedings not of a judicial character, by Code Civ. Proc. § 579, declaring that "the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person."

2. Writs of prohibition to prevent the secretary of state from certifying certain nominations to county clerks and recorders, and to prevent a county clerk and recorder from printing the names of persons nominated by a certain convention, are not within the jurisdiction of the supreme court under Const. art. 8, § 3, giving that court power, in its discretion, to issue writs of

The general rule that prohibition will lie only to stop proceedings that are of a judicial nature appears in a note to *Fleming v. Guthrie* (W. Va.) 3 L. R. A. 53.

prohibition, since this must be construed to extend only to proceedings wherein such writs lay at the time the Constitution was adopted; and the authority to issue such writs cannot, therefore, be derived from the subsequently enacted provisions of Code Civ. Proc. § 1980, providing for the issue of such writs to officers exercising ministerial functions.

(October 17, 1900.)

A PPLICATIONS for writs of prohibition to prevent the secretary of state from certifying the name of Welling Napton as candidate for judge of the third judicial district; and to prevent the clerk of Deer Lodge county from printing the names of certain persons on the official ballots in the Democratic column. *Dismissed.*

The facts are stated in the opinion.

Messrs. W. W. McConnell, T. O'Leary, and J. B. Clayberg for relators.

Mr. T. J. Walsh for respondent.

Figott, J., delivered the opinion of the court:

These are original proceedings in this court. In No. 1,612 it appears that a certificate of the nomination of the relator as the candidate of the Democratic party for the office of judge of the district court of the third judicial district of the state of Montana was duly filed with the secretary of state, and that a certificate of the nomination of one Welling Napton as the candidate of the Democratic party for said office was also duly filed with the secretary of state. Both certificates were filed under the provisions of §§ 1312 and 1316 of the Political Code. By § 1317 of the Political Code, the secretary of state must certify to the county clerk of each county within which any of the electors may be entitled to vote for candidates for such office the name and description of each person nominated, as specified in the certificates of nomination filed with him. The secretary of state threatens to certify both of the nominations to the clerks and recorders of Deer Lodge and Granite counties, these counties comprising the third judicial district of Montana; and it is sought to prevent him from so certifying the nomination of Mr. Napton. In No. 1,615 the relators seek, by the writ of prohibition of this court, to prevent the county clerk and recorder of Deer Lodge county, Montana, from printing in the column headed "Democratic," upon the official ballot to be prepared by him for use at the general election of Deer Lodge county, to be held on the 6th day of November, 1900, the names of the persons nominated by a Democratic convention of that county held on the 17th day of September, 1900, and certificates of whose nominations were duly filed with the county clerk within the time prescribed in § 1316, *supra*. An alternative writ of prohibition was issued in each proceeding. It is now suggested that this court is without jurisdiction in the premises.

Except as otherwise provided in the Constitution, this court has appellate jurisdiction only. Const. art. 8, § 2. It has power, in its discretion, to issue and to hear and de-

termine writs of prohibition. Id. § 3. At the time the Constitution was adopted, chapter 3 of title 13 of the first division of the Code of Civil Procedure (Comp. Stat. 1887) was in effect, § 579 whereof provided that "the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." This section did not enlarge the common-law office of the writ so as to permit the arrest of proceedings not of a judicial character. Mandamus lies to compel the performance of a ministerial duty, whereas, under § 579, prohibition arrests judicial action in proceedings which are without or in excess of the power to hear and determine, and in this sense prohibition is the counterpart or opposite of mandamus. *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Ct.* 22 Mont. 220, 56 Pac. 281; *Maurer v. Mitchell*, 53 Cal. 289. We are aware that in *Williams v. Lewis*, 54 Pac. 619, the supreme court of Idaho entertained a different view of the provisions of a statute identical with § 579, *supra*; but we decline to approve it.

Such was the condition when the Constitution was adopted in 1889. In 1895, § 579, *supra*, was supplanted by § 1980 of the Code of Civil Procedure of that year, which reads: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." And it may be argued that by virtue of the change worked by means of the incorporation of the words, "whether exercising functions judicial or ministerial," the supreme court possesses the right to issue the writ of prohibition to an officer exercising ministerial functions only. Although as was held in *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Ct.* 22 Mont. 220, 56 Pac. 281, the section as it now stands does not change the scope of the writ so as to permit proceedings to be arrested unless they are without or in excess of the jurisdiction, yet, manifestly, the words quoted have expanded the office of the writ so as to include acts other than those judicial. The section does not, however, add to the jurisdiction of this court, whatever effect it may be deemed to have upon proceedings cognizable in the district courts. The Constitution clothes this court with power to issue and to hear and determine writs of prohibition in proceedings wherein the writs lay at the time the Constitution was adopted, and the act of the legislative assembly passed subsequently thereto could not confer upon the supreme court jurisdiction of proceedings in prohibition instituted to arrest the exercise of functions by a mere ministerial officer. *Camron v. Kenfield*, 57 Cal. 550; *People ex rel. Taylor v. Election Comrs.* 54 Cal. 404; *Spring Valley Water*

works v. Bartlett, 63 Cal. 245. There may have been instances, as in *Pigott v. Cascade County Bd. of Canvassers*, 12 Mont. 537, 31 Pac. 536, and *Donovan v. State Capitol Commission*, 21 Mont. 344, 53 Pac. 1133, in which the attention of this court was not called to the principles here announced.

Nothing in this opinion contained is to be understood as denying to the district courts jurisdiction, under § 11 of article 8 of the Constitution, of the writ of prohibition defined by § 1980, *supra*, nor as intimating a doubt of the jurisdiction of the supreme

51 L. R. A.

court on appeal from judgments and from orders made by district courts in proceedings instituted under that section. The several alternative writs of prohibition are therefore set aside, and the proceedings dismissed for lack of jurisdiction.

Dismissed.

Brantly, Ch. J., concurs.

Word, J., being a nominee of the Independent Democratic party of Montana, did not hear the argument, and does not participate in the decision of these cases.

END OF CASES IN BOOK 51.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1900. Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. TORTS; NEGLIGENCE; INJURIES.
- VI. PROPERTY RIGHTS; WILLS; LIENS.
- VII. CIVIL REMEDIES.
- VIII. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A majority of the votes cast for a constitutional amendment is held insufficient for its adoption under a constitutional provision requiring a majority of the electors of the state to ratify it, where the number cast for the amendment is less than half of the votes cast at the same election for state officers and presidential electors. (Ind.) 722.

A city ordinance requiring a license fee for the privilege of towing boats in a harbor, although the barge thus engaged had a coasting license under United States authority, is held to be in violation of constitutional provisions as to regulation of commerce and prohibiting tonnage duties by state authority. (Mo.) 850.

Legislative journal.

The bound and permanent record delivered to the secretary of state, and not the bundle of papers from which it is made up, is held to be the legislative journal in which the Constitution requires certain entries to be made respecting enactment of statutes. (Ala.) 396.

Taxes.

See also *infra*, VIII.

A statute authorizing personal property omitted from assessment to be reassessed is held applicable to property omitted before the statute was passed, and notwithstanding the fact that the year of the reassessment the property is no longer owned by the taxpayer, or even in existence, and therefore cannot be assessed for the current year. (Wis.) 917.

Tax assessments on land, made pending a life estate, are held not to be a lien on the fee under statutes requiring assessments against life tenants as such, and authorizing a sale of their chattels as well as of their estate in the property, while expressly providing that it shall not affect the title of reversioners or remaindermen. (Va.) 283.

Assessments.

A railroad running along the side of a street without occupying any part of it is held not to be subject to an assessment for street paving under a statute providing that

assessments should be made upon lots or parcels of land fronting on the highway. (Iowa) 763.

License and regulation of business.

A license tax on sales of merchandise at auction, though alleged to be prohibitory because the rate is fixed at \$25 per day, is held to be within the power of the city council to license for regulation and for revenue. (Wash.) 892.

An ordinance imposing a greater license fee for the sale of intoxicants on the main street of a town than for a license on other streets is held unconstitutional. (Ky.) 897.

Cases in which drummers and traveling agents of nonresidents have been held exempt from state license tax on the ground that they are engaged in interstate commerce, as is shown in a note in 14 L. R. A. 97, are distinguished in a case which holds that a traveling agent who takes orders but receives the goods in bulk upon shipment from another state, and then breaks the packages and distributes the contents among his customers, is not engaged in interstate commerce. (Ga.) 134.

Physicians.

See also *infra*, II.

The constitutionality of statutes regulating the right to practise medicine, which is sustained in most of the decisions found in a note in 14 L. R. A. 581, is again upheld in a recent Iowa case, notwithstanding the exemption from examination of those who have certificates from reputable medical schools, and those who have practised in the state five years, three of which have been in the same locality. (Iowa) 776.

The practice of osteopathy is held to be the practice of medicine within the meaning of a statute requiring a certificate from the state board of health for engaging in such business. (Neb.) 717.

Dams.

The power of the state to require a fishway to be made in a dam is held not to be defeated by the fact that the state built the

dam and conveyed it without such fishway, and without reserving expressly any right to exercise police power over it. (Iowa) 414.

Municipal corporations.

A liability of a city for negligence in failing to furnish a servant a reasonably safe place to work is held to exist at common law, being distinguishable, by reason of the violation of a right to an individual, from cases respecting the nonperformance of a public duty. (N. H.) 381.

A municipal corporation is held not to be liable for the judicial act of the mayor in requiring a bond greater than the law authorizes from an accused person, or for an unlawful arrest by a policeman, or for the injury to the health of a prisoner by reason of the unfit condition of the city guard house and the failure of the authorities to furnish him any protection against inclement weather. (Ga.) 131.

An ordinance requiring all printing of the city to be given to union printers is held void as tending to create a monopoly and prevent competition. (Ga.) 335.

Mere user of a strip of land as a street is held insufficient to constitute an acceptance which will make the city liable for failure to keep it in repair. (Mo.) 170.

Highways.

A pole used by a trolley, passenger street-railway line in a city street is held not to be an additional burden on the fee, though the same court held, in 41 L. R. A. 575, that an electric railway on a country road is an additional burden. (Wis.) 923.

The right of a street-railway company to remove shade trees which are an obstruction to the road which it is authorized to build is upheld without requiring compensation to the abutting owner, though notice to him is required, as well as an opportunity to remove the trees if he sees fit. (Mich.) 955.

A railroad company is held to have the right of eminent domain, though its road is short and built chiefly for the transportation of the coal of a coal company which is composed of substantially the same persons that are in the railroad company. (Mo.) 936.

The removal of shade trees from a street without any notice of the public necessity therefor to the owner of the fee, and without giving him any opportunity to transplant them or remove them himself, is held to be an invasion of his rights for which he is entitled to damages. (Mich.) 345.

Inebriates.

A statute providing for the treatment of inebriates at public expense in any county having 50,000 or more inhabitants is held unconstitutional on the ground that classification by population for such a purpose is purely arbitrary. (Minn.) 828.

Courts.

A constitutional grant of superintending control over inferior courts, made by a state Constitution, is held to give the supreme court an independent and separate jurisdiction to restrain the excesses and quicken the neglects of inferior courts, in the absence of other adequate remedy, with the use of all 51 L. R. A.

ancient writs necessary to the exercise of the power. (Wis.) 33.

A court of mediation and arbitration for the settlement of differences between employers and employees is held to be within the constitutional grant of power to establish courts of conciliation against the contention that it was lacking in the essentials of a court with respect to compelling the attendance of the parties and enforcing its decisions. (Mich.) 458.

The general superintending control over inferior courts, conferred by a state Constitution upon the supreme court, is held not to authorize a review by certiorari of a judgment within the jurisdiction of the lower court merely because it was in conflict with the settled doctrine upon the subject. (Colo.) 105.

The general superintending control over circuit courts, given to the supreme court of a state by the Constitution, is held to authorize a mandamus to compel the reinstatement of a cause erroneously stricken from the docket, but not to direct the disposition which shall be made of the cause, or the determination of any question involved in it. (Mo.) 95.

Political parties.

The decision of the state central committee of a political party between bodies claiming to be the executive committee of a county is held conclusive on the courts. (Ky.) 671.

The right of a county committee of a political party to remove a member is denied under a statute which provides for the election of such committee for a specified term. (N. Y.) 674.

A primary election law which in effect deprives members of a political party that polled less than 3 per cent of the votes cast at the next preceding election of the right to nominate any candidates, and thereby practically disfranchises them, is held unconstitutional. (Cal.) 115.

Executors and administrators.

The county in which a promissory note constituting the entire assets of a decedent's estate may be, although that is not the county in which the debtor resides, is held to be the place for granting letters of ancillary administration. (Pa.) 876.

Gas company.

A rule of a gas company charging those who use natural gas for both lights and fuel a rate of 20 cents per 1,000, regardless of the amount used for either purpose, while it is supplied to those who use it for fuel only at 12½ cents per 1,000, as had been done formerly to those who used it for any purpose, is held to constitute an unreasonable discrimination which makes it void. (Ind.) 744.

Board of dental examiners.

A statute authorizing some of the members of a board of dental examiners to be appointed by the state dental association is upheld against the claim that a private corporation cannot be authorized to appoint

officers, or to exercise police power. (Ind.) 748.

Guaranty.

Notice of the acceptance of a guaranty is held necessary to bind the guarantor, where the guaranty is made to secure advances by a bank to another person on checks, drafts, and overdrafts up to a limited amount, within a specified period, although there is an express waiver of demand, notice, and protest in collecting such obligations. (Iowa) 758.

Seamen.

The power of the state to make it an offense to induce or aid articted seamen to desert from a foreign vessel while in the

waters of that state is upheld in the absence of any legislation by Congress on the subject. (Ga.) 720.

Smallpox hospital.

The establishment of a smallpox hospital, depreciating the value of neighboring real estate, is held not to constitute a taking or damaging of such property within the constitutional provision requiring compensation. (Ill.) 306.

Sunday law.

The work of a barber is held not to be a work of necessity within the meaning of the Sunday law, unless special circumstances are shown. (Tex.) 270.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Public policy; illegality.

A sale of goods with knowledge that they are to be used in a house of ill fame, reserving title and right to retake possession on default in the deferred payments, is held to make the vendor a participant in the illegal use which will defeat its right to recover the goods from a purchaser of them at sale under execution against the vendees, even if they buy with knowledge of the vendor's right. (Wash.) 889.

What amounts to a contract in restraint of trade is held to be made by a lease of machinery used for making chaplets or anchors, with an agreement that the lessor would not engage in such business for five years, except to furnish one specified party for his own use, while the lessee executes another lease to the first lessor for the use of such machinery for any purpose except to make chaplets or anchors, and there is no limit in the lease as to territory, while the lessor's business extends into several states. (Mich.) 785.

Usury.

See also *infra*, VIII.

A commission paid by a borrower to an agent of the lender, which, added to the interest paid, exceeds legal interest, is held to be usurious. (Ga.) 499.

Brokers.

The right of a broker to commissions on a contract for the purchase of land is sustained notwithstanding a defect in the title not known to him, where the principal had entered into a valid contract for its purchase before the defect was discovered. (Mass.) 510.

Abandonment of contract.

The refusal of the purchaser of wood to pay as he had agreed to do for each shipment as received, and his declaration that he would not pay for a shipment until the next shipment was received, while he insisted on having all the wood shipped, is held not to constitute an abandonment of the contract on his part which would justify the seller in refusing to complete his contract. (Mich.) 791.

Bills and notes.

The addition of the name of another person as comaker of a note, when made by the payee after it is delivered to him, is held 51 L. R. A.

to be such an alteration as relieves the maker. (Ala.) 403.

A right of action for breach of a contract by the payee of a note in transferring it to a bona fide holder is held to arise on such transfer, although the maker is insolvent and has not paid the note, but the fact of insolvency is held to be a matter for consideration on the question of damages. (Wis.) 906.

Carriers.

A night watchman at a railroad depot, who gets on a train after being off duty a few days, to ride to the depot to announce his readiness to resume duty the following night, is held to be entitled to the rights of a passenger if injured by negligence of the carrier, where he is riding by implied permission of the conductor, but in violation of a rule which requires him either to pay fare or have a pass. (Tenn.) 886.

Carriers.

Service of summons in garnishment upon a carrier that has received goods for interstate transportation and placed them in a car that is not a part of a train is held to be no defense to the carrier for unreasonable delay in forwarding the goods. (Minn.) 640.

Physicians.

See also *supra*, I.

A patient who accepts the visits of a physician without protesting that they are too frequent, or fixing the times when visits are to be made, is held to be precluded from contending that some of them were unnecessary, when called upon to pay for them. (Ill.) 298.

Building contracts.

A building contract is held not to be substantially performed where there is an omission to comply with the requirements as to girders and a partition, when this omission creates structural defects which can be remedied only by a partial reconstruction of the building. (N. Y.) 238.

Interstate commerce.

On the question of the interstate commerce business of peddlers, treated in a note in 14 L. R. A. 97, a recent case holds that one who takes orders in his own name for articles manufactured in another state, and has them shipped to him in his own name,

RÉSUMÉ OF DECISIONS.
(CORPORATIONS AND ASSOCIATIONS. DOMESTIC RELATIONS.)

and then delivers the separate articles to his own customers, is not engaged in interstate commerce. (Tenn.) 254.

Revenue stamps.

The rule established by the great weight of authority, that the omission of revenue stamps from a document must be with intent to evade the law in order to render the document void, as shown by a note in 48 L. R. A. 305, is applied in a decision to the effect that an inadvertent omission of a stamp from an assignment of a mortgage will not defeat the rights of a purchaser on foreclosure if the stamps are affixed and canceled by a collector after the sale. (Md.) 316.

Street railways.

Failure to run street cars as often as every half hour during part of one winter is held not to justify a rescission of a contract for land, by which the vendor agrees to operate a street railway and run cars every half hour as such roads are usually run, where the failure was due to unusually heavy

snowfalls and winds, which made it practically impossible some of the time to run the cars, and this road was run as well as other roads in the vicinity. (N. Y.) 951.

Insurance.

An insurance policy providing for an inventory once a year, and the keeping of books of account, all of which must be locked in a fireproof safe, with forfeiture for failure to observe those conditions, is construed to provide for a forfeiture only when all the conditions are broken. (Neb.) 698.

A stipulation against liability on a life-insurance policy for death caused by suicide, sane or insane, is held not to defeat recovery for death caused by an overdose of morphine, unless it is proved that this was intentional. (Tenn.) 252.

The forfeiture of the rights of the beneficiary in a benefit certificate by murdering the insured is held not to defeat the right of the estate of the insured to recover the insurance. (Iowa) 141.

III. CORPORATIONS AND ASSOCIATIONS.

Meetings outside the state of incorporation are held to be impliedly authorized in case of a corporation constituting the supreme legislative department of a benevolent order with power to establish subordinate bodies throughout the United States and Canada. (Tex.) 898.

The right of officers of a corporation to their salaries is held to be cut off by the appointment of a receiver. (N. C.) 146.

Press association.

The power of the court to compel a press association to furnish news to a newspaper is denied in the Missouri court, which disapproves of the Illinois case in 48 L. R. A. 568. (Mo.) 151.

Produce exchange.

A produce exchange is held to be an illegal combination in violation of a statute, when its constitution and by-laws regulate the credit to be allowed its members, discriminate in the price to be paid for produce against persons not members, control the delivery of goods, and provide a penalty by fine and suspension for offending and defaulting members. (Minn.) 825.

Humane society.

A humane society which is by statute authorized to destroy or appropriate unlicensed dogs is held not to be entitled to receive the license fees for its own purposes, on the ground that this would be an appropriation

of public money for private purposes, and a special privilege given it to keep dogs without paying fees is also held unconstitutional. (N. Y.) 681.

Partnership.

The right of one partner while the partnership continues to sue the other at law for damages to the partnership by reason of failure to carry out a stipulation in the partnership agreement is denied, although the plaintiff seeks only a *pro rata* share of the damage, and the partnership owes no debts, and there are no other debts due from one partner to the other. (Ga.) 504.

A partnership is held to be liable as such to an action for malicious prosecution or malicious arrest, where all the members unite in procuring the wrongful act to be done. (Ga.) 463.

A contract by which a partnership in its own name binds itself against re-engaging in business, though signed by the partners, is held not binding on them as individuals. (Iowa) 412.

Churches.

The general rule that courts cannot interfere with decisions of ecclesiastical tribunals when property rights are not involved, as shown by a note in 49 L. R. A. 353, is applied in a recent case refusing to review the removal of a pastor by church authority. (Tenn.) 260.

IV. DOMESTIC RELATIONS.

Cohabitation after the removal of an impediment to legal marriage is held to constitute a lawful marriage, where the wife entered into the relation without knowing of the impediment, and did not learn of it until after her husband's death, though she had lived with him for seven years after the impediment was removed, and had been described by him as his wife in insurance on his life payable to her. (Mich.) 787.
51 L. R. A.

The right of a wife to charge her husband with liability for her necessities when she is living apart from him by reason of his misconduct is held not to be defeated by the married women's statutes, or by the fact that she has financial ability to provide for herself. (N. H.) 226.

A loathsome disease, making it unsafe for a man to marry, when it appears without any intervening fault of his after the con-

tract is made, is held to be sufficient reason for postponement of the marriage until he is cured, and, if permanent, to justify his refusal to carry out the contract. (Mo.) 854.

Custody of children.

The right of a father to the custody of his children is sustained notwithstanding an alleged contract made by his wife on her deathbed, with his assent, to give their custody to her relatives, where it appears that the father is fit for their custody, and capable of taking care of them and giving them better advantages than they could otherwise have. (Miss.) 839.

Illegitimates.

An illegitimate half sister is held not to be a "sister" entitled to sue as such for the

death of a sister or brother under a statute. (Miss.) 837.

The mother of an illegitimate child is denied a right of action for its death under a statute authorizing such actions by the mother or other specified relatives of the deceased person. (Miss.) 836.

Dower.

A conveyance to sons of a former marriage, made without consideration other than love and affection, by a man who has entered into a contract for a second marriage, when made without the knowledge or consent of his prospective wife, is held to be a fraud on her marital rights which will not defeat her right to dower in case of his death after the marriage. (Ohio) 858.

V. TORTS; NEGLIGENCE; INJURIES.

Libel.

A circular addressed to voters, stating that a candidate for re-election to the legislature has championed legislation opposed to the moral interests of the community, is held libelous, and not privileged. (Mich.) 451.

Dishonoring checks.

The wrongful dishonor by a bank of the checks of a trader is held to raise a conclusive presumption of damages to him; but an action therefor is held not to be an action for slander within the meaning of a statute of limitations. (Tenn.) 255.

Nuisance.

The liability of a landowner for a nuisance created by another person is held to exist in the case of a derrick with a guy rope stretched across a highway so low as to be dangerous to travelers, where the landowner permitted it to remain after he had knowledge of it, though it was erected by a licensee. (Mass.) 779.

Mines.

An electric wire laid along a passageway in a mine where employees are accustomed to go during the noon hour, with the knowledge of the proprietor and without objection from him, is held to impose on him the duty of properly guarding it, or of giving notice of the danger to those who are likely to come in contact with it. (C. C. A. 6th C.) 389.

Falling brick.

An injury to a person by a brick falling from a building in the course of construction is held to create no liability against the contractor for the carpenter work or the one for the mason work without any proof as to whose negligence caused the accident, where there were workmen of other contractors engaged at the same time upon the building. (N. Y.) 241.

Injury to building.

For injury to a building, caused by the discharge of surface water from different lots into a sewer that runs past it, it is held that the different lotowners are not liable jointly, when each acted independently, but that each is liable only for that part of the damage caused by his own act. (Ky.) 187. 61 L. R. A.

Defect in leased premises.

Defects in the condition of leased premises, such as a defective balustrade on a porch, are held not to make the landlord, who has reserved no part of the premises, liable for injury to a child of a subtenant, especially when no defect is shown to have existed at the time the original lease was made. (Md.) 772.

Injury to passenger.

A rule forbidding passengers to ride on the front platform of an electric car, and making them do so at their own risk, is held reasonable, but it is also held to be waived when passengers are accustomed to ride there freely and without question, and to pay fare while so doing. (Mass.) 783.

Injury to servant.

The general doctrine that a master is not required to furnish medical aid to a servant, as shown by a note in 28 L. R. A. 546, is followed in a case which holds that a foreman in charge of the carpenter work on a building has no implied authority to engage a physician for an injured employee. (Ky.) 668.

The use of old barrels that have contained whisky, oil, etc., for shipping iron, is held not to make the employer liable for injury to an employee caused by explosion of a barrel when a match was lighted to read the number on it. (Pa.) 881.

A roadmaster directing the work of tearing down a railroad bridge is held not to be a vice principal of a workman injured by a bolt in the timber while doing such work. (Minn.) 532.

A master mechanic who was an intermediate officer in the establishment, having authority to direct a person who was injured and some authority as to his employment and discharge, is held to be a fellow servant of the latter, and not a vice principal. (C. C. A. 1st C.) 513.

Injury by street car.

One who alights from a street car and goes behind it to a parallel track, on which he is struck by another car, is held to be only a traveler on the highway, and no longer entitled to the extraordinary degree

of care that is due to passengers. (Tenn.) 885.

A person who attempts to cross a street-car track in the dark after proper signals to stop the car have been given and believing that the car is about to stop, but who is deceived by the glare of the headlight and the unlawful speed of the car, is held not to be guilty of contributory negligence as matter of law. (Minn.) 632.

By train.

For fatal injuries to a person awaiting the arrival of a relative at a railroad station in a place provided for such purpose by the

company it was held that, if the person was in the exercise of due care and caution, and the injuries were received by the negligence of the railroad employees, the company was liable. (Colo.) 121.

Failure to fence railroad track.

The doctrine that the owner of premises is liable for a dangerous condition attractive to children if he fails to guard them, as adopted by some of the courts in the so-called Turntable Cases, is denied in a case of injury to a child attracted to a fire on a railroad right of way. (Minn.) 645.

VI. PROPERTY RIGHTS; WILLS; LIENS.

The right of a street-railway company to cross a railroad where that crosses a street, without any condemnation proceedings or paying any damages to the railroad company, is sustained in a Georgia case, following the doctrine of the authorities in a note in 29 L. R. A. 485. (Ga.) 125.

A newspaper publication of an ode written for the World's Columbian Exposition, made without the consent of the author or of the exposition committee before the ode was delivered or published elsewhere, is held to violate the common-law rights of the author, and subject the newspaper to damages. (C. C. App. 2d C.) 353.

Bankrupt's assets.

See also *infra*, VII.

A liquor license transferable to any person acceptable to the board which has authority in the matter, though subject to revocation by subsequent legislation, is held to be property which passes under the bankrupt law. (C. C. A. 1st C.) 292.

Creditors' rights in insurance.

The proceeds of life insurance taken out by an insolvent and made payable to his parents as a gift to them are held subject to his creditor's claims, although he paid nothing toward the premium, where he did create an obligation against himself and his estate by giving a check therefor which was an outstanding obligation at the time of his death, but was never presented as a claim against his estate because it was paid gratuitously by his administrator from the latter's own funds. (Ala.) 112.

Registration acts.

The constitutionality of a statute for the registration of land titles is upheld where the provision for notice was for notice by mail, by publication, and by posting on the land. (Mass.) 433.

Trusts.

A change of the trust relation into the relation of debtor and creditor is held to be effected by the use of the proceeds of trust property in the trustee's business with the knowledge and consent of the *cestui que trust*, although with an understanding that the money was to be repaid when a favorable opportunity for the investment was found; and therefore when the trustee becomes financially ruined an action therefor is held to be subject to the statute of limitations 51 L. R. A.

governing the actions for debt. (Mass.) 190.

Tradename.

The use of the term "health food" for foods that had previously been known as sanitarium foods is held to be preventable by injunction at the suit of one who had been using the name for eighteen years before, even though there is no trademark in the name, and there is no attempt to imitate the packages of the other party. (C. C. A. 2d C.) 332.

Mortgage.

A change in the color of a mortgaged horse after the mortgage was given is held not to defeat the rights of the mortgagee as against a subsequent purchaser of the horse without notice of the mortgage. (N. C.) 800.

Waters.

The taking of ice from a public lake in large quantities for shipment for market is held not to be an exercise of a common right in such waters. (Minn.) 829.

The diversion of a large quantity of water from a stream for use in salt works, and the pollution of the stream by a return of part of the water, which makes the stream so salt that cattle will not drink it except as a matter of necessity, and many fish are destroyed, is held to be a wrong which can be restrained by a lower riparian proprietor. (N. Y.) 687.

Streams or springs or other waters arising through percolation upon land after it has been segregated from the public domain and is subject to private ownership are held not to be subject to appropriation. (Utah) 289.

The rule that land reformed by accretions after it has been washed away belongs to the original proprietor is applied to accretions on the seashore made in front of land which extended to the line of ordinary high tide, when the present owner obtained title to it, but which when his grantor obtained it was cut off by intervening land that was afterwards washed away. (N. J.) 425.

Boundary of land on an artificial pond which has become a permanent body of water is held in Georgia on a review of the conflicting authorities to carry title only to the low-water mark of the pond. (Ga.) 178.

The draining of underground or subsurface water from land by powerful city pumping works is held to be a wrong which the

owner of the land can restrain, and for which he can have damages. (N. Y.) 695.

Wills.

A will is held to have been signed in the presence of the testator, though done in an adjoining room, where he was within sound of the voices of the witnesses, and could have seen them by moving a little, while they returned and showed him their signatures,

and he pronounced the will satisfactory. (Minn.) 642.

Judgment lien.

A deed in fraud of creditors, which the statute declares void, is held to be merely voidable and sufficient to prevent the acquisition of a specific lien on the property by judgment subsequently rendered against the grantor. (Wis.) 910.

VII. CIVIL REMEDIES.

The right to sue on a contract made between other parties is denied to a creditor of a partnership who endeavors to enforce the liability of a corporation which has been formed after the death of one partner to carry on the business, under an agreement by which it is to pay all the firm debts. (Conn.) 653.

A statute making it unlawful to send a chose in action out of the state for suit, and have process to reach wages due to a resident of the state from an employer subject to process of a court of the state, is held unconstitutional. (Mo.) 176.

Survival of action.

An action for damages caused by the death of a person, brought by an administrator, who is also the father and sole next of kin of the deceased and the sole beneficiary of the action, is held to be an action for injuries to property rights, which survives to the father's estate on his death pending the action, although there are others who would have been next of kin and beneficiaries of the action if the father had not been living when the right of action accrued. (N. Y.) 235.

Jurisdiction of state court.

Jurisdiction obtained by a state court of an action against a corporation is held not to be ousted by the subsequent appointment of a receiver for the corporation by a Federal court, and the attempt to remove the case into the Federal court on the basis of such appointment as creating a case arising under Federal laws. (Miss.) 649.

Action by agent.

Possession of a chattel merely as agent, without any special property or interest therein, is held insufficient to sustain an action by the agent for the conversion of the property. (Ga.) 622.

Injunction.

A bill in equity to restrain an action at law on a judgment is upheld where the judgment had been obtained by the fraud of an officer charged with the service of the writ, who falsely returned that he had served it; and an action at law against the officer is held not to constitute an adequate remedy at law. (R. I.) 873.
See also *supra*, III.

The rule generally adopted by the courts, as shown by the note in 42 L. R. A. 235, against interference with church tribunals on ecclesiastical matters, is held not to prevent an injunction against proceedings for the expulsion of a member by a church tribunal which has not been organized in conformity with the constitution of the church. (Ind.) 751.

formity with the constitution of the church. (Ind.) 751.

An injunction against the publication of letters by producing them in evidence is denied, although the complainant, who wrote and received them and against whom they are to be used, gave them to an agent with instructions to burn them, and he had violated his trust. (Vt.) 754.

A suit in equity by a municipal corporation to restrain a public nuisance is held, in a suit where such a case was made by cross bill, to be sustainable. (N. J.) 657.

An injunction against threats by a labor union, upon employers for the purpose of making them induce employees who had withdrawn from the union and become members of another to rejoin the former, is upheld although no actual violence was shown. (Mass.) 339.

An injunction against the encroachment by a building upon a space reserved by a common plat of lots for a courtyard is denied where other owners had erected buildings encroaching on such space, though to a less extent, and no objection had been made by the complainants. (Ill.) 310.

An injunction is held to be the proper remedy to prevent a city from taking possession of an embankment built and owned by a lessor of the city under a lease for ninety-nine years, and converting it into a public highway. (Ill.) 301.

Mandamus.

Mandamus to compel the issuance of election notices under a prior apportionment act on the ground that the later one is unconstitutional is denied where the earlier acts are subject to substantially the same objections as the later one. (Nev.) 229.

Mandamus in the exercise of supervisory jurisdiction is issued to compel the dissolution of an injunction which may work irreparable injury to a city. (La.) 71.

Prohibition.

The writ of prohibition authorized by a state Constitution is held to be limited to the uses of the writ recognized at the time when the Constitution was adopted, and, if at that time the writ lay only to reach judicial proceedings, it is unaffected by a subsequent statute attempting to enlarge it so as to reach ministerial acts. (Mont.) 958.

Garnishment.

The doctrine that a person can be garnished only in the state where the debt is payable, if that be the creditor's residence, is reasserted in a recent Nebraska case. This doctrine, however, though it may be upheld

in the state courts to the extent of refusing to entertain garnishment proceedings to reach a debt due to a nonresident, cannot be carried to the extent of refusing to recognize a judgment entered in another state in such case, since the validity of such a judgment is upheld by the United States Supreme Court (*Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797). (Neb.) 715.

Action against married woman.

A loan to a married woman is held to give a right of action at law on the common counts, notwithstanding the invalidity of notes therefor, because they were made payable to her husband, who indorsed them. (Mass.) 447.

Against executor.

An action of claim and delivery against an executor in his representative capacity, to recover possession of personal property wrongfully withheld by him, is held by a divided court not to be sustainable. (S. C.) 261.

Action on note.

A transfer of a negotiable note after maturity and without consideration, for the purpose of having action thereon brought in the state, is held to give the transferee a right to maintain the action in the right of his transferrer where the latter was a bona fide holder before maturity for value. (Mass.) 432.

On insurance policy.

Admissions by an insurance agent after the death of the insured, that the latter had paid all premiums during his life, are held binding on the company, when the agent had authority to collect such premiums. (Wash.) 288.

Imprisonment for debt.

The imprisonment of sureties for refusal to pay a judgment against their principal is held to be an unconstitutional imprisonment for debt. (Ohio) 860.

Bankruptcy; alimony.

A decree for alimony is held to be a penalty for failure to perform a duty, and not a debt which can be proved and discharged in bankruptcy proceedings. (Ill.) 351. As to assets, see also *supra*, VI.

Survivorship.

In case of death of sisters by the same disaster it is held that there is no presumption as to which survived, and therefore the

rights of succession to their estates, so far as covered by wills mutually giving such property to the survivor of them, must be determined as if all died at the same moment. (R. I.) 863.

Damages.

The difference between cost and selling price of patented articles equal in number to those used by an infringer is held to be the proper measure of damages for the infringement. (C. C. A. 3d C.) 801.

Anticipated profits from contemplated use of property taken and held not to be entitled to consideration in estimating damages for land taken in eminent domain. (Pa.) 319.

Limitation of actions.

The running of the statute of limitations in favor of a bank on a demand certificate of deposit is held to begin at the date of the certificate, and not to be interrupted by the death of the owner, or by the subsequent misrepresentations of the bank in denial of its liability, whereby the administrator was deceived into believing that there was no such liability, the certificate itself being lost. (Iowa) 410.

Taxes.

See also *supra*, I.

A suit for the collection of taxes is held not to be within the jurisdiction of chancery, where the statute has provided other efficient remedies. (Va.) 902.

Usury.

As to usury, see also *supra*, II.

The power of equity to compel payment of legal interest as a condition of canceling a contract for usury is held not to be taken away by a statute prohibiting enforcement of such contracts, either at law or in equity, except for the principal. (Ala.) 393.

Foreign probate of will.

The probate of a will in a foreign court, which was considered in a note in 20 L. R. A. 673, is held in a late case to be binding upon the courts of the country in which the testator was domiciled. (Ky.) 419.

Warranty.

The fact that an employer has been held liable for injuries to an employee by the explosion of a boiler, on the ground of negligence in failing to discover the defect by inspection, is held not to preclude him from recovering against the maker of the boiler on breach of warranty. (Mass.) 781.

VIII. CRIMINAL LAW AND PRACTICE.

A statute denying any review on appeal of any error in a charge to the jury, unless excepted to by bill or in motion for new trial, is held constitutional, although a dissenting judge contends that it violates various constitutional provisions, including that of the right to trial by jury. (Tex.) 272.

A statute authorizing prosecutions to be begun by information except when the court deems it advisable to convene a grand jury is held constitutional against the contention that the legislature cannot modify the grand-jury system without abolishing it, and that §1 L. R. A.

the statute constitutes a denial of due process of law and of the equal protection of the laws. (Or.) 246.

Police power.

A statute making it unlawful to add water or any other substance to milk that is intended for sale is held to be a constitutional exercise of the police power, even if the substances added are not injurious or used with intent to defraud, but are merely for the purpose of preserving the milk. (Iowa) 347.

Game laws.

A statute making it unlawful to have possession of quail during a certain period of the year is held constitutional, even as to those of which possession was obtained during the open season, but was continued into the closed season. (Ind.) 404.

Lottery.

A merchant who gives each customer a chance to operate a slot machine and secure in addition to his purchase some article of value, determined by the place at which a revolving wheel stops, is held to be guilty of conducting a lottery. (Ga.) 496.

House of ill fame.

A covered wagon moving from place to place is held to be a house within the prohibition of a statute against houses of ill fame. (Iowa) 630.

Sale of dead body.

An attempt to make an unauthorized sale of the dead body of a human being is held to constitute a misdemeanor at common law. (Tenn.) 883.

Ten-pin alleys.

An ordinance prohibiting ten-pin alleys within the fire limits, or within 100 yards of any business place or dwelling house, which
51 L. R. A.

would exclude them from any part of the city that was near the business center or near any thoroughfare or public place, is held not to be authorized by statutes providing for the regulation of such alleys, since this power does not extend to their prohibition. (Tex.) 654.

Pardon.

A pardon granted while the case is pending on bill of exceptions is held valid on the ground that by applying for and accepting it and asking to have the record remanded to the trial court the bill of exceptions is waived and guilt admitted. (Mich.) 461.

Unlawful arrest.

Officers making an arrest without a warrant under orders of a chief of police are held liable for false imprisonment, where the person was detained without trial and without the issuance of any writ to legalize his detention. (Ohio) 193.

Witnesses.

A divorce granted after the commission of a crime by the husband against a third person is held not to make the former wife a competent witness against him respecting such crime or conversations with him during marriage. (Mo.) 509.

INDEX TO NOTES.

(The General Index follows this.)

Accretions. See **WATERS.**

Arrest; liability of an officer for making an arrest:—(I.) Under a warrant or writ: (a) valid on its face; (b) where the warrant or writ is irregular; (c) where the warrant is invalid or void; (d) where the court has no jurisdiction; (e) where the defendant is exempt from arrest; (f) return; (g) where the warrant is not in possession of the arresting officer; (II.) without warrant: (a) for a felony; (b) for a breach of the peace "on view;" (c) for a breach of the peace not "on view;" (d) for breach of a city ordinance: (1) where a statute authorizes arrests on view; (2) where an ordinance authorizes arrests on view; (3) other arrests made on view; (4) arrests not made on view; (e) for other misdemeanors: (1) past offenses; (2) for offenses "on view" under statutory authority; (3) arrests in other cases; (III.) circumstances attending arrest: (a) time; (b) place of arrest; (c) manner of making arrest; (d) disposition of prisoner: (1) unreasonable detention; (2) place of detention or delivery; (IV.) arrest of wrong party or by wrong name: (a) name unknown; (b) arresting wrong man; (c) arresting right man under wrong name; (d) arrest after judgment taken against wrong party; (V.) joinder; (VI.) liability on official bond; (VII.) arresting for one offense and justifying for another; (VIII.) question of probable cause; (IX.) summary 193

Boundaries. See **WATERS.**

Breach of peace. See **ARREST.**

Canal; boundary on 179

Certiorari; in exercise of superintending control over inferior courts 33

Copyright. See also **DAMAGES.**

Common-law rights of authors and others in intellectual productions:—(I.) General theories; (II.) prerogative publications; (III.) parties: (a) originators; (b) compilers; (c) annotators and commentators; (d) successors; (e) masters and servants; (IV.) works: (a) in general; (b) immoral, libelous, or irreligious works; (c) letters; (V.) rights: (a) before publication; (b) after publication; (c) what constitutes publication: (1) general principles; (2) what is a publication; (3) what is not a publication; (VI.) infringements: (a) names or designations; (b) abridgments; (c) translations; (d) reproductions; (e) originals: (1) author's own obtained surreptitiously; (2) independent creations; (3) combinations; (VII.) Remedies; (VIII.) liabilities: (a) creditors; (b) taxation 353

Corporations; effect of appointment of receiver or assignee for creditors of a

corporation on compensation of officers, agents, or employees for unexpired term of employment 146

Courts; superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal:—(I.) Introductory; (II.) inherent power of supervisory or superintending control over inferior tribunals: (a) existence and derivation of power; (b) in what courts the inherent power exists: (1) in the highest law court of original general jurisdiction; (2) in courts of appellate jurisdiction; (3) in courts of local jurisdiction; (III.) constitutional and statutory grants of superintending control, general supervision, etc.; (IV.) in states which have no express constitutional or statutory grants of the power; (V.) in courts of the United States; (VI.) where the application to correct should be first made: (a) to the court sought to be controlled; (b) to an inferior jurisdiction having the power; (VII.) when the power is exercised without designating it as such: (a) by courts of original jurisdiction as successor of the King's bench; (b) by courts having no grant of the specific power; (c) by courts having grants of the jurisdiction; (VIII.) use in place of appeal or other remedy; (IX.) for what purposes exercised: (a) compelling lower court to act; (b) controlling lower court's discretion or judgment; (c) to aid appellate jurisdiction; (d) in exercise of revisory jurisdiction; (X.) power of legislature to interfere: (a) to enlarge the power; (b) to encroach upon the power; (XI.) exercise of the power by courts of local jurisdiction; (XII.) conclusion 33

Damages. See also **EMINENT DOMAIN.**

Damages for infringement of patents, copyrights, or trademarks as affected by loss of profits:—(I.) Nature and scope of the subject; (II.) the concurrent remedies in patent cases; (III.) actions in equity; (IV.) actions at law: (a) statement as to existence of the remedy; (b) measure of damages generally; (c) as affected by mode of enjoyment of patent: (1) different rules with relation to; (2) by granting licenses: (a) application of the rule; (b) what sufficient to constitute an established fee; (c) right to base fee on utility; (3) by holding close monopoly: (a) application of the rule; (b) establishment of loss of sales; (c) establishment of reduction of price; (d) consideration of profits of the infringer; (e) when profits of infringer may be made the criterion; (f) separation of profits due to patent; (V.) the rule in equity under statutes authorizing damages: (a) scope of subdivision; (b) the act of Congress of

- 1870; (c) estimation of damages under; (d) separation of profits and damages due to patent; (e) the English act of 1858; (VI.) effect of recovery; (VII.) the rule in copyright cases; (VIII.) the rule in trademark cases; (IX.) conclusion 801
- Death.** See EVIDENCE.
- Eminent domain;** damages in eminent domain cases as affected by loss of profits:—(I.) Scope of note and nature of subject; (II.) early rule confining damages to the actual taking; (III.) rules under provisions for compensation for property taken or injured: (a) general statement of; (b) where property is taken, in whole or in part, for railway purposes; (c) where tangible property is taken for other than railway purposes; (d) where property taken consists of a franchise or privilege; (e) where property is injured, but not taken; (IV.) loss of profits from suspension of business while moving; (V.) summary 820
- Evidence;** injunction against use of document 754
- Presumption of survivorship among those who perish in a common calamity:—(I.) Introduction; (II.) the civil law; (III.) the common law: (a) the English cases; (b) the American cases: (1) in general; (2) exceptions 863
- Executors and administrators;** in what capacity may an executor or administrator be sued for his personal tort:—In general; fraud or misrepresentation in sale of property of estate; torts in care or management of property of estate; actions arising from conversion; malicious prosecution; abuse of process, replevin, detinue, etc. 261
- Felony.** See ARREST.
- Foreman.** See MASTER AND SERVANT.
- Fraud.** See EXECUTORS AND ADMINISTRATORS.
- Injunction;** right of a municipality to maintain suit to enjoin or abate a public nuisance 657
- Against documentary evidence 754
- Insurance;** condition in fire policy as to keeping, producing, and preserving books and papers:—(I.) Keeping books and vouchers: (a) validity of clause; (b) condition precedent and warranty; (c) compliance with policy; (d) waiver; (II.) production of books and papers: (a) validity of clause; (b) condition precedent; (c) compliance with policy by insured: (1) substantial and reasonable compliance; (2) procuring vouchers from third parties; (3) time, place, and manner of examination; (4) demand; (5) destruction or loss of books and vouchers; (d) waiver: (1) generally; (2) failure to act, or delay; (III.) keeping books and vouchers in a safe, or safe place: (a) validity of clause; (b) condition precedent and warranty; (c) compliance; (d) waiver; (IV.) summary 698
- Literary property.** See COPYRIGHT.
- Malicious prosecution.** See EXECUTORS AND ADMINISTRATORS.
- Mandamus;** in exercise of superintending control over inferior courts 33
- Master and servant;** vice-principalship considered with reference to the superior rank of a negligent servant:—(I.) Mere inequality of rank, significance of. Usually held not to warrant inference, that the superior servant is a vice-principal; (II.) doctrine that vice-principalship is not deducible merely from the possession of a power of control over the injured servant: (a) general statement; (b) *rationale* of the doctrine; (c) qualification of the doctrine in cases where an order takes a servant outside the original scope of his employment; (d) power of hiring and discharging subordinates, significance of; (e) application of the doctrine to the various grades of supervising employees; (f) illustrative cases: (1) general managers; (2) employees in control of railway trains; (3) supervising employees in railway yards; (4) foreman of wrecking gangs on railways; (5) employees supervising track work on railways; (6) employees supervising various kinds of construction work; (7) supervising employees in the mechanical departments of railways and other concerns; (8) foreman supervising work in quarries; (9) employee supervising the loading of vehicle elsewhere than on railways; (10) foreman of ganga loading or unloading ships; (11) supervising employees in smelting works; (12) employees supervising farms; (13) supervising employees in manufacturing establishments; (14) supervising employees in mines: (a) without reference to statutes; (b) appointed under statutes; (15) subordinate officers of ships; (16) commanding officers of ships; (III.) doctrine that all superior servants are vice-principals as regards their subordinates: (a) general statement; (b) relation of the superior-servant doctrine to the doctrine that the head of a department is a vice-principal; (c) *rationale* of the doctrine: (1) unequal knowledge of superior and subordinate; (2) inability of master or superior agents to supervise all details of the work; (3) obligation of servant to obey his superior; (4) duty to use care in giving orders regarded as one of the nonassignable duties of the master; (5) summary: (d) what constitutes the exercise of control within the meaning of the doctrine; (e) existence or absence of a power to hire and discharge subordinates, significance of; (f) illustrative cases: (1) general managing agents; (2) employees controlling the movements of trains which they do not assist in operating; (3) employees in control of railway trains; (4) supervising employees in railway yards and depots; (5) employees supervising the loading of railway cars; (6) employees supervising track work on railways; (7) employees supervising various kinds of construction work; (8) foremen in the mechanical departments of railway companies; (9) employees in charge of machinery; (10) supervising employees in manufacturing establishments; (11) supervising employees in smelting works; (12) employees supervising the moving of heavy articles; (13) employees supervising the loading of vessels; (14) foremen in quarries; (15) foremen in mines; (16) officers of ships; (IV.) relation of a gen-

eral managing agent to his subordinates: (a) introductory; (b) doctrine that a general manager is a vice-principal: (1) English and colonial cases; (2) American cases; (c) *rationale* of the doctrine; (d) doctrine that a general manager is not a vice-principal: (1) English and colonial cases; (2) American cases; (e) opposing theories reviewed; (V.) relation of employees in charge of departments to their subordinates: (a) general statement; (b) *rationale* of the master's liability for negligence of a departmental manager; (c) limits of the doctrine of departmental control; (d) supervising employees held to be heads of departments: (1) employees in the operating department of railway companies; (2) employees in charge of railway trains; (3) employees supervising the construction and maintenance of railway tracks and structures; (4) supervising employees in railway yards, depots, etc.; (5) supervising employees in the mechanical departments of railways; (6) employees supervising railway departments not connected with transportation; (7) supervising employees in manufacturing establishments; (8) foremen in smelting works; (9) employees supervising mining work; (10) supervising employees under municipalities; (11) employees concerned with the loading of vessels; (12) the commanding officers of ships; (e) supervising employees held not to be heads of departments; (VI.) for what acts of superior servants a master must answer: (a) no responsibility as to matters beyond the scope of the authority of the superior servant; (b) distinction between official and nonofficial acts of supervising employees: (1) generally; (2) distinction considered with relation to the doctrine that the nature of the negligent act is the test of liability; (c) breach of nondelegable duties by any superior servant, master liable for; (d) issuance of orders deemed to be an official act; (e) failure to protect subordinates from transitory dangers deemed to be official negligence; (f) theory that a vice-principal does not represent the master except in so far as he is discharging some nondelegable duty: (1) theory that a vice-principal does not act as the master's representative when he engages in manual labor; (2) qualifications of this theory: (g) theory that a vice-principal represents the master, even when he participates in manual labor; (h) discussions of the doctrine of the dual capacity of the vice-principals: (1) with reference to the standpoints of the courts which re-

VI L. R. A.

ject the superior-servant doctrine; (2) with reference to the superior-servant doctrine. (VII.) summary of the effect of the decisions in each jurisdiction with regard to the relation of supervising employees to their subordinates: (a) introductory statement; (b) the United Kingdom; (c) British colonies; (d) Federal courts; (e) state courts

513

Municipal corporations; right to sue to enjoin or abate public nuisance

657

Nuisance. See INJUNCTION.

Partnership; liability of partnership for torts:—(I.) Introductory; (II.) torts of partnership as an entity; (III.) torts of individual member: (a) wilful and malicious torts: (1) when other members liable; (2) when other members not liable; (b) trespass and trover: (1) trespass; (2) trover; (c) negligence: (1) when other members liable; (2) when other members not liable; (d) fraud: (1) general; (2) in purchase of property; (3) in sale of property: (4) as to trust funds: (a) when other members liable; (b) when other members not liable; (5) for individual debt or benefit; (6) estoppel; (e) approval of other members—firm accepting benefit; (f) other torts: (1) when other members liable; (2) when other members not liable; (IV.) engaging in unlawful business; (V.) liability joint and several; (VI.) conclusion

463

Patents. See DAMAGES.

Physicians; physician's right to determine frequency of visits to patient

208

Ponds. See WATERS.

Presumption. See EVIDENCE.

Prohibition; in exercise of superintending control over inferior courts

33

Receivers; effect of appointment of, on compensation of officers, agents, or employees for unexpired term

146

Replevin. See EXECUTORS AND ADMINISTRATORS.

Superintending control. See COURTS.

Survivorship. See EVIDENCE.

Torts; liability of partnership for

463

Trademarks. See DAMAGES.

Trespass; liability of partnership for

463

Trover; liability of partnership for

463

Vice-principals. See MASTER AND SERVANT.

Waters; boundary on artificial body of water:—In general; canal; pond; permanent artificial pond

178

Right to follow accretions across division line previously submerged by the action of the water

425

Use of natural stream to convey appropriated water

930

GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ABANDONMENT.

Of Contract Justifying Rescission, see CONTRACTS, 8.

Loss of Right to Custody, see INFANTS, 2.

ACCOUNTING.

Of Partner, see PARTNERSHIP, 3.

See also INSOLVENCY, 3; PARTNERSHIP, 3.

ACCRETIONS.

See WATERS, 6, 7, NOTES AND BRIEFS.

ACTION OR SUIT.

Statute Prohibiting Bringing in Other State, see CONSTITUTIONAL LAW, 18.

Prohibition against Sending Chose out of State for Garnishment of Residents' Wages, see CONSTITUTIONAL LAW, 4.

On Note Transferred after Maturity, see BILLS AND NOTES.

Limitations of, see LIMITATION OF ACTIONS.

By Agent for Conversion, see TROVER. See also BOUNDARIES, 2.

1. Agents who are given a right of action for interference with their possession of property by Ga. Civ. Code, § 3038, which is to be construed as a mere codification of the previously existing law, include only those agents who have a special property or interest in the chattels of which they have possession, and not those whose possession is merely that of the principal. *Mitchell v. Georgia & A. Ry.* (Ga.) 622

2. An action against those who sign a guaranty of payment on the back of a negotiable promissory note can be maintained only in the name of the one to whom such promise is made, as they are not indorsers, but guarantors, and the guaranty, although thus indorsed, is a non-negotiable chose in action. *Edgerly v. Lawson* (Mass.) 432

3. An agreement by a corporation organized to take the property and carry on the business of a copartnership upon the death of one of the members, by which it binds itself to pay all the partnership debts, cannot be enforced in an action at law by a creditor of the copartnership, since he was not a party to the contract and it was not made for his benefit. *Morgan v. Randolph-Clowes Co.* (Conn.) 653

51 L. R. A.

4. An agreement by a building contractor to indemnify the owner of the building against any loss resulting from injuries to others in the progress of the work will not sustain an action against the contractor by an injured person who was not a party to the contract, and for whose benefit it was not made. *Wolf v. Downey* (N. Y.) 241

5. A lessee of a railroad which has agreed to pay all taxes and assessments is not for that reason personally liable to a municipality or a contractor, neither of which is in privity with the lessee, for the amount of a local assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa* (Iowa) 763

6. An action for breach of promise of marriage is not prematurely brought when begun eight days after the day fixed for the marriage, and without waiting for the cure of a disease for which the defendant claimed to have postponed the marriage, where his acts and declarations sufficiently show that he did not intend to fulfil his contract, even after he was cured. *Trammell v. Vaughan* (Mo.) 854

7. The payment of a note which has been transferred to an innocent purchaser by the payee in violation of his contract with the maker is not a condition precedent to a right of action by the maker for breach of the contract, notwithstanding that he is insolvent. *Lyle v. McCormick Harvesting Mach. Co.* (Wis.) 906

8. Riparian proprietors, each owning a distinct piece of land situated upon a part of the stream separate from that abutted upon by the land of every other owner, have a common grievance which entitles them to sue jointly for the prevention of the diversion and pollution of the waters of the stream. *Strobel v. Kerr Salt Co.* (N. Y.) 687

9. There is no misjoinder of parties defendant in an action against a partnership, the individual members thereof, and a sheriff for malicious prosecution, where they all confederated and conspired together in instituting and carrying on the prosecution against plaintiff for the purpose of injuring him. *Page v. Citizens' Bkg. Co.* (Ga.) 463

10. An action for causing the death of a person, brought under N. Y. Code Civ. Proc. § 1902, by an administrator who is also the father and sole next of kin of the deceased and the sole beneficiary of the action, is an

action to recover damages, not for injury to the person of the decedent, but for wrongs done to the property rights or interests of the beneficiary, and therefore survives to his estate on his death, although there are other persons living who would have been next of kin of the deceased, and for whose benefit the action might have been maintained if the father had not been living when the right of action accrued. *Re Meekin* (N. Y.) 235

NOTES AND BRIEFS.

Action; joint or several; against joint wrongdoers; several liability. 187
By creditor on agreement to assume debts. 653

ADMISSION.

By Insurance Agent, see EVIDENCE, 18.

ALIENS.

See EVIDENCE, 13, 25.

ALIMONY.

As Debt, see BANKRUPTCY, 3.
Commitment for Refusal to Pay, see CONTEMPT, 1.

ALTERATION OF INSTRUMENTS.

The addition by the payee, after delivery of a note to him, of the name of another person as comaker, is such an alteration as relieves the maker. *Brown v. Johnson Bros.* (Ala.) 403

NOTES AND BRIEFS.

Alteration of instruments; effect of. 403

ANIMALS.

Destruction of Unlicensed Dogs, see CONSTITUTIONAL LAW, 2, 17.

Privilege of Humane Society to Keep without License, see CONSTITUTIONAL LAW, 5.

Grant of License Fees to Humane Society, see PUBLIC MONEY.

There is only a qualified property in dogs, and in fact there may be said to be no property in them as against the police power of the state, though as against a wrongdoer the law regards them as property. *Fox v. Mohawk & H. R. Humane Soc.* (N. Y.) 681

NOTES AND BRIEFS.

Animals; summary destruction of unlicensed dogs. 681

ANTI-TRUST LAW.

Press Association as Violation of, see CONSPIRACY.

See also STOCK AND PRODUCE EXCHANGE.

APPEAL AND ERROR.

Limitation of Right to Reverse for Error, see CONSTITUTIONAL LAW, 19.

1. A habeas corpus proceeding to determine the right to the custody of a child being a civil suit, a judgment of the district court awarding the custody to the father as against the relatives of the deceased mother may be reviewed by the court of appeals on writ of error. *People ex rel. Green v. Court of Appeals of Colo.* (Colo.) 105

2. The omission of a statement in an order
51 L. R. A.

of reversal by an appellate court, that the reversal was upon the facts, is immaterial in a case where there are no disputed questions of fact. *Buffalo & L. Land Co. v. Bellevue Land & I. Co.* (N. Y.) 951

3. A conclusive presumption that a judgment of reversal by the appellate division was not based upon a question of fact arises under N. Y. Code Civ. Proc. § 1338, when the order of reversal is silent upon that subject, although the opinion in that court shows an intention to reverse upon the facts as well as the law. *Spence v. Ham* (N. Y.) 238

4. The practice of the court as to permitting a paper put in evidence during the examination of a witness to be read by counsel or witness is not reviewable on appeal. *Press Pub. Co. v. Monroe* (C. C. A. 2d C.) 353

5. The unconstitutionality of arbitrary assessments per front foot will not be considered when the question has not been presented to the lower court and the assessment complained of is void for other reasons. *Chicago, R. I. & P. R. Co. v. Ottumwa* (Iowa) 763

6. The refusal to strike the answer of defendants in an action for malicious prosecution will not be considered on appeal from a judgment sustaining demurrers to and dismissing the petition, since, if the court below passed on the question at all, it was in an irregular way. *Page v. Citizens' Banking Co.* (Ga.) 463

7. An instruction cannot be complained of on appeal where no objection was taken to it in the lower court. *Rockport v. Rockport Granite Co.* (Mass.) 779

8. Rulings on the admission and rejection of testimony will not be considered if no exception was preserved to them. *Ebner v. Mackey* (Ill.) 298

9. An alleged error in the charge of the court cannot be reviewed on appeal, where appellant failed to complain of the charge by bill of exceptions or on motion for a new trial, as required by Tex. Code Crim. Proc. § 723. *Johnson v. State* (Tex.) 272

10. A finding by a referee and court, made without excluding any evidence, to the effect that there is no evidence tending to prove an allegation, cannot be reviewed on appeal, as that would be to pass upon the weight of the evidence. *Lenoir v. Linville Improv. Co.* (N. C.) 146

11. There is no error in refusing an instruction the effect of which was given in the general charge. *State v. Tucker* (Or.) 246

12. Failure to give instructions, though correct, that would have been mere surplusage because already substantially given, is not prejudicial error. *Bonte v. Postell* (Ky.) 187

NOTES AND BRIEFS.

See also JUDGMENT.

Appeal; finality of judgment or order in habeas corpus. 106

ARBITRATION.

1. The court of mediation and arbitration for the amicable adjustment of differences between employers and employees, which is created by Mich. Comp. Laws, §§ 559-568, is not outside the grant by Mich. Const. art. 6, § 23, of the power to create courts of conciliation on the ground that it is lacking in the essential powers to compel attendance of the parties and to enforce its decisions. *Renaud v. State Court of Mediation and Arbitration* (Mich.) 458

2. An election of the judges of a court of conciliation the creation of which is provided for by Mich. Const. art. 6, § 23, is not necessary, since the Constitution does not specify the mode of their selection, and the legislature may therefore provide for their appointment. *Id.*

3. The power to grant a rehearing is not possessed by the state court of mediation and arbitration established by Mich. Comp. Laws, §§ 559-568, since the statute contains no grant of such power. *Renaud v. State Court of Mediation and Arbitration* (Mich.) 458

NOTES AND BRIEFS.

Arbitration; what constitutes agreement for. 458

ARREST.

Liability for, see FALSE IMPRISONMENT.

NOTES AND BRIEFS.

Arrest; liability of an officer for making an arrest:—(I.) Under a warrant or writ: (a) valid on its face; (b) where the warrant or writ is irregular; (c) where the warrant is invalid or void; (d) where the court has no jurisdiction; (e) where the defendant is exempt from arrest; (f) return; (g) where the warrant is not in possession of the arresting officer; (II.) without warrant: (a) for a felony; (b) for a breach of the peace "on view;" (c) for a breach of the peace not "on view;" (d) for breach of a city ordinance: (1) where a statute authorizes arrests on view; (2) where an ordinance authorizes arrests on view; (3) other arrests made on view; (4) arrests not made on view; (e) for other misdemeanors: (1) past offenses; (2) for offenses "on view" under statutory authority; (3) arrests in other cases; (III.) circumstances attending arrest: (a) time; (b) place of arrest; (c) manner of making arrest; (d) disposition of prisoner: (1) unreasonable detention; (2) place of detention or delivery; (IV.) arrest of wrong party or by wrong name: (a) name unknown; (b) arresting wrong man; (c) arresting right man under wrong name; (d) arrest after judgment taken against wrong party; (V.) joinder; (VI.) liability on official bond; (VII.) arresting for one offense and justifying for another; (VIII.) question of probable cause; (IX.) summary. 103

ASSAULT.

An assault with a deadly weapon with 51 L. R. A.

intent to kill is sufficiently proved by evidence that defendant, after some controversy, had made a threat against the prosecuting witness and fired a pistol after her, sending a ball through her clothing. *State v. Kodat* (Mo.) 509

ASSEMBLING.

Denial of Right, see VOTERS AND ELECTIONS, 2.

ASSOCIATIONS.

NOTES AND BRIEFS.

Requirement of submission to organization, tribunals; resort to court by member. 671

ASSUMPSIT.

1. A loan made to a married woman on her credit, although she gives notes therefor which are void because made payable to her husband, who indorses them, will sustain an action at law against her estate upon the common counts for money lent or money had and received. *National Granite Bank v. Tyndale* (Mass.) 447

2. Payment in excess of the amount constitutionally chargeable for a license fee imposed under an unconstitutional ordinance entitles the one who pays it to recover it back from the city. *Harrodsburg v. Renfro* (Ky.) 897

ATTEMPT.

An attempt to make an unlawful sale of the dead body of a human being is itself a misdemeanor. *Thompson v. State* (Tenn.) 883

ATTORNEYS.

Attorneys at Law, see COURTS, NOTES AND BRIEFS.

AUCTION.

License for, see LICENSE.

BANKRUPTCY.

1. The fact that an unauthorized appeal, which must be dismissed, is taken in a bankruptcy case in which a petition is also filed to revise the proceedings of the lower court, will not defeat the right to have the case determined on the petition. *Fisher v. Cushman* (C. C. A. 1st C.) 292

2. A liquor license which is by law transferable to any person who is satisfactory to a board of police commissioners, though it may be destroyed without compensation by subsequent legislation, is "property" within the meaning of the bankrupt act, § 70 (30 Stat. at L. 565, 566), which provides that a bankrupt must transfer "property which, prior to the petition, he could by any means have transferred." *Id.*

3. A decree for alimony being a penalty imposed for a failure to perform a duty, and always subject to modification by the court according to the varying circumstances of the parties, the obligation imposed thereby

is not a provable debt in bankruptcy proceedings. *Barclay v. Barclay* (Ill.) 351

NOTES AND BRIEFS.

Bankruptcy; what constitutes "property." 293

BANKS.

Presumption as to Damage from Refusal to Pay Checks, see EVIDENCE, 10.

Slander by, see LIMITATION OF ACTIONS, 1.

Running of Statute against Certificate of Deposit, see LIMITATION OF ACTIONS, 3-5.

BARBERS.

Work of Necessity, see SUNDAY.

BENEVOLENT SOCIETIES.

As Insurers, see INSURANCE, 5.

1. Authority to hold meetings for the exercise of strictly corporate functions outside of the state of incorporation arises by implication where the corporation constitutes the supreme legislative department of a benevolent order to be established by it, with power to organize subordinate bodies throughout the United States and Canada. *Sovereign Camp, W. O. W. v. Fraley* (Tex.) 893

2. An amendment to the Constitution of a benevolent order incorporated as the "Sovereign Camp of the Woodmen of the World," when adopted by delegates assembled as the sovereign camp, in the manner required by the by-laws, is a proper exercise of the power given to the corporation to make its own constitution and to exercise general legislative authority, when the sovereign camp constitutes the supreme judicial department of the order, although an executive council composed of the officers of the sovereign camp may exercise legislative authority under certain conditions and limitations. Id.

NOTES AND BRIEFS.

Benevolent societies; right to make by-laws; where exercisable. 899

Measure of authority of officers and agents; waiver by, of by-laws. 899

BILLS AND NOTES.

Guaranty of, see ACTION OR SUIT, 2.

Payment as Condition Precedent, see ACTION OR SUIT, 7.

Agency as to Loan, see PRINCIPAL AND AGENT.

See also ALTERATION OF INSTRUMENTS;

A transfer of a negotiable note after maturity and without consideration, for the purpose of enabling the transferee to bring an action thereon in the state, will sustain a right of action by him against the maker in the right of the transferor when the latter is a bona fide holder before maturity for value. *Edgerly v. Lawson* (Mass.) 432

NOTES AND BRIEFS.

See also ALTERATION OF INSTRUMENTS; LIMITATION OF ACTIONS.

Wrongful Negotiation, see DAMAGES.

Certificate of deposit; character of. 410
51 L. R. A.

BOUNDARY.

See also WATERS, NOTES AND BRIEFS.

1. A deed bounding land by an artificial pond which has been in existence more than forty years and has become a permanent body of water, although its waters ebb and flow from time to time so as to leave a margin of land between high and low water marks, does not carry title to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the execution of the deed. *Boardman v. Scott* (Ga.) 173

2. The raising of a dam pending litigation over the boundary of land conveyed as bounded on a pond will not give the owner of the bed of the pond any right to the additional land which is thus covered by the water. Id.

BOYCOTT.

Estoppel of Member of Produce Exchange, see ESTOPPEL, 1.

BREACH OF PEACE.

See ARREST, NOTES AND BRIEFS.

BREACH OF PROMISE.

NOTES AND BRIEFS.

Breach of promise; disease as defense. 855

BROKERS.

A broker through whose efforts a binding contract is made for land between his principal and the owner of the land has earned his commission, notwithstanding the fact that the owner cannot make a good title to the land because of encumbrances not known to the broker, as the remedy of the principal is against the other party to the contract. *Roche v. Smith* (Mass.) 510-

NOTES AND BRIEFS.

Real-estate brokers; commissions on failure of principal to complete deal. 511

BUILDINGS.

Encroachment by, see INJUNCTION, 4, 5.

BURGLARY.

Presumption as to, see EVIDENCE, NOTES AND BRIEFS.

CANALS.

NOTES AND BRIEFS.

Canal; boundary on. 179

CANCELLATION.

Payment of Legal Interest as Condition, see USURY, 3.

CARRIERS.

Garnishment of, see GARNISHMENT, 2.
Question as to Contributory Negligence, see TRIAL, 5.

1. A night watchman at a railroad depot, who boards a train near his home to ride to

the depot and report his readiness to return to duty the coming night, after being off duty a few days, has the rights of a passenger in case he is injured by the carrier's negligence, although he was riding, in violation of a rule of the company, without a pass or payment of fare, but with the implied permission of the conductor, who has neglected to enforce the rule. *Chattanooga Rapid Transit Co. v. Venable* (Tenn.) 880

2. A person leaving a street car, who passes behind it and is then struck by a car on a parallel track, is no longer a passenger to whom the street-railway company owes the extraordinary degree of care to which passengers are entitled, but is to be deemed only a traveler on the highway. *Chattanooga Electric Ry. v. Boddy* (Tenn.) 885

3. A person crossing a street-car track in the dark on a crosswalk for the purpose of taking passage, after proper signals have been given to stop the car, is not negligent in assuming that the car will heed the signals, and that it is running at lawful speed only, where reliance upon such assumption is not apparently attended with danger. *Walker v. St. Paul City R. Co.* (Minn.) 632

4. A rule forbidding passengers on electric cars to ride on the front platform, and declaring that the company will not be responsible for their safety there, is a reasonable one, for the violation of which a passenger may be denied any remedy for injury resulting therefrom. *Sweetland v. Lynn & B. R. Co.* (Mass.) 783

5. A custom to receive passengers upon the front and rear platforms of electric cars without question, and to receive fare from them, will constitute a waiver and abandonment of a rule which forbids them to ride there. *Id.*

6. Fatal injuries to a person at a railroad station awaiting the arrival of a relative, at the place provided by the company for that purpose, and while in the exercise of due care and caution, render the railroad company liable if caused by negligence of its employees. *Denver & R. G. R. Co. v. Spencer* (Colo.) 121

7. The service of a garnishee summons upon a carrier after goods have been received and placed in a car for interstate transportation, although the car has not been yet put into the train, does not excuse the carrier from its duties as such, or authorize unreasonable delay in forwarding the property to its destination. *Baldwin v. Great Northern R. Co.* (Minn.) 640

NOTES AND BRIEFS.

See also GARNISHMENT.

Carriers; duty as to safe condition of platforms and approaches. 122

Seizure of shipment by garnishment as defense for delay; notice of. 640

Employees as passengers; persons riding free with company's consent. 887

Contributory negligence by breach of rule; custom. 784

51 L. R. A.

CERTIFICATE.

Of Deposit; running of Statute, see LIMITATION OF ACTIONS, 3-5.

NOTES AND BRIEFS.

Certificate of deposit; as promissory note. 410

CERTIORARI.

1. Under its general superintending control over inferior courts conferred by Colo. Const. art. 6, § 2, the supreme court has no power to review on certiorari a judgment of the court of appeals in a habeas corpus proceeding to determine the right to the custody of a child, as between the father and relatives of the deceased mother, upon the theory that the court exceeded its jurisdiction by applying a rule of law at variance with the settled doctrine upon the subject, where it had jurisdiction to determine the question, and its judgment was not in conflict with any prior decision of the supreme court. *People ex rel. Green v. Court of Appeals of Colo.* (Colo.) 105

2. A writ of certiorari may be issued to compel the sending to the supreme court of the record of proceedings in a trial court, which is necessary for the information of the supreme court upon the question of the issuance of a writ of mandamus to compel the trial court to accord suitors a statutory right which it has denied them. *State ex rel. Fourth Nat. Bank v. Johnson* (Wis.) 33

NOTES AND BRIEFS.

Certiorari; to review expulsion of member of general committee. 674

In exercise of superintending control over inferior courts. 33

COMBINATIONS.

See STOCK AND PRODUCE EXCHANGE.

COMMERCE.

1. A city ordinance exacting from vessels having a coasting license under U. S. Rev. Stat. § 4321, a license fee for the privilege of towing boats or other water craft into or out of the harbor or from one place to another within the harbor, although this fee is declared to be in lieu of all wharfage provided the boat or barge does not engage in any other than towing or transfer business, is in violation of U. S. Const. art. 1, § 8, giving Congress power to regulate commerce with foreign nations and among the several states, and art. 1, § 10, prohibiting states from laying any duties of tonnage without the consent of Congress. *St. Louis v. Consolidated Coal Co.* (Mo.) 850

2. A penal statute against aiding or inducing an artiled seaman or apprentice to desert from or leave a foreign vessel while in the waters of the state, such as Ga. Pen. Code, § 655, is not an unconstitutional regulation or interference with commerce, in the absence of any legislation of Congress on the subject, but is an aid to commerce, and is within the right and power of the state. *Handel v. Chaplin* (Ga.) 720

3. One who takes orders in his own name

from house to house, for articles manufactured in another state, and who in his own name sends a single order to the manufacturer, without stating the names of his customers, and, on receiving the package containing the articles, delivers therefrom the separate articles to his customers, is not engaged in interstate commerce so as to be exempt from a tax on the privilege of selling articles of that kind within the county. *Croy v. Epperson* (Tenn.) 254

4. A traveling agent for a nonresident principal, who makes executory contracts for the sale of goods, and who, when the goods are shipped into the state to him, receives them in bulk, breaks the original package, and distributes the contents among his customers, is not exempt from a state license tax on the ground that he is engaged in interstate commerce. *Racine Iron Co. v. McCommons* (Ga.) 134

NOTES AND BRIEFS.

Commerce; sale by sample and order; nonresident vendor; license. 134

COMMITTEE.

Powers and Rules of, see **VOTERS AND ELECTIONS**, 4, 5.

COMPULSORY SERVICE.

Of News, see **PRESS ASSOCIATIONS**, 3.
See also **GAS**.

CONCILIATION.

See **ARBITRATION**, 1-3.

CONFLICT OF LAWS.

As to Garnishment of Residents' Wages in Other State, see **CONSTITUTIONAL LAW**, 4.

Probate of Foreign Will, see **JUDGMENT**, 4, 5.

CONSPIRACY.

To Compel Reinstatement in Labor Union, see **INJUNCTION**, 2.

The furnishing of news by a press association to newspapers is not within the scope of Mo. Rev. Stat. 1899, § 8965, prohibiting trusts or combinations to regulate or fix the price of manufactures, commodities, "or any article or thing whatsoever." *State ex rel. Star Pub. Co. v. Associated Press* (Mo.) 151

NOTES AND BRIEFS.

Conspiracy; to prevent continuance of employment; absence of personal violence; injunction against. 330

To ruin business; membership in organization as affecting right of action. 826

CONSTITUTIONAL LAW.

Commitment for Refusal to Pay Alimony, see **CONTEMPT**, 1.

Abatement of Nuisance as Taking of Property, see **EMINENT DOMAIN**, 7.

Constitutional Amendment; Judicial Notice of Votes, see **EVIDENCE**, 2.

Delegation of Appointments of Examiners, see **OFFICERS**.

Regulation of Press Association Business, see **PRESS ASSOCIATIONS**.

As to Voters and Elections, see **VOTERS AND ELECTIONS**, 1-3.

Appropriation of License Fees, see **PUBLIC MONEY**.

As to Enactment of Statutes, see **STATUTES**, 1.

Amendments.

1. A constitutional amendment is not ratified by a majority of "the electors of the state," within the meaning of Ind. Const. art. 16, § 1, requiring a majority of said electors to ratify an amendment, where the persons voting in favor of it at a general election, though more than those who vote against it, are less than half of those who vote for governor or for President, or even for another constitutional amendment on the same ballot, notwithstanding the provision of art. 16, § 2, that where two or more amendments are submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of them separately. *Re Denny* (Ind.) 722

Delegation of power.

2. The authority given to a humane society by N. Y. Laws 1896, chap. 448, to destroy or appropriate unlicensed dogs, is not an unconstitutional delegation of governmental power to a private corporation, since unlicensed dogs have long been regarded as subject to destruction by any person. *Fox v. Mohawk & H. R. Humane Soc.* (N. Y.) 681

Equal protection or privileges.

3. The equal protection of the laws is not denied by Or. Sess. Laws 1899, p. 99, authorizing prosecutions to be commenced by information filed by the district attorney except when the court deems it advisable to convene a grand jury, thereby leaving it to the district attorney and the court to determine which method the prosecution should follow. *State v. Tucker* (Or.) 246

4. A statute making it a crime to send any chose in action out of the state for the purpose of suit thereon and of having garnishment or other process issued against the wages of a resident of the state, and served upon any person indebted to him for wages who is subject to the processes of the courts of the state, is in violation of the provisions of U. S. Const. 14th Amend., for equal protection of the laws and the equal privileges and immunities of citizens of the United States, and also of a provision of Mo. Const. art. 2, § 30, against granting special or exclusive privileges or immunities, since the statute discriminates between employees whose employers are subject to the processes of the courts of the state and others, and also discriminates among creditors by granting greater exemptions of wages in suits out of the state than can be had in suits within the state, while it denies the creditor of a wage earner the same right that other creditors have to bring suits in other states, and permits a creditor of a wage earner who obtains judgment in the state to enforce it out of the state by processes denied to creditors who

bring suit out of the state in the first instance. *Re Flukes* (Mo.) 176

5. The privilege of a humane society to keep dogs without paying any license fee, which is conferred by N. Y. Laws 1896, chap. 448, while every other citizen is obliged to pay such fee, is the grant of an exclusive privilege and immunity forbidden by N. Y. Const. art. 3, § 18. *Fox v. Mohawk & H. R. Humane Soc.* (N. Y.) 681

6. Classification of counties by population in a statute providing for the treatment of inebriates at public expense in any county having a population of 50,000 or more is purely arbitrary and makes the act unconstitutional. *Murray v. Board of Commissioners* (Minn.) 828

7. The discrimination with respect to the right to practise medicine, made by Iowa Code, § 2579, allowing persons to practise medicine only when they have passed an examination before the state board of medical examiners or have received a certificate from a medical school that is found by the board to be of good standing, or have practised medicine in the state for five years, three of which shall have been in one locality,—is not in violation of Iowa Const. art. 1, § 6, or U. S. Const. 14th Amend., since the classification made is not arbitrary, and the distinction upon which it is based is reasonable and apparent. *State v. Bair* (Iowa) 776

8. Constitutional provisions as to uniformity of taxation do not apply to license taxes on business. *Stull v. De Mattos* (Wash.) 892

9. An ordinance fixing the amount of a license for the sale of intoxicants at \$300 more for a place on the main street than is required for a place on any other street is unconstitutional because it violates the spirit of the Constitution as to uniformity of laws,—especially in respect to taxation, and the prohibition against local and special legislation. *Harrodsburg v. Renfro* (Ky.) 897

10. A license tax is not unconstitutional by reason of discrimination because it imposes a higher rate upon those who sell merchandise at auction than upon those who sell household furniture at the house where it has been in use. *Stull v. De Mattos* (Wash.) 892

Due process of law.

11. A judgment against sureties in a summary proceeding for the amount of a judgment recovered against the principal in an action to which they were not made parties is without due process of law, when there has been no suit brought against them on the undertaking, nor any opportunity given them to plead or defend according to the usual course of legal proceedings. *Second Nat. Bank v. Becker* (Ohio) 860

12. Prosecution upon an information filed by the district attorney, as provided by Or. Sess. Laws 1899, p. 99, instead of upon indictment of a grand jury, is sufficient to constitute due process of law within the meaning of U. S. Const. 14th Amend., where all the rights and privileges of a regular trial 51 L. R. A.

are preserved to the accused. *State v. Tucker* (Or.) 246

13. Jurisdiction of a proceeding *in rem* acquired by virtue of the power of the court over the *res*, without personal service on claimants within the state or notice by name to those outside of it, is not in violation of constitutional provisions for due process of law. *Tyler v. Judges of Court of Registration* (Mass.) 433

14. The failure to provide for any notice of transfers or other dealings subsequent to a registration of title under Mass. Stat. 1898, chap. 502, does not make the act invalid, as the legislature has power to fix conditions on which land that has been brought into the registry system shall be held. *Id.*

15. The notice by mail, by publication, and by posting on the land which Mass. Stat. 1898, chap. 502, § 32, requires to be given of a proceeding for registration of title to all persons who are known to make any claim to the land, is sufficient to satisfy the constitutional provision for due process of law. *Id.*

16. The prohibition of the possession of quail during the closed season, made by Burns's (Ind.) Rev. Stat. 1894, § 2209 (Hornor's Rev. Stat. § 2106), which declares it unlawful to shoot, destroy, or have in possession any quail between January 1 and November 10 of any year, is not in violation of U. S. Const. 14th Amend., forbidding the taking of property without due process of law, or of Ind. Const. art. 1, § 21, providing that no man's property shall be taken without just compensation, even as to persons in possession of quail in the closed season which were acquired during the open season, but is a legitimate exercise of the power of the legislature to protect game. *Smith v. State* (Ind.) 404

17. The summary destruction or appropriation of a dog by a humane society, without notice to the owner, when he has failed to procure a license for the dog as required by N. Y. Laws 1896, chap. 448, does not constitute a taking of his property without due process of law, though such a confiscation of domestic animals, such as horses and oxen, would be in violation of the constitutional provisions on that subject. *Fox v. Mohawk & H. R. Humane Soc.* (N. Y.) 681

18. A statute depriving a creditor of his vested right of bringing an action in another state is a deprivation of property without due process of law. *Re Flukes* (Mo.) 176

19. A provision that a judgment shall not be reversed for error in the charge of the court, unless such error is excepted to by bill or on motion for new trial, in Tex. Code Crim. Proc. § 723, is not unconstitutional, since it affects no vested right, but regulates the remedy merely. *Johnson v. State* (Tex.) 272

Police power.

20. No restraint on the police power by the states is imposed by U. S. Const. 14th Amend. *State v. Schlenker* (Iowa) 347

21. The power of the legislature to prohibit the addition of water or any other sub-

stance whatever to milk that is sold is included within the police power to protect health, even when it extends to the addition of that which is harmless in itself and which is added without intent to defraud, but merely to preserve the milk. *Id.*

NOTES AND BRIEFS.

Constitutional law; requiring fishways in dams; exercise of police power; impairment of contract obligation; as taking. 415

Primary law; discriminations and privileges; restrictions on right to vote. 116

Right to trial on indictment by grand jury. 247

Prosecution by information as due process of law. 247

Police power of state; limitations of, in regulating food. 348

Forfeiture of all interest for violation of usury law. 393

Ordinance prohibiting authorized business. 655

Validity of statute authorizing summary destruction of unlicensed dogs; due process of law; exercise of police power. 681

Amendment; majority of electors; electors not voting on. 722

Regulation of dentistry; exercise of police power; delegation of appointment of examiners to private corporation. 748

Right of state to enact laws for preservation of health; practice of medicine. 777

CONTEMPT.

1. The commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt within the constitutional provision against imprisonment for debt. *Barclay v. Barclay* (Ill.) 351

2. An order made in a proceeding in contempt against sureties on an undertaking for the redelivery of attached property by the principal, requiring them to pay a judgment recovered against him, and directing that, in default of such payment, they shall be imprisoned, is in contravention of their constitutional right of exemption from imprisonment for debt. *Second Nat. Bank v. Becker* (Ohio) 860

NOTES AND BRIEFS.

Contempt; compelling delivery of property by. 862

CONTRACTS.

As to Partnership Debts, Action by Creditor, see ACTION OR SUIT, 3.

Burden of Proof as to, see EVIDENCE, 4.

Compelling the Making of, by Press Association, see MANDAMUS, 7, 8.

1. A vender of goods with knowledge that they are to be used in a house of ill fame must be deemed to aid and participate in the immoral and illegal use, so as to defeat its right of action to recover the goods from a purchaser thereof on sale under execution against the vendees, where the sale reserved title, ownership, and possession of the property, with the right to take possession even before maturity of the deferred payments, whenever the vendor deemed itself insecure. *Standard Furniture Co. v. Van Alstine* (Wash.) 889

2. A contract made by a mother on her death bed, with the assent of the father, by which the custody of their children is given to relatives of the mother, is null and void on grounds of public policy. *Hibbette v. Bains* (Miss.) 839

3. A contract by which a partnership making a sale of its business binds itself by the partnership name not to re-engage in such business for a certain period within the same place, though signed by the individual partners, does not preclude them from again re-engaging in such business as individuals. *Steichen v. Fehleisen* (Iowa) 412

4. A partnership covenant against re-engaging in business is not made operative upon the former partners as individuals by virtue of Iowa Code, § 3465, giving a right of action against any or all of the parties where two or more are bound by contracts, as that statute applies, not to create a liability, but to provide a remedy in case there is a liability. *Id.*

5. A lease by a firm of all its machinery used in the manufacture of chaplets or anchors with an agreement that they will not for five years manufacture or sell any chaplets or anchors, except that they may furnish double-headed chaplets for the use of a single third party, upon the execution of which lease the lessee leases back the machinery to the first lessor to use for any purpose except for the manufacture of chaplets or anchors—constitutes an illegal contract in restraint of trade, where it is not limited as to territory, and the lessor has been engaged in carrying on such business in other states. *Clark v. Needham* (Mich.) 785

6. Substantial performance of a building contract requiring girders of a certain length and properly placed, and a wooden partition on a brick wall in the cellar, for which recovery may be had on the allowance of compensation for defects, is not made where these things are not done and their omission constitutes structural defects of so essential a character that they cannot be remedied without partial reconstruction of the building. *Spence v. Ham* (N. Y.) 238

7. Failure to run street cars as often as every half hour, for part of one winter, on account of unusually heavy snowfalls and high winds, by which the road was blocked and it was made practically impossible some of the time to run cars over it, where all usual means were used to keep the track open and the road was operated as well as similar roads in the vicinity, is held not to justify a purchaser of land who sustained no damage thereby, in rescinding his contract for the land, by the terms of which the vendor agreed to construct and operate the street railway, and run cars every half hour "as such street railroads are usually run," until the land is sold, or, in default thereof, to

take back the land, return the consideration, and pay a specified sum as liquidated damages. *Buffalo & L. Land Co. v. Bellevue Land & I. Co.* (N. Y.) 951

8. The refusal of a purchaser of wood to keep his agreement to pay for each shipment as received, and his declaration that he would not pay for a shipment until the next shipment was received, while he insisted on the complete delivery of the wood, do not constitute such an abandonment of the contract on his part as will justify the seller in refusing to ship any more wood. *West v. Bechtel* (Mich.) 791

NOTES AND BRIEFS.

See also ACTION OR SUIT; COVENANT; DAMAGES; PLEADING; TRIAL.

Contract; substantial performance of; compliance with conditions. 239

Breach of, by conspiracy; enjoining conspirators. 340

Invalidity of, for use of property for immoral purposes; assertion of, by one not a party. 890

Rescission for default of other party. 791

In restraint of trade; reasonableness. 786

COPYRIGHT.

1. The common-law right of an author to his unpublished manuscript is not abrogated by the copyright acts of Congress. *Press Pub. Co. v. Monroe* (C. C. A. 2d C.) 353

2. A newspaper publication of an ode written for the World's Columbian Exposition, made before the delivery of the ode at the Exposition or its publication elsewhere, and without the consent of the author or of the Exposition Company, for which it was written, is a violation of the rights of the author, which makes the newspaper liable for damages. *Id.*

3. An author's reservation of "copyright" in an ode written for the World's Columbian Exposition, subject to the concession that in addition to the delivery of the ode at the Exposition the Exposition Company shall have the right to publish it in the final history thereof and to furnish copies to the newspaper press and for free distribution, is not invalid, although it accompanies an acknowledgment of the receipt of money "in full payment for ode composed by me." *Id.*

NOTES AND BRIEFS.

See also DAMAGES.

Copyright; common-law rights of authors and others in intellectual productions:— (I.) General theories; (II.) prerogative publications; (III.) parties: (a) originators; (b) compilers; (c) annotators and commentators; (d) successors; (e) masters and servants; (IV.) works: (a) in general; (b) immoral, libelous, or irreligious works; (c) letters; (V.) rights: (a) before publication; (b) after publication; (c) what constitutes publication: (1) general principles; (2) what is a publication; (3) what is not a publication; (VI.) infringements: (a) names or designations; (b) 51 L. R. A.

abridgments; (c) translations; (d) reproductions; (e) originals: (1) author's own obtained surreptitiously; (2) independent creations; (3) combinations; (VII.) remedies; (VIII.) liabilities: (a) creditors; (b) taxation. 353

CORPORATIONS.

Meetings out of State, see BENEVOLENT SOCIETIES, 1.

Delegation to, of Appointment of Examiners, see OFFICERS.

The right of officers of a corporation to their salaries is terminated, although their term of office has not expired, by the appointment of a receiver for the company on account of its insolvency, since the appointment of the receiver operates as a dissolution of any contract between the parties for such services by the sovereign power of the state. *Lenoir v. Linville Improv. Co.* (N. C.) 146

NOTES AND BRIEFS.

See also TREES.

Corporations; effect of appointment of receiver or assignee for creditors of a corporation on compensation of officers, agents, or employees for unexpired term of employment. 146

Liability for employment of physician by agent. 669

Requirement of submission to organization tribunals; members' right to resort to court. 871

Right to make by-laws; where exercisable. 899

CORPSE.

Attempted Sale as Misdemeanor, see ATTEMPT.

Unlawful Sale, see INDICTMENT, 2.

An unauthorized sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade and *malum in se*. *Thompson v. State* (Tenn.) 883

COSTS.

One who attempts to obtain a deposition, and begins to take it, but does not get it completed because the witness refused to go on with the testimony, is not chargeable with costs under N. H. Pub. Stat. chap. 225, § 12, on the ground that he neglected or refused to take a deposition after giving notice of it, where he in fact desired to have the deposition completed, but understood that he could not compel the witness to proceed, while the other party was present and had the same means and opportunity of enforcing the examination. *Ott v. Hentall* (N. H.) 226

COURTS.

Of Mediation and Arbitration, see ARBITRATION AND AWARD.

Granting of Original Writ of Habeas Corpus, see HABEAS CORPUS.

Denial by, of Creditor's Right to an Accounting, see INSOLVENCY, 3.

Proceedings of, see MANDAMUS, 1-4.

Waiver of Lack of Jurisdiction, see PLEADING, 2.

As to Prohibition, see PROHIBITION.

Review of Action of Religious Society, see RELIGIOUS SOCIETIES, 2, 3.

Jurisdiction of Suit to Collect Taxes, see EQUITY, 1.

1. A constitutional grant of superintending control over inferior courts vests in the supreme court an independent and separate jurisdiction, enabling it to restrain the excesses and quicken the neglects of inferior courts in the absence of other adequate remedy, and authorizes the use of all the ancient writs necessary to the exercise of that high power, including mandamus, prohibition, certiorari, and procedendo. *State ex rel. Fourth Nat. Bank v. Johnson* (Wis.) 33

2. The right to hear and determine the cause, involved in the constitutional grant to the supreme court of superintending control over inferior courts, cannot be taken away by the legislature by directing that issues of fact arising during the attempted exercise of such control shall be tried in certain designated inferior courts. *Id.*

3. The general superintending control conferred by Mo. Const. art. 6, § 3, upon the supreme court over inferior courts, includes no power to control the judgment or discretion of a lower court for any particular purpose or in any particular manner. *State ex rel. Monett Mill. Co. v. Neville* (Mo.) 95

4. The power of the assistant recorder to register titles, given by Mass. Stat. 1898, chap. 562, as amended by Stat. 1899, chap. 131, § 8, under which he makes the registration "in accordance with the rules and instructions of the court," is not a judicial power conferred upon a nonjudicial officer, but is merely ministerial, and the registration is the act of the court. *Tyler v. Judges of Court of Registration* (Mass.) 433

5. A court in which a person has been adjudged bankrupt has power to proceed summarily to compel the bankrupt to sign a transfer of property to which the trustee in bankruptcy is entitled. *Fisher v. Cushman* (C. C. A. 1st C.) 292

6. A definition in a statute of terms therein used is not an invasion of the province of the courts to construe statutes. *State v. Schlenker* (Iowa) 347

7. The decision of the state central committee of a political party, which by the rules of the party is invested with full control of the management of its affairs, in a contest as to which of two bodies of men constitute the executive committee of a certain county, is conclusive upon the courts, since the question is a political one, and the courts have no power to question the regularity of the proceedings or the justice of the decision. *Davis v. Hambrick* (Ky.) 671

8. The inquiry whether or not a church tribunal that undertakes to decide as to the expulsion of a member has been organized in conformity with the constitution of the church is not ecclesiastical within the exclu-

sive jurisdiction of the ecclesiastical tribunals, but is within the jurisdiction of the civil courts, although the decision of such ecclesiastical tribunal, if it were properly constituted, would be conclusive on the courts. *Hatfield v. DeLong* (Ind.) 751

9. All remedies within the church must be exhausted by a member before the secular courts will interfere, if they have a right to interfere at all, with the action of an ecclesiastical tribunal against him. *Id.* See also RELIGIOUS SOCIETIES.

10. To determine the amount of revenue required for the needs of a municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion. *Stull v. De Mattos* (Wash.) 892

11. The intent of the council that a license tax shall be prohibitory is immaterial, if the council has power to impose the tax for the purpose of raising revenue and the ordinance imposing it is valid on its face. *Id.*

12. A state court which has obtained jurisdiction of a suit against a corporation cannot be ousted thereof by the subsequent appointment of a receiver for the corporation by a Federal court and the removal of the cause, based on the fact of such appointment, when the case was not otherwise removable. *Pendleton v. Lutz* (Miss.) 640

NOTES AND BRIEFS.

See also EQUITY; REMOVAL OF CAUSES.

Courts; inherent power of self-protection as to admission of attorneys. 724

Interference with legislative discretion. 230

Interference with ecclesiastical tribunals. 752

Jurisdiction after judgment and lapse of term. 96

Superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal:—(I.) Introductory; (II.) inherent power of supervisory or superintending control over inferior tribunals: (a) existence and derivation of power; (b) in what courts the inherent power exists: (1) in the highest law court of original general jurisdiction; (2) in courts of appellate jurisdiction; (3) in courts of local jurisdiction; (III.) constitutional and statutory grants of superintending control, general supervision, etc.; (IV.) in states which have no express constitutional or statutory grants of the power; (V.) in courts of the United States; (VI.) where the application to correct should be first made: (a) to the court sought to be controlled; (b) to an inferior jurisdiction having the power; (VII.) when the power is exercised without designating it as such: (a) by courts of original jurisdiction as successor of the King's bench; (b) by courts having no grant of the specific power; (c) by courts having grants of the jurisdiction; (VIII.) use in place of appeal or other remedy; (IX.) for what purposes exercised: (a) compelling

lower court to act; (b) controlling lower court's discretion or judgment; (c) to aid appellate jurisdiction; (d) in exercise of revisory jurisdiction; (X.) power of legislature to interfere: (a) to enlarge the power; (b) to encroach upon the power; (XI.) exercise of the power by courts of local jurisdiction; (XII.) conclusion. 33

COVENANT.

NOTES AND BRIEFS.

Covenant; for operation of road; strict construction; enforcement; breach of, excuses for; *vis major*. 951

CREDITORS' BILL.

1. Equity will not aid a judgment creditor against a fraudulent conveyance until he actually obtains a specific lien by attachment of the property or levy thereon under an execution, or until he has exhausted all his legal remedies to collect his claim, but, when that is done, equity will enforce his right to a lien by annulling the fraudulent transfer so that the judgment may attach to the property. *French Lumbering Co. v. Theriault* (Wis.) 910

2. The death of the vendor before a specific lien shall have been obtained on property that he has conveyed in fraud of creditors will prevent the enforcement of a judgment by execution against such property, and preclude the acquisition thereby of a lien which equity will protect. 1d.

CRIMINAL LAW.

Sale of Dead Body, see ATTEMPT; CORPSE.

Corroboration of Accomplice, see EVIDENCE, 26.

Acquittal as Bar to Civil Action, see JUDGMENT, 2.

As to Pardon, see PARDON.

Application of Penalty to Amendment of Statute, see STATUTES, 5.

See also ATTEMPT; CONSTITUTIONAL LAW, NOTES AND BRIEFS.

1. It does not lie in the power of the legislature to make that act a crime which consists in the bare exercise of a simple constitutional right. *Re Flukes* (Mo.) 176

2. The fact that one of the participants in a crime was a mere agent of another does not affect his criminal liability for his acts. *Thompson v. State* (Tenn.) 883

3. Punishment of two or more persons for the same crime is to be inflicted as if each one had committed the crime separately. *Id.*

CUTTING ICE.

See INJUNCTION, 7.

DAMAGES.

Pleading of Special, see PLEADING, 4.

From Water, Joint Liability as to, see TORTS.

See also EVIDENCE, 10, 20-23.

1. Wanton and reckless indifference to the rights of others, equivalent to an intentional 51 L. R. A.

violation of them, may constitute a ground of exemplary damages. *Press Pub. Co. v. Monroe* (C. C. A. 2d C.) 353

2. Actual damages are not necessary to authorize exemplary damages in case of wanton and reckless indifference to the rights of others by a wrongdoer. *Id.*

3. Exemplary or punitive damages, as such, cannot be recovered for breach of a contract of marriage by reason of the fact that the promise was not made in good faith, but was made without intent to perform it, for the purpose of humiliating and disgracing the other party, although this fact may constitute an aggravation of the compensatory damages. *Trammell v. Vaughan* (Mo.) 854

4. The insolvency of the plaintiff is a fact to be considered on the question of his damages for breach of contract by transferring to a bona fide purchaser a note made by him, but which he has not paid. *Lyle v. McCormick Harvesting Mach. Co.* (Wis.) 906

5. Damages which an employer is compelled to pay for injuries to an employee caused by the explosion of a boiler are not too remote to be included in the recovery of damages against the maker of the boiler for breach of warranty. *Boston Woven Hose & Rubber Co. v. Kendall* (Mass.) 781

6. Four thousand dollars is excessive compensatory damages for the death of a man sixty-eight years old, whose net worth at the time of his death was little more than \$6,400, and whose annual income arising from his personal exertions, after deducting personal expenses, was \$1,000, in an action by persons whose sole claim is for diminution of the estate in which they are entitled to share. *Denver & R. G. R. Co. v. Spencer* (Colo.) 121

7. Anticipated profits from contemplated use of property taken cannot be considered in estimating the damages to be awarded in eminent domain proceedings. *Hamilton v. Pittsburg, B. & L. E. R. Co.* (Pa.) 319

8. Damages in an eminent domain proceeding to obtain land for railroad purposes cannot be enhanced by reason of the danger of fire because of proximity of the proposed road to a building used for storing highly inflammable material, but must be limited to the cost of removing the building to a safe place. *Id.*

9. A woman who breaks a contract of marriage in order to marry another man is not entitled to recover from the latter for his breach of promise any damages growing out of her wrongful act in breaking her promise to marry the former. *Trammell v. Vaughan* (Mo.) 854

10. The number of infringing articles purchased by defendant for incorporation into his manufactured product may form the basis of damages in an action for infringement of a patent, where up to the time of infringement he had procured all his stock from the patentee, who maintained a strict monopoly, and afterwards deliberately substituted infringing articles for the patented ones, so

that the conclusion is reasonable that, in the absence of infringement, he would have purchased the same quantity from the patentee. *Rose v. Hirsh* (C. C. App. 3d C.) 801

11. The difference between the cost and selling price of a number of articles equal to those used by the infringer is the proper measure of damages in an action for infringement of a patent, where the expenses of the patentee are simple and easily computed, as to which he has suppressed no evidence, while defendant has not used evidence within his power to show that the alleged cost is erroneous, while the plaintiff's evidence is corroborated by the cost of the infringing articles. *Id.*

NOTES AND BRIEFS.

See also EMINENT DOMAIN; EVIDENCE.

Damages; for wrongful negotiation of note; measure. 907

Effect of provision in contract, on measure of. 952

Punitive; for infringement of copyright. 354

For death. 122

For dishonor of check; form of action. 256

Measure of, for destruction of trees. 950

Damages for infringement of patents, copyrights, or trademarks as affected by loss of profits:—(I.) Nature and scope of the subject; (II.) the concurrent remedies in patent cases; (III.) actions in equity; (IV.) actions at law: (a) statement as to existence of the remedy; (b) measure of damages generally; (c) as affected by mode of enjoyment of patent: (1) different rules with relation to; (2) by granting licenses: (a) application of the rule; (b) what sufficient to constitute an established fee; (c) right to base fee on utility: (3) by holding close monopoly: (a) application of the rule; (b) establishment of loss of sales; (c) establishment of reduction of price; (d) consideration of profits of the infringer; (e) when profits of infringer may be made the criterion; (f) separation of profits due to patent; (V.) the rule in equity under statutes authorizing damages: (a) scope of subdivision; (b) the act of Congress of 1870; (c) estimation of damages under; (d) separation of profits and damages due to patent; (e) the English act of 1858; (VI.) effect of recovery; (VII.) the rule in copyright cases; (VIII.) the rule in trademark cases; (IX.) conclusion. 801

DAMS.

Failure to Maintain Fishway over, see INDICTMENT, ETC., 1.

Acquittal of Charge of Nuisance, see JUDGMENT, 1.

Jurisdiction as to Nuisance by, see JUSTICE OF THE PEACE.

Power of State as to Fishways in, see WATERS, 1.

The power of the state to compel a fishway to be made in every dam across a stream, as required by Iowa Code 1897, § 2548, extends to a dam which the state itself made without any fishway, and conveyed in that condition, without expressly reserving any right to exercise police power over it. *State ex rel. Remley v. Meek* (Iowa) 414

NOTES AND BRIEFS.

Dams; statutory provision for; vested right. 415

DEATH.

See also DAMAGES, 6.

1. The mother of an illegitimate child cannot recover for his death under Miss. Acts 1898, p. 83, giving a right of action to the mother and other specified relatives of one whose death results from wrongful injury. *Alabama & V. R. Co. v. Williams* (Miss.) 836

2. An illegitimate half sister cannot maintain an action under Miss. Acts 1898, p. 82, entitling a sister or brother to sue for the death of a sister or brother. *Illinois C. R. Co. v. Johnson* (Miss.) 837

NOTES AND BRIEFS.

See also CARRIERS; DAMAGES; EVIDENCE.

Survival of action. 235

DEEDS.

In Chain of Title, Notice of Easement Reserved in, see EASEMENTS.

Fraudulent, as Affecting Lien, see JUDGMENT, 3.

NOTES AND BRIEFS.

Deeds; restrictions and reservations; as to building. 310

DEFINITIONS.

In Statute Giving Right of Action for Death, see DEATH.

Void, see STATUTES, 6.

NOTES AND BRIEFS.

See also BANKRUPTCY; GAMING.

Law of land. 348

Practice of medicine. 718

DENTISTS.

Appointment of Examiners, see OFFICERS.

NOTES AND BRIEFS.

Dentistry; legislative regulation; exercise of police power. 748

DEPOSITIONS.

Costs Where Not Completed, see COSTS AND FEES.

DESCENT AND DISTRIBUTION.

Presumption as to Survivorship, see EVIDENCE, 6.

In Case of Death by Same Disaster, see WILLS, 2.

See also EVIDENCE, 6.

DESERTION.

Penal Statute against Inducing Seamen, see COMMERCE, 2.

DISORDERLY HOUSE.

A covered wagon traveling from place to place, in which prostitution is carried on, may constitute a house of ill fame within the meaning of a statute prohibiting the keeping of such houses. *State v. Chauvet* (Iowa) 630

NOTES AND BRIEFS.

Disorderly houses; covered wagon as house. 631

DOGS.

Destruction of Unlicensed, see CONSTITUTIONAL LAW, 2, 17.

Privilege of Humane Society to Keep without License, see CONSTITUTIONAL LAW, 5.

Grant to Humane Society of License Fees, see PUBLIC MONEY.

See also ANIMALS.

NOTES AND BRIEFS.

Dogs; summary destruction of, where unlicensed. 681

DOWER.

Conveyance to Defeat, see HUSBAND AND WIFE, 5.

DRUNKENNESS.

Classification of Counties in Statute Providing Public Treatment, see CONSTITUTIONAL LAW, 6.

EASEMENTS.

Prevention of Encroachment, see INJUNCTION, 4, 5.

See also PUBLIC IMPROVEMENTS, NOTES AND BRIEFS.

A purchaser of a lot with notice of restrictions in the original plat of the lands, which was referred to and made a part of a deed in the chain of title, and has been constantly recognized by the different lotowners as a common source of title, is not released from the binding force of the restrictions merely because they are not expressly reserved in the conveyance to him or in others of the deeds in his chain of title. *Ewertsen v. Gerstenberg* (Ill.) 310

ELECTION DISTRICTS.

Issuance of Election Notices, see MAN-DAMUS, 6.

EMINENT DOMAIN.

Damages in Case of, see DAMAGES, 7, 8.
Evidence as to Damages, see EVIDENCE, 22, 23.

Instructions in, see TRIAL, 9.

Prohibition of Possession of Game, see CONSTITUTIONAL LAW, 16.

1. A railroad of a regularly organized and chartered railroad company is a public railroad for which the power of eminent domain may be exercised, notwithstanding the fact that the road is short and built chiefly for the purpose of conveying the product of a coal company which is composed of substantially the same persons that organized the 51 L. R. A.

railroad company, since the railroad company, under Mo. Const. art. 12, § 14, will be a common carrier obliged to serve all people alike. *Kansas & T. Coal Ry. v. Northwestern Coal & M. Co.* (Md.) 936

2. The selection by a railroad company of the location of its proposed road being given by statute to such company, the court has no right to deny the exercise of the power of eminent domain to condemn such right of way because it thinks some other location is as good or better. Id.

3. The right of a railroad company organized chiefly for the benefit of a coal company, to condemn land for the road, is not precluded by Mo. Rev. Stat. 1889, § 1119, giving the coal company the right to have a switch connection with an existing railroad, and §§ 9559 and 9560, providing for the construction of a tramway for such coal. Id.

4. Courts in eminent domain cases must deal with the conditions that exist at the time the condemnation is asked, and cannot take into account conditions that may or may not arise or be created thereafter. Id.

5. Land used by a mining corporation for railroad purposes without charter authority is not within the protection of Mo. Rev. Stat. 1889, § 2741, declaring that the right to appropriate for a railroad lands held by any corporation shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the land is authorized to put it. Id.

6. Condemnation of the land of a coal company for a railroad track, although its use for railroad purposes would materially interfere with the coal company's authorized use of its land for mining purposes, is not precluded by Mo. Rev. Stat. 1889, § 2741, declaring that the right to appropriate for a railroad lands held by any corporation shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the land is authorized to put it. Id.

7. The abatement of a nuisance does not constitute a taking of private property for public purposes for which compensation is required by Iowa Const. art. 1, § 18. *State ex rel. Remley v. Meek* (Iowa) 414

8. The depreciation of the value of real property caused by the establishment of a smallpox hospital in the neighborhood under statutory authority does not constitute a taking or damaging of private property for public use without just compensation within the meaning of Ill. Const. art. 2, § 13. *Frazer v. Chicago* (Ill.) 306

9. An electric street-railway for passengers does not constitute a new burden or servitude upon a public street or highway. *Southern R. Co. v. Atlanta R. & P. Co.* (Ga.) 125

10. A passenger street railway which takes on and discharges passengers at reasonable points, if so constructed and operated as not materially to interfere with the ordinary modes of using the streets for public travel or with private rights, is not an

additional burden on the fee of the land, whatever may be the motive power used or the manner in which it is built. *La Crosse City Ry. Co. v. Higbee* (Wis.) 923

11. A supporting trolley wire pole for a passenger street-railway, when set in a street in front of the sidewalk, if placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located and so as not materially to interfere with access to his lot outside the street line, does not constitute an additional burden on the fee of the land. *Id.*

NOTES AND BRIEFS.

Eminent domain; street railways as additional burden; poles and wires. 924

What constitutes public use; incidental private benefit; discretion as to location of line; property already devoted to public use; determination of right by existing conditions. 927

Damages in eminent domain cases as affected by loss of profits:—(I.) Scope of note and nature of subject; (II.) early rule confining damages to the actual taking; (III.) rules under provisions for compensation for property taken or injured: (a) general statement of; (b) where property is taken, in whole or in part, for railway purposes; (c) where tangible property is taken for other than railway purposes; (d) where property taken consists of a franchise or privilege; (e) where property is injured, but not taken; (IV.) loss of profits from suspension of business while moving; (V.) summary. 320

Crossing tracks of other company in street; compensation; additional servitude. 125

EQUITY.

Imposition of Condition on Canceling Contract, see *USURY*, 3.

See also *CREDITORS' BILL*.

1. A suit by the state or by a county for the collection of taxes is not within the jurisdiction of a court of equity, where the statutes have provided efficient remedies to enforce payment of the taxes without suit. *Marye v. Diggs* (Va.) 902

2. Where the objection that a party has an adequate remedy at law is not taken until after the testimony is all in, the court, in its discretion, will retain the cause if the court is competent to grant the relief asked for, and has jurisdiction over the subject-matter. *Coast Co. v. Spring Lake* (N. J. Err. & App.) 657

3. Relief in equity by reason of an estoppel cannot be granted to the holders of the notes of a married woman who had the proceeds, against the legal defense that the notes are void because made payable to her husband, who indorsed them. *National Granite Bank v. Tyndale* (Mass.) 447

NOTES AND BRIEFS.

Equity; inherent jurisdiction as to property rights of husband and wife; contracts between. 448

51 L. R. A.

Jurisdiction of suit between factions of voluntary organization; property rights. 671

Jurisdiction as to taxes. 903

Relief against judgment procured by fraud. 873

ESTOPPEL.

Against Legal Defense as to Notes of Married Woman, see *EQUITY*, 3.

1. A person who is boycotted by a produce exchange after he has been suspended from membership therein for violating its unlawful constitution and by-laws is not estopped to claim damages from the boycott because, as a member, he participated in the adoption of such illegal provisions. *Ertz v. Produce Exchange* (Minn.) 825

2. Purchasers of goods on execution sale subject to the rights of a prior vender of the property under a contract of conditional sale are not estopped to set up the illegality of such contract on the ground of public policy. *Standard Furniture Co. v. Van Alstine* (Wash.) 889

NOTES AND BRIEFS.

See also *CONSPIRACY*.

Estoppel; of married woman by negotiation of notes. 448

Of purchaser at judicial sale subject to prior contract. 890

EVIDENCE.

Establishing Assault, see *ASSAULT AND BATTERY*.

Restraining Use of Letters, see *INJUNCTION*, 9.

Devise as Affecting Witness's Competency, see *WITNESSES*.

Judicial notice.

1. Judicial notice will be taken of the number of votes cast in the state at a general election on a constitutional amendment, and also the number cast for governor and for presidential electors, as the same have been returned to the secretary of state. *Re Denny* (Ind.) 722

2. The vote on a constitutional amendment at a general election at which the question was submitted by the last preceding general assembly, which was the only general assembly authorized to speak on the subject, is not to be deemed a special election so that judicial notice of the votes cast at the general election cannot be taken in determining whether or not the amendment received the requisite vote merely because the procedure did not conform to a statute passed some years previously respecting the submission of such amendments. *Id.*

Presumptions and burden of proof.

3. The burden of proving the allegations in a cross-complaint necessary to entitle defendants to a decree rests upon them to the same extent as if they had brought an original action to obtain the relief sought in the cross-complaint. *Herriman Irrig. Co. v. Butterfield Min. Co.* (Utah) 930

4. The burden of proof as to the cost of performing certain terms of a contract in accordance with its terms is upon the contractor, where the question at issue is with respect to the amount to be allowed to the owner for failure to make a full compliance with the contract. *Spence v. Ham* (N. Y.) 233

5. It is presumed to be for the best interests of a child to be in the custody of its father rather than in that of collateral relatives, unless the contrary is shown by reason of the father's unfitness or abandonment of the child. *Hibbette v. Baines* (Miss.) 839

6. In case of death by the same disaster, of sisters who left wills in each other's favor, with no circumstances appearing from which it can be inferred that either survived the others, the rights of succession to the estates will be determined as if death occurred to all at the same moment. *Re Willbor* (R. I.) 863

7. A presumption of the continuance of an agency arises from proof of a prior appointment as agent without anything to show its revocation. *Hall v. Union C. L. Ins. Co.* (Wash.) 288

8. Officers of an electric-railway company are supposed to know the habitual methods of their servants in managing their cars. *Sweetland v. Lynn & B. R. Co.* (Mass.) 783

9. Neither the contractor for the mason work on a building, nor the contractor for the carpenter work, has the burden of proving that a brick which fell from the building and caused an injury was not set in motion by his employee, when there were employees of other contractors also at work upon the building. *Wolf v. Downey* (N. Y.) 241

10. The law conclusively presumes that a trader is damaged by the wrongful refusal of a bank to pay his checks. *J. M. James Co. v. Continental Nat. Bank* (Tenn.) 255

11. The burden of proving the quantity of water diverted by defendant from the channel of a creek is upon the defendant in an action to enjoin the use of the water, when the plaintiff shows that its stockholders many years before appropriated all the waters of the creek for irrigating purposes, continued their use up to the time of the incorporation, transferred their rights to the corporation, and since then have enjoyed the use of the water as stockholders until this diversion by the defendant. *Herriman Irrig. Co. v. Butterfield Min. Co.* (Utah) 930

12. The burden of proving that the quantity of water diverted by defendant from a creek does not exceed that discharged into the creek from tunnels on its property, is upon the defendant in an action to enjoin the use of the water, when the plaintiff makes a prima facie case. *Id.*

Documentary evidence.

13. A certificate of naturalization of a person since deceased is admissible without further proof as evidence of his citizenship, 51 L. R. A.

upon the question of the forum having jurisdiction of proceedings to administer his estate. *Newcomb v. Newcomb* (Ky.) 419

14. The fact of probate of a will in a foreign court may be shown by an exemplification of the probate signed by the registrar of the court, a certificate of the judge that the will shown by the exemplification appears to have been duly proved and the probate to be in force and that registrar had jurisdiction and his attestation was duly made, all of which is certified by the United States consular agent and accompanied by a deposition showing service on nonresident interested parties as authorized by the laws of the country. *Id.*

Demonstrative.

15. The admission in evidence of a patent for the process of devulcanizing india rubber by hot naphtha vapor under pressure is proper to lay a foundation for the patentee's testimony that he notified the maker of a boiler which exploded during such an experiment, of the use for which the boiler was intended. *Boston Woven Hose & Rubber Co. v. Kendall* (Mass.) 781

16. Evidence of experiments made after the explosion of a boiler, with similar machinery and with all conditions similar except a hinge, is admissible for the purpose of showing that the explosion was caused by a defective hinge. *Id.*

Parol.

17. Oral evidence is admissible in support of a plea of *res judicata* to show the facts determined on the former trial. *State ex rel. Remley v. Meek* (Iowa) 414

Admissions.

18. An admission by an insurance agent after the death of a person from whom he had authority to collect premiums, that the premiums were paid during the lifetime of the insured, is competent evidence against the insurance company. *Hall v. Union C. L. Ins. Co.* (Wash.) 288

Res geste.

19. A third person may testify as to a conversation between one fatally injured at a railway station and a relative alighting from an incoming train which purported to explain the decedent's presence at the station. *Denver & R. G. R. Co. v. Spencer* (Colo.) 121

Relevancy and materiality.

20. Evidence of the general impairment of credit resulting from the dishonor of checks is admissible in an action therefor, without any averment of special damage. *J. M. James Co. v. Continental Nat. Bank* (Tenn.) 255

21. Evidence that particular persons have ceased to deal with a trader is not admissible without an averment of special damage therefrom, in an action for injury to his credit by wrongful refusal of a bank to pay a check. *Id.*

22. Evidence of the value of the contents of an adjacent building is inadmissible in a proceeding to condemn land for a railroad right of way on the theory that the risk of

fire will be increased, since if the risk is great the use of the building should be discontinued, and if not, the evidence is purely speculative. *Hamilton v. Pittsburg, B. & L. E. R. Co. (Pa.)* 319

23. Evidence of absence of benefit to the landowner from construction of a railroad through it is inadmissible in a proceeding to condemn the right of way, but it must be limited to the question of benefit to the property. *Id.*

Weight; sufficiency.

24. The mere presumption of negligence arising from the causing of a personal injury by the falling of a brick from a building in course of construction is not sufficient to charge the contractor for either the carpenter or the mason work, in the absence of proof to show from what part of the building the brick came, or who set it in motion, where numerous employees of several other independent contractors were at the time at work upon the building. *Wolf v. Downey (N. Y.)* 241

25. The foreign citizenship of a person whose estate is to be settled is shown by a certificate of naturalization issued by the clerk of the proper court in the foreign country, followed by a deposition certified by the United States consular agent, of the present clerk of such court, that the records of the court show the granting of the order of naturalization. *Newcomb v. Newcomb (Ky.)* 419

26. A statutory requirement of corroboration of an accomplice to warrant a conviction on his testimony is sufficiently met by admissions and acts of the accused tending to connect him with the commission of the offense. *State v. Chauvet (Iowa)* 630

27. Evidence that a number of springs which had been previously running continuously for many years into a certain creek were dried up upon the cutting of mining tunnels is sufficient to entitle the one who has the right to all the water flowing in the creek to the water discharged therein through the tunnels, although he is unable to trace the underground channels of the springs. *Herriman Irrig. Co. v. Butterfield Minn. Co. (Utah)* 930

28. Defendants in a suit to restrain the use of water in a creek are not required to prove the quantity added to the flow by their mining tunnel, with such nicety as to show the exact number of miners' inches or cubic feet, but are only required to show such an approximation to the amount as to make it clearly appear that their diversion does not diminish the water previously appropriated by, and belonging to, the plaintiff. *Id.*

NOTES AND BRIEFS.

Evidence; presumption as to gift from possession of stolen property. 247

Presumption as to damages from dishonor of check. 256

Presumption of negligence from injury; in case of servant. 390

Presumption of survivorship among those who perish in a common calamity:—(I.) 51 *L. R. A.*

Introduction; (II.) the civil law; (III.) the common law: (a) the English cases; (b) the American cases: (1) in general (2) exceptions. 863

Injunction against use of document. 754

Admissibility of documentary evidence as affected by manner of obtaining. 755

Effect of omission of revenue stamp from document. 316

Admissions of agent. 283

Admissibility of, as to possession of stolen property. 247

Conclusiveness of naturalization certificate as to preliminary steps. 419

Sufficiency of proof of circumstances to establish negligent injury. 390

EXECUTORS AND ADMINISTRATORS.

Under Foreign Will, Liability, see JUDGMENT, 4.

1. The grant of ancillary administration in a county in which there is a note belonging to the estate, although the debtor resides in another county, is authorized by Pa. act March 15, 1832, providing that, where the decedent was not domiciled in the commonwealth, such letters shall be grantable in the county where the principal part of his goods and estate shall be. *Engelskirger's Appeal (Pa.)* 876

2. An action of claim and delivery cannot be maintained against an executor of an estate in his representative capacity, to recover possession of personal property wrongfully withheld by him. *Elmore v. Elmore (S. C.)* 261

NOTES AND BRIEFS.

See also INSURANCE.

Executors and administrators; situs of contract debts for purposes of administration. 876

In what capacity may an executor or administrator be sued for his personal tort:—In general; fraud or misrepresentation in sale of property of estate; torts in care or management of property of estate; actions arising from conversion; malicious prosecution; abuse of process; replevin, detinue, etc. 261

EXPERIMENTS.

See EVIDENCE, 16.

EXPLOSION.

Liability for Injury by, see MASTER AND SERVANT, 6.

FALSE IMPRISONMENT.

1. An imprisonment resulting from an arrest under a valid warrant gives no right to an action for false imprisonment. *Page v. Citizens' Bkg. Co. (Ga.)* 463

2. A partnership may be sued as such for a malicious arrest, where the arrest was made in the interests of the partnership and all the members unite in procuring it. *Id.*

3. That the officers making an arrest without a warrant acted under the orders of

the chief of police does not release them from liability for the subsequent detention of the prisoner without any charge having been made against him or opportunity given him for trial, since, the arrest having been made without a warrant, they are responsible, equally with those by whom the imprisonment was continued, for failure to obtain the writ necessary to legalize his further detention. *Leger v. Warren* (Ohio) 193

4. The detention of a person in prison for five days without a warrant, and without any charge having been made against him before any competent tribunal, or opportunity allowed him for trial, renders the officers causing his arrest and detention liable to an action for false imprisonment, although there was reasonable cause for making the arrest, and the statutes provide that, upon reasonable cause, any person may be arrested without a warrant. *Id.*

FELONY.

See also ARREST, NOTES AND BRIEFS.

FENCES.

NOTES AND BRIEFS.

Fences; statutory duty of railroad as to; failure to perform. 640

FIRE.

Negligence as to, see RAILROADS.

NOTES AND BRIEFS.

Fires; negligence of railroad in setting. 646

FISHWAYS.

In Dams, Power of State to Compel, see DAMS.

In Dams, Powers of State as to, see WATERS, 1.

Failure to Maintain Over Dam, see INDICTMENT, ETC., 1.

Acquittal of Charge of Not Maintaining, see JUDGMENT, 1.

See also CONSTITUTIONAL LAW, NOTES AND BRIEFS.

FOOD.

Prohibition of Adulteration, see CONSTITUTIONAL LAW, 21.

An intent to defraud is not an essential element of the offense denounced by Iowa Code, §§ 4989, 4990, which prohibit the adulteration of milk intended for sale by adding to it anything whatever. *State v. Schlenker* (Iowa) 347

NOTES AND BRIEFS.

Food; adulteration of milk; what constitutes. 347

Limitation of police power as to regulation of. 348

FOREMAN.

See MASTER AND SERVANT, NOTES AND BRIEFS.

51 I. R. A.

FRAUD AND FRAUDULENT CONVEYANCES.

In Antenuptial Conveyance to Defeat Dower, see HUSBAND AND WIFE, 5.

Lien on Land Conveyed by, see JUDGMENT, 3.

See also EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE, NOTES AND BRIEFS.

GAME LAWS.

Prohibition of Possession of Game, see CONSTITUTIONAL LAW, 10.

Possession of quail acquired during the open season is nevertheless unlawful if continued after the close season begins, under Burns's (Ind.) Rev. Stat. 1894, § 2209 (Horner's Rev. Stat. § 2106), making it unlawful to have possession of quail between January 1 and November 10 of any year. *Smith v. State* (Ind.) 404

NOTES AND BRIEFS.

Game laws; right of state to impose restriction on granting right to kill. 405

Possession during close season; prior acquisition. 405

GAMING.

NOTES AND BRIEFS.

Gambling; what constitutes. 497

GARNISHMENT.

Not Excuse Carrier from Duties as Such, see CARRIERS, 7.

Of Residents' Wages in Other State, Prohibition against, see CONSTITUTIONAL LAW, 4.

1. One can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor. *Bullard v. Chaffee* (Neb.) 715

2. A common carrier, after acceptance of freight for shipment from a place within the state to a place without, is not required to forego the right to transport the same and receive payment therefor by reason of the service upon it of a garnishee summons in a suit by a third party against the owner of such goods. *Baldwin v. Great Northern R. Co.* (Minn.) 640

NOTES AND BRIEFS.

See also CARRIERS.

Garnishment; of goods in transit. 640

Place of. 715

GAS.

1. A natural-gas company which has been given by ordinance the right to exercise the power of eminent domain, and to lay under the streets and alleys of the city its gas pipes and mains for the supplying of natural gas to the city and its inhabitants, is engaged in a business affected with a public interest requiring it to serve impartially, on equal terms, all who apply for service. *Richmond Natural Gas Co. v. Clawson* (Ind.) 744

2. A rule of a gas company requiring those who use natural gas both for fuel and lights to pay 20 cents per 1,000 feet for all that is used, without respect to the quantity used for either purpose, while the gas is supplied for 12½ cents per 1,000 feet to those who use it for fuel alone, as it has for some years been furnished to all who used it for any purpose, is unreasonable and invalid as an unjust and arbitrary discrimination. *Id.*

GRAND JURY.

See also CONSTITUTIONAL LAW, NOTES AND BRIEFS.

An act providing for an information by the district attorney in place of an indictment by a grand jury, but that the circuit court may convene a grand jury whenever in its opinion it is deemed advisable to do so, is authorized by Or. Const. art. 7, § 18, regulating the organization of grand juries and giving the legislature power to modify or abolish them. *State v. Tucker (Or.)* 246

GUARANTY.

Of Negotiable Note, see ACTION OR SUIT, 2.

1. Notice of acceptance is necessary in order to bind the guarantors on an instrument by which they promise to pay to a certain bank all notes, checks, drafts, and overdrafts of a third person, not exceeding a certain amount, that may accrue within six months from date, waiving demand, notice, and protest on the part of the bank in collecting said sums, as this constitutes a mere offer or proposal. *German Savings Bank v. Drake Roofing Co. (Iowa)* 758

2. The insolvency of a debtor at the time a guaranty is made to secure future advances to him up to a limited amount, and the continuance of such insolvency is a sufficient excuse for the failure of the creditor to give notice to the guarantor of advancements made or of the state of the account. *Id.*

NOTES AND BRIEFS.

Guaranty; necessity of notice of acceptance; release of guarantor. 759

HABEAS CORPUS.

Review of, to Determine Custody of Child, see APPEAL AND ERROR, 1.

An original writ of habeas corpus may be granted by the Texas court of criminal appeals notwithstanding the failure of the prisoner to appeal from his sentence to the county court, as he might have done, where, if he had done so, he could not have appealed from that court if the punishment had been a fine of not more than \$100, and the writ of habeas corpus was refused by the county judge. *Ex parte Patterson (Tex.)* 654

NOTES AND BRIEFS.

Habeas corpus; to release one imprisoned for violation of ordinance. 655

HEALTH.

See CONSTITUTIONAL LAW, NOTES AND BRIEFS.

61 L. R. A.

HIGHWAYS.

Use of Railroad Embankment, see INFRACTION, 6.

Assessment of Railroad, see PUBLIC IMPROVEMENTS, 2-4.

1. Mere user by the public of a strip of land dedicated by the owner as a street does not constitute it a public street or highway which the city is bound to keep in repair, where the officers authorized by the city charter to lay out, open, and establish streets have not accepted the street, or treated it as such. *Downend v. Kansas City (Mo.)* 170

2. Leaving an opening from a city street to a strip of land used by the public as a street, but not accepted by the city, and placing a light at the same point, do not constitute an adoption of the alleged street as a public highway which the city is bound to keep in repair. *Id.*

3. A narrow strip of land on the border of a platted block will, for the purposes of an action against the city for injuries caused by defects in a walk thereon, be treated as part of a street formed adjacent to it in the platting of adjoining property, where it has been so treated by the persons interested, and it appears on the plat in such a form that it might be considered as dedicated to public use. *Id.*

4. The approval of the plat of a proposed addition to a city by the common council does not constitute an acceptance of the streets thereon laid out, or amount to an act of jurisdiction over them, or impose an obligation upon the city to keep them in repair, although such plat vests the fee of the streets therein described in the city, and the charter of the city provides that it shall be unlawful to make or file any such plat without the approval of the common council. *Id.*

5. A derrick erected upon land by a licensee, with a guy stretched across a public highway so low as to be dangerous to persons using the road, is a nuisance for which the owner of the land is liable if he permits it to remain, although it may have been placed upon the land before he became the owner. *Rockport v. Rockport Granite Co. (Mass.)* 779

6. A street-railway company with a charter granted by the secretary of state, but confirmed and made valid by an act of the general assembly, is "chartered by the legislature" within the meaning of Ga. Civ. Code, § 2219, providing for the crossing of railroads by companies chartered by the legislature. *Southern R. Co. v. Atlanta R. & P. Co. (Ga.)* 125

7. The charter right of a street-railway company to use steam as well as electricity as a motive power is a matter of no consequence in testing its right to cross a railway on a street under a grant restricting it to the use of electric power, where it is not seeking to employ steam power. *Id.*

8. The removal by a municipality of shade trees from a street without giving the abutting owner, who owns the fee of the street,

any notice of the public necessity for the removal, or any opportunity to transplant them or to remove them himself, constitutes an invasion of the owner's legal rights for which the municipality is liable in damages. *Stretch v. Cassopolis* (Mich.) 345

9. A street-railway company has a right to remove shade trees within the limits of the public highway for the construction of its road, as authorized by the township authorities, without compensation for damages to the abutting owner, but it must first give him notice and an opportunity to remove the trees as he may see fit. *Miller v. Detroit, Y. & A. A. Ry.* (Mich.) 955

NOTES AND BRIEFS.

Highways; establishment of, by user; dedication; acceptance; municipal liability for defects in. 171

Control of, by municipality. 346

Recovery by municipality against creator of defect in streets; failure to repair as affecting. 779

HOMICIDE.

By Beneficiary, see *INSURANCE*, 8-10.

HOSPITAL.

Depreciation of Property by Establishment of, as Taking, see *EMINENT DOMAIN*, 8.

The establishment of a smallpox hospital by a city under statutory authority cannot, in the absence of carelessness or negligence or an abuse of the police power in any way, be a public nuisance, nor can it be a private nuisance unless it becomes such in its subsequent use or unwarranted operation. *Frazer v. Chicago* (Ill.) 306

HUMANE SOCIETY.

Privilege of Keeping Dogs without License, see *CONSTITUTIONAL LAW*, 5.

Grant to, of License Fees, see *PUBLIC MONEY*.

HUSBAND AND WIFE.

Breach of Promise, see *ACTION OR SUIT*, 6.

Loan to Married Woman, see *ASSUMPTION*, 1.

Alimony as Debt, see *BANKRUPTCY*, 3.

Damages for Breach of Promise, see *DAMAGES*, 3, 9.

Relief against Married Woman by Estoppel, see *EQUITY*, 3.

1. Cohabitation after the removal of an impediment to marriage by the death of a former wife is sufficient to constitute a lawful marriage, where the second wife entered into the relation in good faith, without any knowledge of the impediment until after the death of the husband, although she continued to live with him seven years after the death of the former wife, during which time he procured insurance on his life, making her the beneficiary and calling her his wife. *Barker v. Valentine* (Mich.) 787

2. A man engaged to marry, in whom

there subsequently appears, without any intervening fault on his part, a loathsome venereal and contagious disease, which renders it unsafe or improper for him to marry, is entitled to postpone the marriage until he is cured if the disease is of a temporary character, and to refuse to carry out the contract if the disease is permanent. *Trammell v. Vaughan* (Mo.) 854

3. Statutes enabling married women to hold property to their own use, and enlarging their rights and liabilities, do not change the rule which gives a wife power to pledge her husband's credit for necessities. *Ott v. Hentall* (N. H.) 226

4. A wife's financial ability to provide for herself does not deprive her of the right to pledge her husband's credit for necessities, when she is living apart from him on account of his misconduct. *Id.*

5. A conveyance in contemplation of marriage, after the marriage has been agreed upon, when made by the prospective husband to his sons by a former marriage, without the knowledge or consent of his contemplated wife, and without consideration other than love and affection, is a fraud on her marital rights, and will not defeat her right to dower at his death after the marriage. *Ward v. Ward* (Ohio) 858

NOTES AND BRIEFS.

See also *EQUITY*; *ESTOPPEL*.

Husband and wife; essentials of valid marriage; ceremony. 788

Antenuptial conveyances as fraud on wife's marital rights. 858

Validity of contracts and transfers between. 448

Liability for necessities furnished wife. 226

Breach of promise, disease as defense. 855

ICE.

The cutting and removing of ice from public waters in large quantities annually for shipment and sale for commercial purposes, whereby the natural level of the waters is materially reduced, is not included within the common right which all persons enjoy to the use of such waters, but is an artificial taking which may be restrained by riparian owners if they are injured thereby. *Sanborn v. People's Ice Co.* (Minn.) 829

NOTES AND BRIEFS.

Ice; public right to take. 830

ILLEGITIMATE PERSON.

Right to Recover for Death of, see *DEATH*.

IMITATIONS.

See also *TRADENAME*.

A mark, name, or phrase that has been so used by a person in connection with his business or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him cannot be used by others so as to lead purchasers to believe that the articles for

sale are his, or so as to obtain the benefit of the market he has built up thereunder. *Fuller v. Huff* (C. C. A. 2d C.) 332

IMPRISONMENT FOR DEBT.

Commitment for Contempt, see CONTEMPT.

INCOMPETENT PERSONS.

A deed made by an insane person not under guardianship is merely voidable and passes title so that a judgment thereafter rendered and docketed against the grantor will not be a specific lien on the property until the conveyance be actually avoided. *French Lumbering Co. v. Theriault* (Wis.) 910

INDEPENDENT CONTRACTOR.

NOTES AND BRIEFS.

Independent contractors; liability for negligence. 242

INDICTMENT.

Prosecution on Information, see CONSTITUTIONAL LAW, 3, 12.

Sale of Dead Body, see CORPSE.

Information in Place of Indictment by Grand Jury, see GRAND JURY.

See also CONSTITUTIONAL LAW, 12, NOTES AND BRIEFS.

1. An information charging defendants with maintaining a nuisance by owning and maintaining a dam over which they had failed to construct a fishway is sufficient under Iowa Acts 17th Gen. Assem. chap. 188, §§ 1, 2, to give jurisdiction of the crime of maintaining a nuisance, although the maintenance of the dam without the fishway is, by §§ 1, 3, made punishable by a fine, since § 2 declares such dam a nuisance, as the intent of the act was not only to punish for past derelictions, but to remedy matters for the future. *State ex rel. Remley v. Meek* (Iowa) 414

2. An indictment for attempting to make an unlawful sale of the dead body of a human being is not bad for duplicity on the ground that it charges three separate offenses merely because it recites a mere narrative of facts leading up to the offense, including statements that the accused failed to bury the body and that they conspired, not to bury, but to sell, it. *Thompson v. State* (Tenn.) 883

3. Several misdemeanors of the same kind may be set forth in as many counts of an information without requiring the prosecutor to elect on which count he will proceed. *Little v. State* (Neb.) 717

INEBRIATES.

Classification of Counties in Statute Providing Public Treatment, see CONSTITUTIONAL LAW, 6.

INFANTS.

Contract as to Custody, see CONTRACTS, 2.

Presumption as to Custody, see EVIDENCE, 5.

Duty to Protect, see RAILROADS.

51 L. R. A.

1. Children about ten and thirteen years of age respectively should be given to the custody of their father, as against maternal aunts who claim them under a disposition made by their mother on her deathbed, where the father, although he has allowed them to live for years with their maternal grandmother until her death, has contributed about \$5,000 to their support, and is not only of good moral character, but of better financial condition and prospects than the aunts or their husbands, and with him the children will be together, while with the aunts they live in separate residences in the same inclosure, and are liable to be separated if their aunts should move to other premises. *Hibbette v. Bains* (Miss.) 839

2. A father cannot be deemed to have abandoned his children so as to lose the right to claim their custody, by allowing them for years to remain in the custody of their maternal grandmother in accordance with an arrangement made by their mother on her deathbed, where he continues to make remittances to them from time to time, amounting in the aggregate to about \$5,000 in the course of about ten years. *Id.*

INFORMATION.

See INDICTMENT, ETC.

INFRINGEMENT.

See DAMAGES, 10, 11.

INJUNCTION.

Joint Action by Riparian Proprietors, see ACTION OR SUIT, 8.

Compelling Dissolution, see MANDAMUS, 5.

As to Waters, see WATERS, 2, 3, 9.

1. An injunction is the proper remedy to protect a person's standing in the community and prevent an injury, for which there is no adequate remedy at law, by an attempt of a tribunal without jurisdiction to expel him from a church. *Hatfield v. DeLong* (Ind.) 751

2. Members of a labor union are entitled to an injunction restraining the members of another union from which they have withdrawn from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. *Plant v. Woods* (Mass.) 339

3. A municipality, as the representative of the public, may sue to abate or prevent a nuisance upon public property within its limits. *Coast Co. v. Spring Lake* (N. J. Err. & App.) 657

4. An encroachment of a building upon a space reserved for a courtyard in a plat of city lots will not be prevented by injunction, when all others who have constructed buildings on the same side of the block have encroached on such space though to a less extent, and without any attempted hindrance on the part of the complainants, while it seems clear that the character of the property is somewhat changed, and it is being used to a large extent for business purposes, even if the complainants' lots are still vacant. *Ewertson v. Gerstenberg* (Ill.) 310

5. The limit of encroachment previously made by other buildings on a space reserved for courtyards on a common plat will not be taken as the limit beyond which a new building will be prevented from extending upon such space, where there has been no uniform limitation adopted or acquiesced in in lieu of that originally fixed by the plat, while, by general consent or acquiescence, that has been so far abandoned and the reserved space so far appropriated to other uses, as to make it inequitable to enforce the restriction by injunction against the owner of the new buildings. *Id.*

6. An injunction is the proper remedy to prevent a city from taking possession of an embankment made on its land for railroad purposes by one having a lease for ninety-nine years, and converting it into a public highway. *Lowery v. Pekin* (Ill.) 301

7. The lowering of the level of a lake about $\frac{1}{4}$ of an inch annually by cutting ice therefrom for market may be a damage to a riparian owner of such a substantial character as entitles him to restrain the taking. *Sanborn v. People's Ice Co.* (Minn.) 829

8. A material injury which necessarily results to a lower riparian owner from the conduct of the business of an upper riparian proprietor will be restrained by a court of equity on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. *Strobel v. Kerr Salt Co.* (N. Y.) 687

9. An injunction against the publication of letters by producing them in evidence will not be granted, in favor of one by whom and to whom they were written against a person who has them in possession and intends to use them as evidence in the prosecution of a joint information against the writers of the letters for adultery, although the letters were obtained by a breach of trust on the part of one to whom they were delivered by the complainant with instructions to burn them. *Barrett v. Fish* (Vt.) 754

10. An injunction to prevent the threatened sale by a tax collector on an execution cannot be granted where there is a remedy by interposition of a claim under Ga. Pol. Code, § 890. *Racine Iron Co. v. McCommons* (Ga.) 134

11. An action against the officer guilty of the fraud is not an adequate remedy at law, which will prevent a court of equity from entertaining a bill to restrain the enforcement of a judgment obtained through the fraud of

the officer charged with the service of the writ. *Dowell v. Goodwin* (R. I.) 873

12. A bill in equity will lie to enjoin an action at law on a judgment obtained by the fraud of the officer charged with the service of the writ in the original action, where the return of the officer showed a full and regular service of the writ. *Id.*

13. While a court of equity will not, as a rule, correct irregularities in municipal procedure, it will nevertheless restrain an irregular proceeding if it threatens irreparable injury. *Coast Co. v. Spring Lake* (N. J. Err. & App.) 657

14. The threatened action of a borough council, which is irregular and will cause an injury that is irreparable by tearing down a building as an alleged nuisance when the nuisance is not such as a municipal officer can abate at common law, will be restrained by injunction. *Id.*

NOTES AND BRIEFS.

Injunction; extent of injury as affecting right. 689

Preliminary; taxpayers' right; irreparable injury; court's discretion. 72

By taxpayer to restrain misapplication or payment of illegal contract. 336

Against continuing trespass; inadequacy of legal remedy; to prevent acquirement of prescriptive title. 304

By riparian owner against taking ice from lake. 830

As to highway; to prevent acquirement of easement. 304

Right of a municipality to maintain suit to enjoin or abate a public nuisance. 657

Against documentary evidence. 754

Restraining violation of building restriction; change of environment. 310

To restrain infringement of tradename. 332

Against conspiracy; continuing and permanent private nuisance; breach of contract. 340

Against publication of letters by public officer. 757

Relief by, against judgment procured by fraud. 873

To restrain enforcement of ordinance requiring license fee. 893

Dissolution on bond where injury repairable. 72

INSOLVENCY.

Proceeds of Life Insurance, see INSURANCE, 7.

1. Creditors for whose benefit the debtor has made an assignment of all his property are entitled, at all reasonable times and in all reasonable ways, to be informed of the progress of affairs and the state of the business. *State ex rel. Fourth Nat. Bank v. Johnson* (Wis.) 33

2. Any creditor for whose benefit a debtor has made a general assignment of his property may demand that the assignee make and file an account answering the require-

ments of the statute, before he is required to make special objection to any particular items of such account. *Id.*

3. A trial judge has no discretionary power to deny creditors for whose benefit a general assignment has been made the right to an account by, and examination of, the assignee, given by statute, which is beyond the control of mandamus. *Id.*

INSURANCE.

Agents.

1. A stipulation in a contract between a general insurance agent and a person employed to solicit insurance and collect premiums for the company, that he shall not be the agent of the company, but only of the general agent with whom he makes the contract, is ineffectual to relieve the company from liability for the acts of such agent within the scope of his employment. *Hall v. Union C. L. Ins. Co. (Wash.)* 288

Construction.

2. The terms of an insurance policy will be construed most strongly against the company, since the language is that of the company and the policy has been carefully prepared and worded in its favor. *Connecticut Fire Ins. Co. v. Jeary (Neb.)* 698

3. Forfeiture clauses in policies of insurance are looked upon with ill favor by the courts, and will be enforced only when the strict letter of the contract requires it. *Id.*

Conditions and warranties.

See also *infra*, Cause of death; Defenses.

4. No forfeiture of a policy of fire insurance is made by failure to keep the inventory and books of account in a fireproof safe, where the policy stipulates that the assured shall take an inventory at least once a year, "and" shall keep books of account correctly detailing the purchases and sales of stock, "and" shall keep all inventories and books locked in a fireproof safe, or other place secure from fire in the insured building, and provides that "failure to observe the above conditions shall work a forfeiture" of all claims under the policy, since, upon a strict construction of the language, a failure to perform, not one, but all, the conditions is required to work a forfeiture. *Connecticut Fire Ins. Co. v. Jeary (Neb.)* 698

5. A certificate of a benevolent order providing that it shall be void if the member die by his own hand, unless he is insane, though made on an application stating that it is subject to all the provisions of the constitution, is not controlled by a constitutional provision that there shall be a condition in every certificate making it void if the member die by his own hand "whether sane or insane," since this is not a general provision of the constitution or by-laws making all certificates void if the insured shall commit suicide, but specifically relates to those certificates of which that condition shall be made a part, or, if it is a general provision, it will not apply as against one who was misled by the failure of the officers
51 L. R. A.

to insert the condition in his contract. *Sovereign Camp, W. O. W. v. Fraley (Tex.)* 898

Cause of death.

See also *infra*, Defenses.

6. A stipulation against liability for death from suicide, sane or insane, does not defeat recovery on a policy of insurance, although the insured died from an overdose of morphine, taken by himself, where the company fails to establish by a preponderance of the evidence that the self-destruction was intentional. *Brown v. Sun Life Ins. Co. (Tenn.)* 252

Interest in proceeds.

7. The proceeds of a life insurance policy which is taken out by an insolvent for the benefit of his parents as a mere gift to them will be subjected to the claims of his creditors, where he created a valid liability against himself or his estate by giving a check for a part of the premium, which is held as an existing obligation at the time of his death, although no part of the premium is actually paid by him or out of his property, and the check is never presented against his estate, but is paid gratuitously by his administrator out of the latter's own funds. *Lehman v. Gunn (Ala.)* 112

Defenses.

8. The murder of the insured by the beneficiary forfeits the rights, not only of the beneficiary, but of her assignee. *Schmidt v. Northern Life Asso. (Iowa)* 141

9. Children of a beneficiary who murders the insured cannot, because she thus forfeits her rights to the insurance, claim it as her heirs, under a certificate payable to her, her heirs, or legal representatives. *Id.*

10. Liability on a benefit certificate is not defeated because the beneficiary's rights are forfeited by causing the death of the insured, but the certificate may be enforced by the latter's administrator for the benefit of his estate on the ground of a resulting trust created in favor of the estate by the forfeiture of the rights of the beneficiary named. *Id.*

Suit.

11. Delay in bringing action for life insurance until after the expiration of the year within which the policy requires it to be brought does not defeat the action, when the delay was caused by representations of the general agent of the company that it would be better to delay until the return to the state of an agent to whom the premiums were alleged to have been paid, and that, if it was found that they were so paid, the policy would be paid without suit. *Hall v. Union C. L. Ins. Co. (Wash.)* 288

NOTES AND BRIEFS.

Insurance; authority of agents and officers of benevolent society; waiver of by-laws. 899

Conflict between by-laws and certificate. 899

Waiver of conditions by agent. 289

Effect of unauthorized statement by agent. 289

Waiver of limitation of actions by acts of insurer. 289

Insurable interest in life; supposed wife. 788

Gift of life insurance policy; rights of creditors to proceeds. 113

Rights in proceeds; incapacity of beneficiary; administrator of insured. 142

Conditions against suicide; liability in case of. 254

Condition in fire policy as to keeping, producing and preserving books and papers:—
(I.) Keeping books and vouchers: (a) validity of clause; (b) condition precedent and warranty; (c) compliance with policy; (d) waiver; (II.) Production of books and papers: (a) validity of clause; (b) condition precedent; (c) compliance with policy by insured: (1) substantial and reasonable compliance; (2) procuring vouchers from third parties; (3) time, place, and manner of examination; (4) demand; (5) destruction or loss of books and vouchers; (d) waiver: (1) generally; (2) failure to act, or delay; (III.) keeping books and vouchers in a safe, or safe place: (a) validity of clause; (b) condition precedent and warranty; (c) compliance; (d) waiver; (IV.) summary. 698

INTENT.

As to Adulteration of Milk, see **FOOD**.

INTERNAL REVENUE.

The omission of a revenue stamp required by act of Congress of June 13, 1898, by mere inadvertence, from an assignment of a mortgage, does not make the assignment void or defeat the title of a purchaser on foreclosure, where the necessary stamps are affixed and canceled by an internal revenue collector after the sale. *Wingert v. Zeigler (Md.)* 316

NOTES AND BRIEFS.

Internal revenue; effect of omission of stamp from document. 316

INTERVENTION.

As to Funds in Court, see **MONEY IN COURT**.

INTOXICATING LIQUORS.

Recovery Back of License, see **ASSUMPSIT**, 2.

License as Property see **BANKRUPTCY**, 2.
 Nonuniformity of License, see **CONSTITUTIONAL LAW**, 9.

JOINT LIABILITY.

For Tort, see **TORTS**.

JOURNALS.

NOTES AND BRIEFS.

Journals of legislature; what constitutes. 398

51 L. R. A.

JUDGMENT.

Restraining Enforcement, see INJUNCTION, 11, 12.

1. An acquittal on the charge of maintaining a nuisance by a dam without a fishway, on the ground that defendants have a contract right to maintain it, is *res judicata* in a subsequent suit to abate such dam as a nuisance. *State ex rel. Remley v. Meek (Iowa)* 414

2. An acquittal in a criminal action is a bar to a subsequent civil action to secure a forfeiture which would have been part of the penalty to be imposed in the criminal proceeding. *Id.*

3. A deed in fraud of the grantor's creditors nevertheless passes title, so that a judgment thereafter rendered on a precedent debt and duly docketed does not become a specific lien on the land under Wis. Rev. Stat. § 2902, but the remedy of the judgment creditor is by a suit in equity. *French Lumbering Co. v. Theriault (Wis.)* 910

4. Probate of a will granted under statutory authority by a tribunal of one country upon the estate located there of one who died its citizen in another country will be binding upon the courts of the latter country, and the liability of the executrix must be tested by the law of the former. *Newcomb v. Newcomb (Ky.)* 419

5. Property located in one country and covered by a will entitled to probate there for the purpose of disposing of such property cannot, after such probate, be the subject of litigation or adjudication in the courts of another country where the testator was domiciled at the time of his death. *Id.*

NOTES AND BRIEFS.

See also **INJUNCTION**.

Judgment; lien of, on property fraudulently transferred. 911

Of foreign probate court; effect; collateral attack. 419

Res judicata. 98

Finality of decree or judgment. 95

JUDICIAL SALE.

Purchaser at, Subject to Prior Vendor's Rights, see **ESTOPPEL**, 2.

See also **ESTOPPEL**, **NOTES AND BRIEFS**.

JUSTICE OF THE PEACE.

The offense of maintaining a nuisance by a dam without a fishway is not beyond the jurisdiction of a justice of the peace, although by Iowa Code 1873, § 4092, a fine of \$1,000 may be imposed for maintaining a nuisance "where no other punishment therefor is specially provided," since a special penalty which a justice may lawfully impose is provided for this particular offense by Iowa Acts 17th Gen. Assem. chap. 188, § 3. *State ex rel. Remley v. Meek (Iowa)* 414

LABOR UNIONS.

Restraining Compulsory Reinstatement in, see INJUNCTION, 2.

Regulation Requiring Union Work, see
MUNICIPAL CORPORATIONS, 2.

NOTES AND BRIEFS.

See also CONSPIRACY.

Labor unions; ordinances requiring work
by. 336

LANDLORD AND TENANT.

1. A person who has the privilege of entering upon land merely for the purpose of quarrying rock and working it up into marketable shape, and whose payments for the use of the land are in the nature of "stumpage," being determined by the quantity of paving blocks obtained, is a licensee, and not a tenant. *Rockport v. Rockport Granite Co. (Mass.)* 770

2. Defects in the condition of leased premises, such as a defective balustrade on a porch, where the landlord has not reserved any part of the premises, do not render the landlord liable to a subtenant who leases from the original lessee, for injury received by the subtenant's child on account of such defect,—especially when it does not appear that the defect existed at the time of the original lease. *Smith v. State Use of Walsh (Md.)* 772

NOTES AND BRIEFS.

Landlord and tenant; liability for damages to tenant from condition of premises. 772

Liability of landlord to third person for condition of premises. 772, 779

LARCENY.

Presumption as to, see EVIDENCE, NOTES AND BRIEFS.

LEGISLATIVE JOURNALS.

Effects of Interpolation, see STATUTES, 2.

The bound and permanent record filed with the secretary of state as the journal of the house of representatives, and not the bundle of papers from which this was made up, is the "journal" which, under Ala. Const. art. 4, § 22, and other sections, must contain the required entry of proceedings in the enactment of statutes. *Montgomery Beer-Bottling Works v. Gaston (Ala.)* 390

NOTES AND BRIEFS.

Legislative journals; what constitutes. 398

LEGISLATURE.

NOTES AND BRIEFS.

Legislature; interference with exercise of discretion. 230

LETTERS.

Restraining Use as Evidence, see INJUNCTION, 9, NOTES AND BRIEFS.

LIBEL AND SLANDER.

By Bank, see LIMITATION OF ACTIONS, 1.

1. A circular charging that a candidate
51 L. R. A.

for office is a champion of saloons, lawlessness, and vulgar theatres, and then adding that, for reasons considered equally good, voters are asked to vote against a certain other candidate, is a libel upon the latter, if untrue as to him. *Eikhoff v. Gilbert (Mich.)* 451

2. A circular addressed to voters, stating generally and unqualifiedly that a candidate for re-election to the legislature has championed measures opposed to the moral interests of the community, when this is stated as a fact, and not as a mere opinion or inference drawn from any specified acts, is, when untrue, libelous *per se*, and is not privileged. *Id.*

NOTES AND BRIEFS.

See also TRIAL.

Libel and slander; privilege of publication concerning candidate. 451

LICENSE.

Recovery of Payment, see ASSUMPSIT, 2.

As Property, see BANKRUPTCY, 2.

Rule of Uniformity as to, see CONSTITUTIONAL LAW, 8-10.

A license tax of \$25 per day on persons selling stocks of merchandise or parts thereof at auction is not authorized by general provisions of law for the regulation of business, but is authorized by a charter giving power to license business for the purposes of regulation and revenue, since this power is conferred without limitation as to the amount of the tax. *Stull v. De Mattos (Wash.)* 892

NOTES AND BRIEFS.

See also COMMERCE.

License; extent of municipal power as to; of business. 893

Of business or profession; uniformity. 897

LIFE TENANTS.

Lien of Tax on Land, see TAXES, 4, 5.

LIMITATION OF ACTIONS.

By Contract, see INSURANCE, 11.

1. An action against a bank for wrongfully refusing payment of a check is not an action for slander within the meaning of Shannon's (Tenn.) Code, § 4468, limiting the time for bringing "actions for slanderous words spoken." *J. M. James Co. v. Continental Nat. Bank (Tenn.)* 255

2. The use of the proceeds of trust property by the trustee in his own business with the knowledge and consent of the *cestui que trust*, and which are credited to him as a debt on the trustee's books, although with the understanding that it is to be paid when there is a favorable opportunity for investment and without any technical revocation of the indenture of trust, changes the trust relation into one of debtor and creditor, so that when the debtor has become financially ruined without repayment of the money an action therefor is subject to the statute of limitations governing the actions for debt. *Treadwell v. Treadwell (Mass.)* 190

3. The statute of limitations commences to run on a demand certificate of deposit at its date, since such a certificate is no more nor less than a promissory note. *Mereness v. First Nat. Bank (Iowa)* 410

4. The death of the depositor does not interrupt the running of the statute of limitations on a certificate of deposit. *Id.*

5. Knowingly false representations by a bank amounting to a denial of liability to the estate of a decedent, and of the fact that there is evidence on its books of a deposit by him for which a demand certificate had been given, which was afterwards lost, do not interrupt the running of the statute of limitations that began to run in favor of the bank at the time the certificate was issued. *Id.*

NOTES AND BRIEFS.

Limitation of actions; as to enforcement of trust. 191

As to suit on insurance policy; when runs. 290

Running of statute against demand certificate of deposit. 410

LITERARY PROPERTY.

See COPYRIGHT, NOTES AND BRIEFS.

LOTTERY.

A merchant who gives to a designated class of customers an opportunity to secure, by lot or chance, any article of value additional to that for which such customers have paid, violates the provisions of Ga. Pen. Code, § 407, which declares that no person "shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing." *Meyer v. State (Ga.)* 496

MAJORITY.

Of Voters for Constitutional Amendment, see CONSTITUTIONAL LAW, 1.

MALICIOUS ARREST.

Liability for, see FALSE IMPRISONMENT, 1, 2.

MALICIOUS PROSECUTION.

Joinder of Parties Defendant, see ACTION OR SUIT, 9.

Liability of Partnership, see PARTNERSHIP, 1.

See also EXECUTORS AND ADMINISTRATORS, NOTES AND BRIEFS.

1. A prosecution is "carried on" within the meaning of a statute giving a right of action for malicious prosecution, where, under authority of a search warrant, the premises of a person are searched and goods not described therein seized and such person arrested and carried before a justice on a charge of larceny, but, after the hearing has been continued from day to day, and the accused, in order to obtain his liberty, has been obliged to give a bond for his appearance before the magistrate, the prosecutors fail to produce any evidence and ask that the prosecution be dismissed. *Page v. Citizens' Bkg. Co. (Ga.)* 463
51 L. R. A.

2. A prosecution is "ended" within the meaning of Ga. Civ. Code, § 3850, providing that a right of action for malicious prosecution occurs only after the prosecution is ended, when the prosecutors announce that they have no evidence to offer, and procure an order dismissing the warrant and discharging the accused from custody, and no further action is ever taken thereon. *Id.*

MANDAMUS.

1. Mandamus to compel the reinstatement of a case erroneously stricken from the docket may be issued to a circuit court by the supreme court of Missouri in the exercise of the general power of superintending control granted to the latter court by Mo. Const. art. 6, § 3, but no order will be made as to what decision the court shall render as to any question involved, or as to the course it shall pursue in disposing of the cause. *State ex rel. Monett Mill. Co. v. Neville (Mo.)* 95

2. Appeal is not an adequate remedy which will bar a writ of mandamus to compel a trial court to require a statutory account by an assignee for creditors, and permit creditors to examine the transactions of the assignee, after it has entered an order refusing to do so, where the assigned property consists of assets of a bank, and by lapse of time prompt action is necessary to prevent claims from being barred by the statute of limitations. *State ex rel. Fourth Nat. Bank v. Johnson (Wis.)* 33

3. Mandamus to compel the granting of a right by the trial court will not be defeated by the fact that that court has entered an order denying the right, which stands unreversed and unappealed from; and, if necessary to meet the exigencies of the case, the ancient writ will be modified and enlarged in terms. *Id.*

4. Mandamus will issue, under the power of superintending control conferred upon the supreme court by Mich. Comp. Laws, § 191, to vacate a void order by the state court of mediation and arbitration granting a rehearing in a cause decided by it. *Renaud v. State Court of Mediation and Arbitration (Mich.)* 458

5. Mandamus to compel the dissolution, as on bond of an injunction issued at the suit of taxpayers, to restrain the sale of a street-railway franchise by a city, will be granted by the Louisiana supreme court in the exercise of the general supervisory jurisdiction over inferior courts given it by the Louisiana Constitution where the effect of the injunction is to arrest the action of the city officers in a matter of public concern within the scope of the authority conferred on them, which is still subject to legislative consideration, and has not yet reached such definite shape as to threaten injury to the plaintiffs in injunction or the public, while the injury to the city may be irreparable, and the remedy by appeal will afford no relief. *State ex rel. New Orleans v. Judge of Civil Dist. Ct. (La.)* 71

6. Mandamus to compel the issuance of election notices under the Nevada apportion-

ment act of 1891, instead of that of 1899, on the ground that the later act is unconstitutional, must be denied for the reason that the prior act is subject to substantially the same constitutional objections as the later, while there are insuperable obstacles of the same character against acting under still earlier statutes, and the case is therefore within the rule that the court will not pass upon a constitutional question unless it is clearly involved and a decision thereon necessary to a determination of the case, and also that mandamus will not be issued unless the right to be protected is clear and undoubted. *State ex rel. Winnie v. Stoddard* (Nev.) 229

7. A demand and refusal of a proper contract to supply news to a newspaper is a necessary condition precedent to any writ of mandamus to compel a press association to enter into such a contract. *State ex rel. Star Pub. Co. v. Associated Press* (Mo.) 151

8. A court will not by mandamus compel a press association to enter into a contract for the supplying of news to a newspaper, since a court cannot compel the making of a contract because the element of the specific act to be performed is lacking, and for the further reason that a contract of this kind would necessarily involve and require for a long time the exercise of judgment, continuous supervision, special experience, and business discretion. *Id.*

NOTES AND BRIEFS.

Mandamus; in exercise of superintending control over inferior courts. 33

To compel service by agency affected with public interest. 152

Absence of adequate remedy. 229

To review expulsion of member of general committee. 674

MASTER AND SERVANT.

Liability for Injury to Waterworks Employee, see MUNICIPAL CORPORATIONS, 4.

1. The obligation of an employer is fundamentally the same towards an employee who volunteers to assist at work not within the scope of his employment as towards one acting within such scope. *Stevens v. Chamberlin* (C. C. A. 1st C.) 513

2. A foreman in charge of the carpenter work on a building has no implied authority to engage medical attendance for one of his men who is injured while at work by a brick falling from a scaffold, so as to render the common employer liable for the value of the services. *Godshaw v. J. N. Struck & Bro.* (Ky.) 668

3. The proprietor of a coal mine who places a dangerous electric wire along a passageway which the miners are accustomed to pass through during the noon hour for the purpose of eating their dinners and for social intercourse, with the knowledge of, and without objection from, the proprietor, is charged with the duty properly to guard and protect the wire or to give notice of the danger to those who, he may reasonably ap-

prehend, are likely to be brought into contact therewith. *Ellsworth v. Metheney* (C. C. A. 6th C.) 389

4. A coal miner going through a passage during the noon hour to another part of the mine to visit another workman is not engaged in the performance of the duties of his employment so as to bring his use of such passageway within the rule that requires the employer to provide a safe place for work. *Id.*

5. The use of barrels that had formerly contained oil, alcohol, turpentine, benzine, whisky, and other things, for the shipment of iron, does not render an employer liable for injury to an employee by explosion of a barrel caused by lighting a match to read the number on the barrel, when it is not shown that the employer had any knowledge that there was danger of such an explosion in the use of such barrels. *Purdy v. Westinghouse Electric & Mfg. Co.* (Pa.) 881

6. A servant who is injured by being caught by a bolt which remains in a timber, in the work of tearing away a portion of a bridge, assumes the danger of the negligence of his fellow servants, as well as the apparent and probable risks of the service in which he is engaged. *O'Neil v. Great Northern Ry. Co.* (Minn.) 532

7. The road master of a railroad company, directing the work of tearing away a bridge, is not the vice-principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends dangers would render the master liable for his omissions in that respect. *Id.*

8. A master is not liable for injury to an employee caused by the fall of a heavy casting which, in order to remove its natural support for repairs, has been negligently shored up by a timber set on end, instead of safe and proper shoring, although the shoring was done by the master mechanic, who was an intermediate officer in the establishment, having authority to direct the person injured and some authority as to his employment and discharge. *Stevens v. Chamberlin* (C. C. A. 1st C.) 513

NOTES AND BRIEFS.

See also EVIDENCE.

Master and servant; liability for medical services rendered servant at request of superior. 669

Use of novel machinery. 390

Safe appliances; negligence of servant supplying. 881

Duty to supply only reasonably safe appliances. 515

Extent of duty to supply safe places. 516

Assumption of risk; contributory negligence. 533

Scope of employment; assumption of more dangerous duty. 514

Liability for injury to servant when not in discharge of duty. 389

Extent of duty of instruction and warning; sufficiency. 517, 533

Warning as to dangers discoverable by servant. 389

Liability of municipality for negligence of servants managing its private business. 383

NOTES AND BRIEFS.

Vice-principalship considered with reference to the superior rank of a negligent servant:—(I.) Mere inequality of rank, significance of. Usually held not to warrant inference that the superior servant is a vice-principal; (II.) doctrine that vice-principalship is not deducible merely from the possession of a power of control over the injured servant: (a) general statement; (b) *rationale* of the doctrine; (c) qualification of the doctrine in cases where an order takes a servant outside the original scope of his employment; (d) power of hiring and discharging subordinates, significance of; (e) application of the doctrine to the various grades of supervising employees; (f) illustrative cases: (1) general managers; (2) employees in control of railway trains; (3) supervising employees in railway yards; (4) foreman of wrecking gangs on railways; (5) employees supervising track work on railways; (6) employees supervising various kinds of construction work; (7) supervising employees in the mechanical departments of railways and other concerns; (8) foreman supervising work in quarries; (9) employee supervising the loading of vehicle elsewhere than on railways; (10) foreman of gangs loading or unloading ships; (11) supervising employees in smelting works; (12) employees supervising farms; (13) supervising employees in manufacturing establishments; (14) supervising employees in mines; (a) without reference to statutes; (b) appointed under statutes; (15) subordinate officers of ships; (16) commanding officers of ships; (III.) doctrine that all superior servants are vice-principals as regards their subordinates: (a) general statement; (b) relation of the superior-servant doctrine to the doctrine that the head of a department is a vice-principal; (c) *rationale* of the doctrine: (1) unequal knowledge of superior and subordinate; (2) inability of master or superior agents to supervise all details of the work; (3) obligation of servant to obey his superior; (4) duty to use care in giving orders regarded as one of the nonassignable duties of the master; (5) summary; (d) what constitutes the exercise of control within the meaning of the doctrine; (e) existence or absence of a power to hire and discharge subordinates, significance of; (f) illustrative cases: (1) general managing agents; (2) employees controlling the movements of trains which they do not assist in operating; (3) employees in control of railway trains; (4) supervising employees in railway yards and depots; (5) employees supervising the loading of railway cars; (6) employees supervising track work on railways; (7) employees supervising various kinds of construction work; (8) foremen in the mechanical departments of railway companies; (9) employees in charge of machinery; (10) su-

pervising employees in manufacturing establishments; (11) supervising employees in smelting works; (12) employees supervising the moving of heavy articles; (13) employees supervising the loading of vessels; (14) foremen in quarries; (15) foremen in mines; (16) officers of ships; (IV.) relation of a general managing agent to his subordinates: (a) introductory; (b) doctrine that a general manager is a vice-principal: (1) English and colonial cases; (2) American cases; (c) *rationale* of the doctrine; (d) doctrine that a general manager is not a vice-principal: (1) English and colonial cases; (2) American cases; (e) opposing theories reviewed; (V.) relation of employees in charge of departments to their subordinates: (a) general statement; (b) *rationale* of the master's liability for the negligence of a departmental manager; (c) limits of the doctrine of departmental control; (d) supervising employees held to be heads of departments: (1) employees in the operating department of railway companies; (2) employees in charge of railway trains; (3) employees supervising the construction and maintenance of railway tracks and structures; (4) supervising employees in railway yards, depots, etc.; (5) supervising employees in the mechanical departments of railways; (6) employees supervising railway departments not connected with transportation; (7) supervising employees in manufacturing establishments; (8) foreman in smelting works; (9) employees supervising mining work; (10) supervising employees under municipalities; (11) employees concerned with the loading of vessels; (12) the commanding officers of ships; (e) supervising employees held not to be heads of departments; (VI.) for what acts of superior servants a master must answer: (a) no responsibility as to matters beyond the scope of the authority of the superior servant; (b) distinction between official and nonofficial acts of supervising employees: (1) generally; (2) distinction considered with relation to the doctrine that the nature of the negligent act is the test of liability; (c) breach of nondelegable duties by any superior servant, master liable for; (d) issuance of orders deemed to be an official act; (e) failure to protect subordinates from transitory dangers deemed to be official negligence; (f) theory that a vice-principal does not represent the master except in so far as he is discharging some nondelegable duty: (1) theory that a vice-principal does not act as the master's representative when he engages in manual labor; (2) qualifications of this theory; (g) theory that a vice-principal represents the master, even when he participates in manual labor; (h) discussions of the doctrine of the dual capacity of the vice-principals: (1) with reference to the standpoints of the courts which reject the superior-servant doctrine; (2) with reference to the superior-servant doctrine; (VII.) summary of the effect of the decisions in each jurisdiction with regard to the relation of supervising employees to their subordinates: (a) intro-

ductory statement; (b) the United Kingdom; (c) British colonies; (d) Federal courts; (e) state courts. 513

MAXIMS.

1. *Aqua currit et debet currere ut currere solebat.* Strobel v. Kerr Salt Co. (N. Y.) 687
2. *Damnum absque injuria.* Fuller v. Huff (C. C. A. 2d C.) 332
3. *Ejusdem generis.* State ex rel. Star Pub. Co. v. Associated Press (Mo.) 151
4. *Noscitur a sociis.* Id.
5. *Nullus commodum capere potest de injuria sua propria.* Schmidt v. Northern Life Asso. (Iowa) 141
6. *Res ipsa loquitur.* Wolf v. Downey (N. Y.) 241
7. *Sic utere tuo ut alienum non lædas.* Strobel v. Kerr Salt Co. (N. Y.) 687
8. *Stare decisis, et non quietam movere.* French Lumbering Co. v. Theriault (Wis.) 910

MAYOR.

Liability for Judicial Act of, see MUNICIPAL CORPORATIONS, 6.

MEDIATION.

See ARBITRATION, 1-3.

MILK.

Prohibition of Adulteration, see CONSTITUTIONAL LAW, 21.

Intent as to Adulteration, see FOOD.

NOTES AND BRIEFS.

Milk; adulteration of; what constitutes. 347

MINES.

Negligence as to, see MASTER AND SERVANT, 3, 4.

MONEY IN COURT.

Any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf. Fisher v. Cushman (C. C. A. 1st C.) 292

MORTGAGE.

Omission of Revenue Stamp, see INTERNAL REVENUE.

A change of the color of a horse which was correctly described in a mortgage when it was given as a bay horse, but which, from natural or unnatural causes, became a white and sorrel spotted horse, without any appearance of bay whatever, does not defeat the rights of the mortgagee as against a person who purchased the horse after his change of color, without any notice of the mortgage. Turpin v. Cunningham (N. C.) 800

MUNICIPAL CORPORATIONS.

Nonuniformity of License Provided by Ordinance, see CONSTITUTIONAL LAW, 9.

Intent of Council as to License Tax, see COURTS, 11.

Establishment of Highways, see HIGHWAYS, 1-4.

51 L. R. A.

Removal of Shade Trees, see HIGHWAYS, 8.

Injunction by, against Nuisance, see INJUNCTION, 3.

Taking Railroad Embankment for Highway, see INJUNCTION, 6.

Restraining Proceeding by, see INJUNCTION, 13, 14.

Liability for Condition of Prisons, see PRISONS.

Lien on Land in Possession of Life Tenant, see TAXES.

Liability for Exhausting Waters, see WATERS, 9.

1. The fact that a general statute for the formation of boroughs has been judicially declared to be unconstitutional in an action brought by the attorney general to test the *de jure* existence of one corporation formed under the act cannot, in a collateral suit, affect the existence or powers of another borough organized under the same act. Coast Co. v. Spring Lake (N. J. Err. & App.) 657

2. An ordinance providing that all municipal printing should be given to union printers is void as tending to encourage monopoly and defeat competition, though there may be no charter requirement for letting such contracts to the lowest bidders. Atlanta v. Stein (Ga.) 335

3. The power to regulate tenpin alleys, given by the general statutes to a city, does not authorize an ordinance forbidding the location of such alleys within the fire limits of the city, or within 100 yards of any private residence or business house, where the only place within the corporate limits and outside of the prohibited points at which such an alley could be located would be 600 yards from the business center, and in a portion of the city remote from any thoroughfare or public place, since the power to regulate does not include the power to suppress or prohibit. Ex parte Patterson (Tex.) 654

4. An injury to a servant of a municipal corporation employed on waterworks, by reason of the negligence of the municipal authorities in failing to furnish him a reasonably safe place to work, to which he has a common-law right under his contract, gives him a right of action for damages, since his right, which is violated, is one which concerns an individual only, and not one which affects the whole community, or depends in any way upon the performance or nonperformance of any public duty. Rhobidas v. Concord (N. H.) 381

5. A city is not liable for the unlawful act of a policeman in making an arrest without just cause and without a warrant. Gray v. Griffin (Ga.) 131

6. The judicial act of the mayor of a city in requiring an accused person to give a larger bond than the law authorizes will not render the city liable. Id.

7. Water commissioners to whom a city ordinance intrusts the entire management of waterworks are servants of the city, and not an independent board for whose acts the

city is not liable, where by N. H. Laws 1871, chap. 69, § 5, which authorizes the establishment of the waterworks, the city is given full control, with the right to place them under the direction of a superintendent or board of commissioners, whose powers and duties may be prescribed by the city council. *Rhobidas v. Concord* (N. H.) 381

8. An action for negligence of water commissioners of a city should be brought against the city, and not against the water precinct, which includes only a portion of the city, where they are officers of the whole city. *Id.*

9. The power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen. *Coast Co. v. Spring Lake* (N. J. Err. & App.) 657

NOTES AND BRIEFS.

See also INJUNCTION; LICENSE; PRISONS; STREETS.

Municipal corporations; ordinance affecting business; unreasonableness. 655

Unreasonable or oppressive ordinances; creation of monopoly; favoring labor unions. 336

Unreasonableness of laws; void as matter of law. 897

Right to sue to enjoin or abate public nuisance. 657

Control of trees; removal of trees. 346

Damages from exercise of police power; protection of health; liability. 306

Liability for negligent management of private business; waterworks or gasworks. 382

Extent of police officer's power; legislative authorization. 199

Liability for torts of policemen and other officers. 131

NEGLIGENCE.

Of or Toward Carrier, see CARRIERS.

Presumption and Burden of Proof as to Injury, see EVIDENCE, 9, 24.

Liability for Leased Premises, see LANDLORD AND TENANT.

As to Master and Servant, see MASTER AND SERVANT.

Liability for Injury to Waterworks Employee, see MUNICIPAL CORPORATIONS, 4.

Sufficiency of Pleading, see PLEADING, 7.

As to Railroad Fire, see RAILROADS.

As Affecting Liability on Warrant, see SALE.

Question for Jury, see TRIAL, 5-8.

NOTES AND BRIEFS.

See also CARRIERS; MUNICIPAL CORPORATIONS.

As affecting recovery on warranty of machine. 781

Negligence; liability of owner of premises for dangerous condition; as to children. 773

Liability of contractors for. 242

Of railroad in setting fires. 646

51 L. R. A.

What constitutes contributory negligence; apparent danger from speed of car. 632

NEWSPAPERS.

As to Press Association, see PRESS ASSOCIATIONS.

NOTICE.

Of Transfer of Land under Registration Act, see CONSTITUTIONAL LAW, 14, 15.

Presumption of, as to Acts of Servants, see EVIDENCE, 8.

Of Acceptance of Guaranty, see GUARANTY.

Failure to Give to Railroad, see PUBLIC IMPROVEMENTS, 1.

NOTES AND BRIEFS.

Notice; of defective title by transfer of negotiable paper after maturity. 433

NUISANCES.

Abatement of, as Taking of Property, see EMINENT DOMAIN, 7.

Obstruction of Highway by Landowner, see HIGHWAYS, 5.

By Establishment of Smallpox Hospital, see HOSPITALS.

Jurisdiction as to, see JUSTICE OF THE PEACE.

Abatement by Municipal Officer, see MUNICIPAL CORPORATIONS, 9.

NOTES AND BRIEFS.

See also INJUNCTION.

Nuisance; unlicensed dogs as; abatement by destruction. 682

Condition of leased premises as; liability for. 773

OBSTETRICS.

Regulation of Practice of Medicine, see STATUTES, 3.

OFFICERS.

Liability for Arrest and Imprisonment, see FALSE IMPRISONMENT, 3, 4.

1. The appointment of some of the members of a board of dental examiners by the state dental association under the provisions of Ind. Acts 1899, p. 479, is not void for want of authority in the legislature to confer such powers upon a private corporation since the office is not one for which the Constitution provides, but is within the provisions of Ind. Const. art. 15, § 1, for the appointment of officers not otherwise provided for in the Constitution, in such manner as may be prescribed by law. *Overshiner v. State* (Ind.) 748

2. The contention that the legislature cannot bestow police powers upon a private corporation is not valid as against the appointment of some of the members of a board of dental examiners by the state dental association in conformity to Ind. Acts 1899, p. 479, as there is no reason why such an organization of practising dentists for the promotion of scientific knowledge and skill in their profession should not be as safe as a repository of such power as an individual. *Id.*

NOTES AND BRIEFS.

See also **POLITICAL PARTIES.**

Officers; appointment of, delegation of power to private corporation. 748

OSTEOPATHY.

One who practises what is known as "osteopathy" is a practitioner of medicine within the meaning of Neb. Comp. Stat. chap. 55, art. 1, making it unlawful to practise medicine without having a certificate from the state board of health. *Little v. State* (Neb.) 717

PARDON.

1. A pardon granted after conviction and pending a hearing in the supreme court, to which the case was removed by the defendant by bill of exceptions before sentence, is valid under Mich. Const. art. 5, § 11, providing that the governor may grant pardons after conviction, since the defendant admits his guilt and waives the bill of exceptions by his petition for, and acceptance of, the pardon and asking to have the record remanded to the trial court on the strength thereof. *People v. Marsh* (Mich.) 461

2. Failure to make application for a pardon in the first instance to the Michigan board of pardons does not make a pardon granted by the governor void. *Id.*

3. The condition attached to the granting of a pardon, that the convicted person shall pay to the county a specified sum for its reimbursement for the expense incurred for the prosecution, is not unlawful so as to render the pardon invalid. *Id.* 463

PARENT AND CHILD.

Action by Mother of Illegitimate Child, see **DEATH.**

Custody of Children, see **INFANTS.**

NOTES AND BRIEFS.

Parent and child; right to custody of children; abandonment of right. 840

PARTNERSHIP.

Agreement in Restraint of Trade, see **CONTRACTS**, 3-5.

Allegation as to Malicious Prosecution by, see **PLEADING**, 8.

Liability for Malicious Arrest, see **FALSE IMPRISONMENT**, 2.

1. A partnership is liable as such in an action for malicious prosecution, where all the members united in instituting and carrying on the prosecution for the purpose of furthering the partnership interests. *Page v. Citizens' Bkg. Co.* (Ga.) 463

2. One partner cannot maintain against another an action at law while the partnership continues for damages resulting to the partnership by reason of the defendant's failure to perform a duty imposed upon him by a stipulation in the partnership agreement, even though the plaintiff seeks to recover only his *pro rata* share of the damage, and although the partnership owes no debts 51 L. R. A.

to third persons, and there may be no other debt due by either of the partners to the other. *Miller v. Freeman* (Ga.) 504

3. An accounting may be had in equity by one partner against the other, without a final winding up and dissolution, in a case where the partnership has, by the agreement, several years to run, and where the partnership articles contemplate a settlement at the end of each season. *Id.*

NOTES AND BRIEFS.

Partnership; action at law by one partner against another. 504

Liability of partnership for torts:—(I.) Introductory; (II.) torts of partnership as an entity; (III.) torts of individual member: (a) wilful and malicious torts: (1) when other members liable; (2) when other members not liable; (b) trespass and trover: (1) trespass; (2) trover; (c) negligence: (1) when other members liable; (2) when other members not liable; (d) fraud: (1) general; (2) in purchase of property; (3) in sale of property; (4) as to trust funds: (a) when other members liable; (b) when other members not liable; (5) for individual debt or benefit; (6) estoppel; (e) approval of other members—firm accepting benefit; (f) other torts: (1) when other members liable; (2) when other members not liable; (IV.) engaging in unlawful business; (V.) liability joint and several; (VI.) conclusion. 463

PATENTS.

Damages for Infringement, see **DAMAGES**, 10, 11, **NOTES AND BRIEFS.**

PEDDLERS.

See **COMMERCE**, **NOTES AND BRIEFS.**

PESTHOUSE.

Depreciation of Property by Establishment of, as Taking, see **EMINENT DOMAIN**, 8.

Establishment of, as Nuisance, see **HOSPITALS.**

PHYSICIANS AND SURGEONS.

Discrimination as to, see **CONSTITUTIONAL LAW**, 7.

Liability for Services, see **MASTER AND SERVANT**, 2.

Practice of Osteopathy, see **OSTEOPATHY.**

Scope of Statute, see **STATUTES**, 3.

A physician must, in the first instance, determine how often he ought to visit a patient, and, if the party employing him accepts his services, and does not discharge him or require him to come less frequently, or fix the times when he wishes him to attend, he cannot afterwards refuse to pay for visits on the ground that they were unnecessary. *Ebner v. Mackey* (Ill.) 298

NOTES AND BRIEFS.

See also **MASTER AND SERVANT.**

Physicians; physician's right to determine frequency of visits to patient. 298

Power of legislature to regulate; what constitutes practice of medicine. 718

PLEADING.

1. A public act dealing with the interests of the general public need not be pleaded. *Sanborn v. People's Ice Co. (Minn.)* 829

2. The objection that a court has no jurisdiction to review the acts of church authorities in a matter purely disciplinary is not waived by an answer, since the court has no jurisdiction of the subject-matter and an objection raised at any time is fatal. *Travers v. Abbey (Tenn.)* 260

3. A petition in an action for conversion of a chattel, brought in the name of one who had not such possession as would entitle him to maintain the action, cannot be so amended as to proceed in the name of the plaintiff for the use of the real owner. *Mitchell v. Georgia & A. Ry. (Ga.)* 622

4. Failure to allege special damages is not fatal to a complaint for wrongful refusal to honor a check, where it is averred that plaintiff is a trader. *J. M. James Co. v. Continental Nat. Bank (Tenn.)* 255

5. Failure to aver that a bank did not have a lien on a deposit which it refused to apply in payment of a check is not fatal to a declaration against it for such refusal, since the lien, if any existed, was a matter of defense to be brought forward by plea. *Id.*

6. An allegation that a newspaper is ready to enter into "a proper contract" with a press association is too vague and indefinite to base thereon the judgment of a court for the making of such a contract. *State ex rel. Star Pub. Co. v. Associated Press (Mo.)* 151

7. A complaint alleging that a railroad company unlawfully and negligently failed to fence its right of way or any portion thereof in a village, and that a child went upon the right of way and was burned by fire thereon, is not sufficient to allege that the child entered at any point that was unfenced or at any point which might lawfully have been protected by fence. *Erickson v. Great Northern R. Co. (Minn.)* 645

8. In an action against a partnership for malicious prosecution, plaintiff should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests, and should state exactly in what way the partnership was involved in the matter which was the foundation of the prosecution. *Page v. Citizens' Bkg. Co. (Ga.)* 463

NOTES AND BRIEFS.

Pleading; excuse or waiver of variation from contract. 239

POLES.

Of Street Railways as Additional Servitude, see *EMINENT DOMAIN*, 11.

POLICE.

Liability for Arrest by, see *MUNICIPAL CORPORATIONS*, 5.

§1 L. R. A.

POLICEMEN.

NOTES AND BRIEFS.

See also *MUNICIPAL CORPORATIONS*.

Policemen; extent of powers; legislative authorization. 199

POLICE POWER.

NOTES AND BRIEFS.

See also *CONSTITUTIONAL LAW*.

Police power; state cannot divest itself of. 415

POLITICAL PARTIES.

Conclusiveness of Decision, see *COURTS*, 7.

Powers and Rules of Committee, see *VOTERS AND ELECTIONS*, 4, 5.

See also *COURTS*, 7.

NOTES AND BRIEFS.

Political parties; power of general committee to expel a member; review by certiorari; by mandamus. 674

PONDS.

See *WATERS, NOTES AND BRIEFS*.

PRESS ASSOCIATION.

As Trust or Combination, see *CONSPIRACY*.

1. A right of eminent domain possessed by a press association under its original charter for the purpose of establishing telegraph and telephone lines, but which has never been exercised and has been abdicated by an amendment to the charter, is of no effect in determining the right of the government to regulate the business. *State ex rel. Star Pub. Co. v. Associated Press (Mo.)* 151

2. A by-law of a press association providing for the admission of new members upon the sanction of a majority of the board of directors, even if it could be deemed to have been passed for the benefit of an applicant for membership, cannot be enforced by the courts for his benefit, where it does not fix the compensation to be paid or the other terms of the contract. *Id.*

3. A press association which has no exclusive or peculiar facilities for the gathering of news, but which has numerous competitors in the business and which has been granted no special or exclusive right or privilege by the state, cannot be compelled to enter into a contract with, or to furnish news to, a newspaper which it has refused to serve in a town where it supplies news to other newspapers. *Id.*

PRESUMPTION.

See *EVIDENCE, NOTES AND BRIEFS*.

PRINCIPAL AND AGENT.

Interference with Agent's Possession of Property, see *ACTION OR SUIT*, 1.

Criminal Liability of Agent, see *CRIMINAL LAW*, 2.

Presumption as to Continuance of Agency, see *EVIDENCE*, 7.

Stipulation as to Agency, see INSURANCE, 1.

Action by Agent for Conversion, see TROVER.

Usury in Agent's Commission, see USURY, 1, 2.

One who received money from the owner thereof for the express purpose of lending it out at interest, and with authority so to do, either general or limited, and who afterwards did lend the money to another, taking therefor a promissory note payable to such owner, is to be regarded as his agent, although the borrower, at the time of executing the note or subsequently, signed a paper purporting to constitute the person with whom he dealt in the transaction his agent to obtain the loan. *Clarke v. Havard* (Ga.) 499

NOTES AND BRIEFS.

Principal and agent; representations; declarations or admissions of agent, subsequent to contract. 289

PRINCIPAL AND SURETY.

Judgment against Surety in Summary Proceeding, see CONSTITUTIONAL LAW, 11.

PRISON.

A city is not liable for injuries sustained by a prisoner in the city guard house by reason of its improper construction and unwholesome condition, or by reason of the failure of the city authorities to furnish him with any means by which he could protect himself from the inclemency of the weather. *Gray v. Griffin* (Ga.) 131

NOTES AND BRIEFS.

Prisons; municipal liability for condition of. 131

PROCEEDINGS IN REM.

Jurisdiction by Virtue of Power over Res, see CONSTITUTIONAL LAW, 13.

PROHIBITION.

1. The common-law office of the writ of prohibition is not enlarged so as to reach proceedings not of a judicial character by Mont. Code Civ. Proc. § 579, declaring that "the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." *State ex rel. Scharnikow v. Hogan* (Mont.) 958

2. Prohibition to stay further proceedings under a void order for rehearing by a court of mediation and arbitration may be granted by the supreme court of Michigan under its power of superintending control. *Renaud v. State Court of Mediation and Arbitration* (Mich.) 458

3. Writs of prohibition to prevent the secretary of state from certifying certain nominations to county clerks and recorders, and 51 L. R. A.

to prevent a county clerk and recorder from printing the names of persons nominated by a certain convention, are not within the jurisdiction of the supreme court under Mont. Const. art. 8, § 3, giving that court power, in its discretion, to issue writs of prohibition, since this must be construed to extend only to proceedings wherein such writs lay at the time the Constitution was adopted; and the authority to issue such writs cannot therefore be derived from the subsequently enacted provisions of Mont. Code Civ. Proc. § 1980, providing for the issue of such writs to officers exercising ministerial functions. *State ex rel. Scharnikow v. Hogan* (Mont.) 958

NOTES AND BRIEFS.

Prohibition; in exercise of superintending control over inferior courts. 33

PUBLICATION.

As Violation of Author's Right, see COPYRIGHT, 2.

PUBLIC IMPROVEMENTS.

Liability of Railroad Lessee, see ACTION OR SUIT, 5.

1. Failure to give notice to the owner of a railroad of an assessment of which notice was given to a lessee only, whose name was placed upon the plat, instead of that of the owner, does not invalidate the assessment under a statute which says that a mere mistake in the name of the owner shall not invalidate the lien, and that the plat must show the names of the owners. *Chicago, R. I. & P. R. Co. v. Ottumwa* (Iowa) 763

2. The authority to assess a railroad right of way that runs along the side of a street without occupying any portion of it, for the expense of paving the street, is not conferred by Iowa Code 1873, § 809, providing that railroad real estate shall not be included in the assessment, to individuals, of the adjacent property, since this section relates to taxation for governmental purposes, and not to local assessments. Id.

3. An assessment upon a railroad for the cost of paving a street, which is made a paramount lien by Iowa Acts 25th Gen. Assem. chap. 7, § 12, is thereby authorized only upon a railroad which occupies a portion of the street, and not upon one which runs along the side of the street, but occupies no portion of it. Id.

4. A railroad right of way alongside a street is not subject to assessment for a street pavement, under Iowa Code 1873, § 466, authorizing municipalities to assess the costs of pavements upon lots and parcels of land fronting on the highway, since such railroad right of way is not a lot or parcel of land within the meaning of that statute, but is only an easement which is not benefited by the pavement. Id.

NOTES AND BRIEFS.

Public improvements; assessment of railroad right of way for. 763

PUBLIC MONEY.

The grant of license fees paid for dogs to a humane society by N. Y. Laws 1896, chap. 448, providing that such fees may be used by the society towards defraying the cost of carrying out the provisions of the statute and maintaining a shelter for lost, strayed, or homeless animals, "and for its own purposes," is an appropriation of public moneys for private use in violation of N. Y. Const. art. 8. *Fox v. Mohawk & H. R. Humane Soc.* (N. Y.) 681

PUMP.

Liability for Exhausting Waters, see **WATERS**, 9.

QUAIL.

Prohibition of Possession, see **CONSTITUTIONAL LAW**, 16.
Possession of, During Close Season, see **GAME LAWS**.

RAILROADS.

As Carriers, see **CARRIERS**.
Condemnation of Land for, see **EMINENT DOMAIN**, 1-8.
Crossing of, by Street Railway in Highway, see **HIGHWAYS**, 6, 7.
As to Injury to Employees, see **MASTER AND SERVANT**.
Assessment of, for Street Improvement, see **PUBLIC IMPROVEMENTS**, 2-4.
Crossing of, by Street Railways, see **STREET RAILWAYS**.

A railroad company setting fire to stumps and rubbish on its right of way is not bound to exercise due care to so guard the fire that children intruding on the right of way cannot come in dangerous contact with the fire, though induced to do so by its attractiveness. *Erickson v. Great Northern R. Co.* (Minn.) 645

NOTES AND BRIEFS.

See also **PUBLIC IMPROVEMENTS**.

Railroads; statutory duty as to fences; failure to perform; setting fires as negligence. 646

Contributory negligence; what constitutes. 632

REAL PROPERTY.

Notice of Transfer under Registration Act, see **CONSTITUTIONAL LAW**, 14, 15.
Registration by Assistant Clerk, see **COURTS**, 4.

RECEIVERS.

Appointment as Affecting Officers' Salaries, see **CORPORATIONS**.

Appointment by Federal Court as Affecting State Court. see **COURTS**, 12.

NOTES AND BRIEFS.

Receivers; effect of appointment of, on compensation of officers, agents, or employees for unexpired term. 146
51 L. R. A.

REHEARING.

Right of Court of Mediation to Grant, see **ARBITRATION**, 3.

RELATIONSHIP.

Under Statute Giving Right of Action for Death, see **DEATH**.

RELIGIOUS SOCIETIES.

Protection of Members, see **INJUNCTION**, 1.

See also **COURTS**, 8, 9.

1. A pastor has no property right in his salary as against his church, when he depends entirely upon the duty of the church to support him by voluntary contributions, and has no contract for salary. *Travers v. Abbey* (Tenn.) 260

2. The removal by church officials, under authority of the church discipline, of a pastor who has no contract right to salary, and the appointment of his successor, will not be reviewed by the civil courts. *Id.* See also **COURTS**, 8, 9.

3. The expulsion from his church connection of a member by reason of which he is deprived of the privilege of sitting as a delegate to a representative assembly to which he has been elected, does not involve a property or civil right so as to entitle him to appeal to the civil tribunals, although as delegate he would be entitled to compensation. *Hatfield v. DeLong* (Ind.) 751

REMOVAL OF CAUSES.

A suit against a receiver appointed by a Federal court is not removable from a state court to a Federal court, when the amount in controversy is less than \$2,000, on the ground that such suit necessarily arises under the laws and Constitution of the United States, since the act of March 3, 1887, as re-enacted by the act of August 13, 1888, § 3 (25 U. S. Stat. at L. 433, chap. 866), authorizing suits against receivers of Federal courts without previous leave of the court, has the effect to make such a suit a distinct and independent suit, which is not ancillary to the suit in which the receiver was appointed, and to authorize it, not only to be brought in a state court, but to be prosecuted to final judgment therein. *Pendleton v. Lutz* (Miss.) 649

NOTES AND BRIEFS.

Removal of causes; to Federal courts; dissolution of association. 649

REPLEVIN.

Sale for Immoral Purposes as Defeating, see **CONTRACTS**, 1.

Against Executor, see **EXECUTORS AND ADMINISTRATORS**, 2, **NOTES AND BRIEFS**.

RES GESTÆ.

See **EVIDENCE**, 19

RÉSUMÉ.

For Résumé of Contents of Book, see 865.

SALE.

For Immoral Purposes as Affecting Vendor's Rights, see **CONTRACTS**, 1.
 Purchaser at, Subject to Prior Vendor's Rights, see **ESTOPPEL**, 2.

The liability of an employer for injury to an employee by the explosion of a boiler, on the ground of negligence in failing to discover the defect in the boiler by inspection, will not preclude the employer from recovering against the maker of the boiler, where the employer's negligence was induced by the warranty or representations of the maker. *Boston Woven Hose & Rubber Co. v. Kendall* (Mass.) 781

NOTES AND BRIEFS.

Sale; negligence as affecting recovery on warranty of machine. 781

SEAMEN.

Penal Statute against Inducing Deser-tion, see **COMMERCE**, 2.

SHIPPING.

Towage License Fees, see **COMMERCE**, 1.
 Penal Statute against Inducing Deser-tion of a Seaman, see **COMMERCE**, 2.

NOTES AND BRIEFS.

Shipping; state regulation; where Con-gress has legislated. 721

SMALLPOX.

Depreciation of Property by Establish-ment of Hospital as Taking, see **EMINENT DOMAIN**, 8.
 Establishment of Hospital as Nuisance, see **HOSPITALS**.

SPRINGS.

See **WATKES**, 5, 10.

STAMP.

Effect of Omission, see **INTERNAL REVE-NUE**.

STATE.

See **GAME LAWS**, **NOTES AND BRIEFS**.

STATUTES.

Nonuniformity of License, see **CONSTITUTIONAL LAW**, 9.

Definition in, as Invasion of Province of Court, see **COURTS**, 6.

Corroboration of Accomplice, see **EVI-DENCE**, 26.

Entry in "Journal," see **LEGISLATIVE JOURNAL**.

1. A constitutional requirement that amendments shall be submitted so that the electors shall vote for or against each separately, does not limit the consideration to the votes cast for or against the amendment alone in determining whether or not it has been ratified by a majority of the electors of the state. *Re Denny* (Ind.) 722

2. A writing on the margin of a legislative journal, under instructions of the clerk after the journal was filed with the secretary of 51 L. R. A.

state, is an unlawful interpolation without any legal effect to give vitality to an enact-ment, however honestly the clerk may have acted. *Montgomery Beer-Bottling Works v. Gaston* (Ala.) 396

3. A regulation of the practice of surgery and obstetrics is within the scope of the title of a statute "to regulate the practice of medicine." *Little v. State* (Neb.) 717

4. Personal property omitted from assess-ment prior to the amendment of Wis. Rev. Stat. § 1050, is subject to the provisions of that statute authorizing reassessment of property thus omitted in preceding years. *State ex rel. Davis & S. Lumber Co. v. Pors* (Wis.) 917

5. The penalty prescribed by one section of a statute for violation of another section applies to the violation of a portion of the latter section that is subsequently added by amendment without amending the section that prescribes the penalty. *Little v. State* (Neb.) 717

6. The word "void" in Wis. Rev. Stat. § 2320, declaring that conveyances in fraud of creditors "shall be void," is to be construed to mean "voidable," and not absolutely void. *French Lumbering Co. v. Theriault* (Wis.) 910

NOTES AND BRIEFS.

Statutes; construction of, as retrospective; penal strictly construed. 918

Strict construction; as to taxes. 284

Regulating "practice of medicine;" con-struction. 718

Covered wagon as disorderly house within terms of. 631

Easement as "land" within terms of. 765

Title; sufficiency of. 718

Legislative journals; what constitutes. 398

STOCK AND PRODUCE EXCHANGE.

Estoppel of Boycotted Member, see **ES-TOPEL**, 1.

See also **CONSPIRACY**, **NOTES AND BRIEFS**.

A produce exchange the constitution and by-laws of which regulate the credit to be al-lowed its members, discriminate in the price to be paid for produce against persons not members, control the delivery of goods, and provide a penalty by fine and suspension for offending and defaulting members, is a com-bination in restraint of trade in violation of Minn. Gen. Laws 1899, chap. 359, prohibiting trusts and combinations, since it tends to limit and control the market price of prod-uce, and limits and interferes with the free and open purchase and sale of commodities. *Ertz v. Produce Exchange* (Minn.) 825

STREET RAILWAYS.

As Carriers, see **CARRIERS**, 2-5.

As Additional Servitude, see **EMINENT DOMAIN**, 9-11.

Crossing Railroad in Highway, see **HIGHWAYS**, 6, 7.

Removal of Trees in Highways, see
HIGHWAYS, 9.

A street-railway company may construct its lines along a street crossing the track of a steam-railroad company when it has permission of the proper municipal or county authorities, without instituting condemnation proceedings or being required to pay damages,—at least where the railroad company has only a mere easement on the street at the crossing. *Southern R. Co. v. Atlanta R. & P. Co.* (Ga.) 125

NOTES AND BRIEFS.

See also TRIAL.

Street railways; as additional burden; poles and wires. 924

Duty as to speed and control at regular stopping places. 633

Contributory negligence; what constitutes; voluntary exposure; apparent danger; what excuses. 632

SUBTERRANEAN STREAMS.

See WATERS, 9, 10.

SUICIDE.

See INSURANCE, 5, 6.

SUNDAY.

The work of a barber is not a work of necessity, within the meaning of an exception to Tex. Pen. Code, art. 196, forbidding Sunday labor, in the absence of any peculiar reason showing that under the circumstances of a particular case the work was necessary. *Ex parte Kennedy* (Tex.) 270

NOTES AND BRIEFS.

Sunday; what are works of necessity. 270

SUPERINTENDING CONTROL.

Of Courts, see CERTIORARI, 1; COURTS, 1-3, NOTES AND BRIEFS.

SURGERY.

Scope of Statute, see STATUTES, 3.

SURVIVORSHIP.

Presumption as to, see EVIDENCE, 6, NOTES AND BRIEFS.

TAXES.

Jurisdiction of Suit to Collect, see EQUITY, 1.

Restraining Sale, see INJUNCTION, 10.
Amendment Covering Omitted Property, see STATUTES, 4.

1. The fact that personal property which had been omitted from taxation for the previous year is no longer in existence, and therefore cannot be entered for the tax of the current year, does not prevent it from being entered for the omitted year under Wis. Rev. Stat. § 1059, as amended by Wis. Laws 1899, chap. 50, although the language of the statute is that in cases of omitted assessments the property shall be entered "once additionally" for each of the previous years (not exceeding three) that it was not 51 L. R. A.

taxed. *State ex rel. Davis & S. Lumber Co. v. Pors* (Wis.) 917

2. Jurisdiction of the assessors to assess property not now in existence or owned by the party to be taxed therefor is conferred by Wis. Rev. Stat. § 1059, as amended by Wis. Laws 1899, chap. 50, authorizing such assessment for a previous year in which it should have been made, but was not, and that it shall be made "according to the assessors' best judgment," although ordinary assessments are required by § 1055 to be made upon actual view as far as practicable. Id.

3. An assessor's report that lumber assessed is manufacturer's stock cannot be ignored and the property regarded by the board of review as merchandise, in the absence of any evidence to contradict the report. Id.

4. Tax assessments on land, made pending a life estate, are not a lien on the fee where the statute requires the assessment to be against the life tenant as such, and authorizes a sale of his chattels as well as of his estate in the property to pay the tax, and then expressly provides that it shall not be so construed to affect the title of a tenant in reversion or remainder to real estate sold for default of the life tenant. *Tabb v. Com.* (Va.) 283

5. The lien of a city for its taxes on land in possession of a life tenant is not extended to the fee by a charter provision that if land is sold to the city for taxes, and not redeemed, the city or its assigns shall acquire an absolute title to the same in fee, where the other charter provisions and the ordinances follow in all material respects the general tax laws of the state which give a lien only on the life estate, and under the charter the lien extends only to the life estate in case the property is struck off to a private bidder, while no opportunity for redemption is given to a reversioner or remainderman. Id.

NOTES AND BRIEFS.

See also STATUTES.

In aid of private enterprises for individual benefit. 336.

During life tenancy; who liable; lien. 283

Failure to assess; subsequent right to collect. 918.

TENPIN ALLEYS.

Regulation of, see MUNICIPAL CORPORATIONS, 3.

TONNAGE.

City License Fees as, see COMMERCE, 1.

TORTS.

A joint liability for injuries to a building, caused by water from an underground sewer, is not imposed upon persons who have discharged surface water from their respective premises into such sewer, where each in so doing acted independently and without intent to cause the injury that resulted; but

each person's liability in such case is limited to that part of the damages that was caused by his own act. *Bonte v. Postell* (Ky.) 187

NOTES AND BRIEFS.

See also ACTION OR SUIT.

Torts; liability of partnership for. 463

TOWAGE.

City License Fees for, see COMMERCE, 1.

TRADEMARK.

See also DAMAGES, NOTES AND BRIEFS.

The term "health food" cannot be a technical trademark, either with or without the word "company," as the term is descriptive of quality. *Fuller v. Huff* (C. C. A. 2d C.) 332

TRADENAME.

The use of the name "health food" to describe foods which the manufacturer had previously called "sanitarium foods" may be prevented by injunction at the suit of another manufacturer which had used the name for eighteen years before, even if the defendant may have been innocent in adopting the same name, where, after it had learned of the complainant's prior use, it continued to use the term in spite of remonstrance, with a guaranty to its purchasers against suits, though the packages plainly state the name of the manufacturer, and do not imitate or resemble in external appearance the packages of the complainant. *Fuller v. Huff* (C. C. A. 2d C.) 332

NOTES AND BRIEFS.

Tradename; infringement; addition of other words; deception. 332

TREES.

Removal of, in Highway, see HIGHWAYS, 8, 9.

NOTES AND BRIEFS.

Trees; right of municipality to remove. 346

Destruction of, in highway; necessity of notice to owner. 950

TRESPASS.

NOTES AND BRIEFS.

Trespass; liability of partnership for. 463

TRIAL.

Submission to jury.

1. The question whether a judgment against the plaintiff could be collected upon execution need not be submitted to the jury in an action by him for breach of contract in transferring a note to a bona fide purchaser which he has not yet paid, where the court has told the jury that his insolvency or the collectibility of the judgment is an element to be taken into consideration in ascertaining the amount of his damages. *Lyle v. McCormick Harvesting Mach. Co.* (Wis.) 900

2. There is sufficient evidence to justify a
51 L. R. A.

submission of defendant's guilt to the jury in a prosecution for burglary, where the stolen property was discovered soon after in the joint possession of defendant, and another and a letter addressed to defendant was found near the burglarized building in the line of horses' tracks leading therefrom directly to his home; and an instruction to return a verdict of not guilty is properly refused. *State v. Tucker* (Or.) 246

Questions for court or jury.

3. A period of about eight months after the expiration of the year within which a policy requires action thereon to be brought cannot be held unreasonable as matter of law, but that question is for the jury, where the insurer had authorized a delay for the return of an agent to whom it was alleged that premiums had been paid. *Hall v. Union C. L. Ins. Co.* (Wash.) 283

4. The question whether one who supported certain measures thereby championed legislation opposed to the moral interests of the community, as an alleged libel charged him with doing, is one for the jury. *Eikhoff v. Gilbert* (Mich.) 451

5. A person desiring to take passage on an electric street car, who attempts for that purpose to go over the track on a crosswalk, after proper signals have been given to stop the car, and who mistakenly believes the car is slackening speed, but is deceived by the glare of the headlight in the darkness, and by the fact that the car is running at unlawful speed, and who is struck and injured by the car, is not guilty of contributory negligence, as a matter of law; but this is a question for the jury. *Walker v. St. Paul City R. Co.* (Minn.) 632

6. The question whether a passenger riding on the front platform of an electric car is in the exercise of due care is ordinarily for the jury. *Sweetland v. Lynn & B. R. Co.* (Mass.) 783

7. The contributory negligence of a person killed through the negligence of railroad employees while awaiting the arrival of a relative on an incoming train, in the space between two tracks, used by the company for receiving and discharging passengers, is a question for the jury, where the situation did not suggest imminent danger. *Denver & R. G. R. Co. v. Spencer* (Colo.) 121

8. The question of the negligence of a railroad company in placing a baggage truck between two tracks, in the space used for receiving and discharging passengers, of such width that as originally placed it would clear a train passing upon either side, but so constructed as to veer easily so that a moving train would come in contact with it and render it dangerous to passengers within the space, is for the jury, in an action to recover damages for the death of a man killed while awaiting the arrival of a relative on an incoming train, where the engine, baggage and smoking car cleared the truck, but the next car, though of the same width, struck and hurled it against deceased, inflicting the injuries from which he died. *Id.*

Instructions.

9. The court should, in an eminent domain proceeding, call the attention of the jury to the particular points in dispute on the evidence, and point out to them their plain duty as to a finding of fact from the weight of it, and as to the application of the law to the facts so found. *Hamilton v. Pittsburg, B. & L. E. R. Co. (Pa.)* 319

10. An instruction that, if two or more persons charged jointly with the crime of burglary were acting together for that purpose, and, while so acting, one of them actually broke and entered the building with intent to steal therefrom, all are guilty and any one of them may be prosecuted alone, is proper on a prosecution for burglary, where the breaking is proved, and there is evidence that two persons were engaged in it, and defendant and another were found shortly thereafter jointly engaged in disposing of the stolen property. *State v. Tucker (Or.)* 246

11. The refusal to give an instruction as to a question submitted to the jury is proper when the only portion of it which is in any wise broader or more instructive than the question itself consists of a general rule of law respecting the effect of an answer given to the interrogatory. *Lyle v. McCormick Harvesting Mach. Co. (Wis.)* 906

NOTES AND BRIEFS.

Trial; construction by public of alleged libelous language; privilege; question for jury. 451

Reasonableness of speed of car for jury in absence of statute; negligence. 633

Reasonable use of water, question of fact. 690

Substantial performance of contract; question of fact. 951

TROLLEY.

Poles Supporting Wire as Additional Servitude, see **EMINENT DOMAIN**, 11.

TROVER.

A person in possession of a chattel merely as agent for another and having no special property or interest therein cannot maintain an action of trover for conversion of the property. *Mitchell v. Georgia & A. Ry. (Ga.)* 622

NOTES AND BRIEFS.

Trover; sufficiency of possession to maintain against wrongdoer. 622

Liability of partnership for. 463

TRUSTS.

See **LIMITATION OF ACTIONS**, 2.

UNFAIR COMPETITION.

See **IMITATIONS**.

USURY.

1. The exaction by a lender's agent of a commission from the borrower, which, in addition to the interest paid, amounts to more 51 **L. R. A.**

than legal interest, constitutes usury. *Clarke v. Harvard (Ga.)* 499

2. A lender of money through an agency, who pays no compensation to the agent, is chargeable with usury in the loan if the agent exacts from the borrower a commission which, added to the interest paid, exceeds lawful interest. *Id.*

3. The power of equity to compel the payment of legal interest as a condition of canceling an usurious contract is not taken away by Ala. Code 1896, § 2630, providing that such contracts "cannot be enforced either at law or in equity, except as to the principal," while the words "either at law or in equity" were not found in the prior statutes, since the requirement that legal interest be paid as a condition of cancelation is not an enforcement of the contract within the meaning of the statute. *Lindsay v. United States Savings & L. Co. (Ala.)* 393

NOTES AND BRIEFS.

Usury; power of legislature to deprive lender of all interest. 393

VICE PRINCIPALSHIP.

See **MASTER AND SERVANT**, **NOTES AND BRIEFS**.

VOTERS AND ELECTIONS.

Majority for Constitutional Amendment, see **CONSTITUTIONAL LAW**, 1. Judicial Notice as to Votes, see **EVIDENCE**, -1, 2.

Restraining Certification of Nominations, see **PROHIBITION**, 2.

Ratification of Constitutional Amendment, see **STATUTES**, 1.

1. A deprivation of the right to participate in the selection of candidates for office is a deprivation of the right of franchise. *Britton v. Board of Election Comrs. (Cal.)* 115

2. The denial to a political party which cast less than 3 per cent of the vote at the next preceding election, of the right to the privileges and protection accorded to other political parties by the California primary election law of March 3, 1899 (Stat. 1899, p. 47), and thereby prohibiting the members of such party from holding a nominating convention, is a deprivation of the right of franchise and a violation of the constitutional rights under Cal. Const. art. 1, § 10, giving them the right to freely assemble together to consult for the common good, etc., § 21, providing for equality of privileges and immunities, and § 11, requiring laws of a general nature to have a uniform operation. *Id.*

3. Permitting voters, without regard to their party affiliations, to vote at a primary election under Cal. act March 3, 1899 (Stat. 1899, p. 47), for delegates to the political convention of any party that he chooses to select, whether he is a member of that party or not, or ever intends to become a member of it, gives an opportunity for the disruption and destruction of a political party by its opponents, and constitutes a violation of

the reserved rights of the people, which, it is provided by Cal. Const. art. 1, § 23, shall not be impaired or denied by the enumeration of rights declared. *Id.*

4. A county committee of a political party has no power to remove one of its members under N. Y. Laws 1898, chap. 179, providing that there must be a county committee for such party, and that its members shall be elected for the term of one year at the primary election provided by statute. *People ex rel. Coffey v. Democratic General Committee (N. Y.)* 674

5. Rules of a county committee of a political party authorizing the expulsion of a member cannot be operative after the enactment of N. Y. Laws 1898, chap. 179, which provides for the election of the members of such committee for a term of one year and authorizes the committee to make rules not contrary to, or in contravention of, the statutes, though it declares that rules previously adopted shall continue in force until new ones are adopted; since this provision is subject to the condition that the rules are in conformity with the statute. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Voters and elections; majority, what constitutions; constitutional amendment; votes not marked for. 723

WARRANTY.

See also SALE.

NOTES AND BRIEFS.

Warranty; negligence as affecting recovery on. 781

WATERS.

Injunction by Riparian Proprietors, see ACTION OR SUIT, 8.

As Boundaries, see BOUNDARIES, 1.

Right to Ice, see ICE.

Pollution, see INJUNCTION, 8.

Liability for Acts of Water Commissioners, see MUNICIPAL CORPORATIONS, 7, 8.

Joint Liability as to, see TORTS.

See also EVIDENCE, 11, 12, 27, 28; MAXIMS, 1.

1. The power of a state to require fishways in dams across streams extends to a navigable stream that flows beyond the bounds of the state, so long as intercommunication between the states is not thereby affected. *State ex rel. Remley v. Meek (Iowa)* 414

2. The use of water from a stream to operate salt works by putting it into a bed of salt and, when saturated, taking it out in the form of brine, evaporating it, and permitting a portion of it after it is again condensed into water to return to the stream, is a wrongful use which a lower riparian owner can restrain, when it results, not only in the permanent diversion of a large quantity of water from the stream, but also renders the rest so salt at times that cattle will

not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted by it. *Strobel v. Kerr Salt Co. (N. Y.)* 687

3. The fact that other manufacturers are doing the same thing as one against whom an injunction is sought to prevent his diverting or polluting the waters of a stream will not prevent relief, but may require it. *Id.*

4. The right to divert any of the water flowing in the natural channel of a creek by reason of having added to its flow by discharging into it water from certain tunnels, without the consent of prior appropriators of the waters of the creek, is lost by inability to prove the amount that the tunnels had added and that such diversion does not diminish the quantity of water belonging to the prior appropriator. *Herriman Irrig. Co. v. Butterfield Min. Co. (Utah)* 930

5. Streams or springs or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto has passed into private ownership, are not subject to appropriation under Utah Comp. Laws 1888, § 2790, but that must be construed to refer to a "natural stream, or other natural source of supply." flowing or situated upon lands over which the sovereignty has dominion, or which forms a part of the public domain. *Willow Creek Irrig. Co. v. Michaelson (Utah)* 280

6. Land remade by accretion after it had been washed away belongs to the original proprietor. *Ocean City Asso. v. Shriver (N. J. Err. & App.)* 425

7. Accretions on the seashore belong to the original owner of the mainland, and not to his remote grantee, although the latter's tract when he obtained title thereto extended to the line of ordinary high tide, if the tract, when conveyed by the original owner, did not extend to that line, but was cut off from the shore by intervening land to which title was retained by the grantor, but which has since been washed away. *Id.*

8. Water intermingling with the ground, or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, has no characteristic of ownership distinct from the land itself, and the rules of law applying to the appropriation of surface waters do not apply thereto. *Willow Creek Irrig. Co. v. Michaelson (Utah)* 280

9. The draining of land of a private proprietor by city pumping works which exhaust from all the region thereabout the natural supply of underground or subsurface water, and thus prevent the raising upon it of crops to which the land was and is peculiarly adapted, or destroy such crops after they are grown or partly grown, renders the city liable to him for the damages which he sustains, and entitles him to an injunction against a continuance of the wrong. *Forbell v. New York (N. Y.)* 695

10. Underground waters that would nat-

usually flow into a stream through certain springs, but which are by percolation diverted from the springs into channels and afterwards discharged from tunnels into the stream, belong to one who, by prior appropriation, owns all the waters naturally flowing in the stream, and not to the owner of the tunnels. *Herriman Irrig. Co. v. Butterfield Min. Co. (Utah)* 930

NOTES AND BRIEFS.

See also INJUNCTION; TRIAL.

Waters; boundary on artificial body of water:—In general; canal; pond; permanent artificial pond. 178

Right to follow accretions across division line previously submerged by the action of the water. 425

Use of natural stream to convey appropriated water. 930

Right to accretions. 426

Prior appropriation; springs; streams on public or private land. 280

Obstruction; as against prior appropriator. 281

Unreasonableness of use; diversion and pollution by upper proprietor; similar use by others; custom. 289

Percolating; diversion of, by excavations. 690

Of lake; public rights in; taking ice from. 830

Abandonment of; intention. 931

WILLS.

Probate in Other Countries, see JUDGMENT, 4, 5.

Proof of Probate in Foreign Country, see EVIDENCE, 14.

51 L. R. A.

1. A will is signed in the presence of the testator, within the meaning of Minn. Gen. Stat. 1894, § 4426, making the attestation of two witnesses in the presence of the testator a prerequisite to the validity of a will, where it was signed within sound of testator's voice, and he, though in another room, knew what was being done and might have seen the witnesses by moving 2 or 3 feet, while the signing occupied not more than two minutes, and the witnesses immediately returned and pointed out their signatures to the testator, who took the instrument, examined it, and pronounced it satisfactory. *Re Cunningham (Minn.)* 642

2. Upon the death by the same disaster, with nothing to show which survived, of sisters who left wills each giving all testatrix's property to her sisters, or to either of the survivors, and to their heirs and assigns forever, giving certain specific legacies upon the death of the last survivor, the property after payment of the specific legacies will be distributed as intestate. *Re Willbor (R. I.)* 863

NOTES AND BRIEFS.

See also JUDGMENT.

Wills; necessity of signature of witness in testator's presence. 642

WITNESSES.

See also WILLS, NOTES AND BRIEFS.

A divorce granted after the commission of a crime by the husband against a third person will not make the former wife a competent witness against him respecting such crime or conversations with the husband during marriage. *State v. Kodat (M.)* 509

